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Starbucks Fine Has Companies Reading CPSC's Tea Leaves

By **Emily Field**

Law360, New York (June 2, 2016, 11:06 PM ET) -- Criticism from within the Consumer Product Safety Commission over a \$3.75 million civil penalty against Starbucks' Teavana for failing to report exploding tea tumblers echoes manufacturers' complaints about a lack of transparency on how the agency calculates fines, attorneys say, leaving companies uncertain how to react as the CPSC seeks higher penalties.

The CPSC on Wednesday ended its claims that the Starbucks unit didn't promptly report that its glass tea tumblers were defective following reports that the cups exploded in consumers' hands, accepting a **\$3.75 million settlement** agreement in a 3-2 vote — prompting one commissioner, Joseph P. Mohorovic, to voice his dissent that the company hadn't done anything wrong and that the agency needs to publicly back the reasoning behind its penalties.

Without such information, companies have few appealing options, knowing that the agency is looking for ways to exercise its full authority given its record-setting \$15.45 million penalty against China-based Gree Electric Appliances Inc. and two of its affiliates this past spring, attorneys said.

"When you're getting into those high numbers, it becomes more important for there to be a perception of fairness, and more transparency would aid in getting that perception," John Kuppens of Nelson Mullins Riley & Scarborough said.

Currently, there's no trust between the CPSC and the business world, and the commission has made it clear that it's going after big businesses, Gary Wolensky of Buchalter Nemer said.

While the CPSC's overall job is to keep the public safe, Kuppens likened its lack of transparency to parents who punish their kids without explaining why.

"I don't think that serves [the CPSC's] intended purpose," Kuppens said.

Lacking the knowledge of how the CPSC weighs certain factors in its decision-making and which factors it's looking at, companies may choose to settle cases that are in a "gray area" or be forced to litigate to find out what the rules really are, Charles Joern of the Joern Law Firm said.

"Or they may make a determination that they are just not going to report certain situations [to the CPSC] because they don't have a good handle on the rules, and it's unknown as to what the results [will be] of reporting something they don't think is really defective or problematic," Joern said.

In the Teavana case, the CPSC accused it of failing to immediately inform the agency about the defect or unreasonable risks associated with the tumblers after it received consumer complaints, and said the company knowingly violated the Consumer Product Safety Act.

Teavana received "numerous reports" of the tumblers exploding, shattering or breaking between 2010 and 2013, the CPSC's settlement agreement says, including six reports of consumers who were cut by broken glass or burned by hot liquid while holding a tumbler when it exploded, according to the CPSC's settlement agreement.

Teavana issued a voluntary recall of 445,000 tumblers in May 2013.

In Mohorovic's view, that timeline given in the settlement isn't enough to prove that Teavana even had an obligation to report in the first place. The commission, he said, does not explain how the breakage happened, the extent of the injuries, the full number of reports, or provide a date when Teavana had enough information to realize it had a product safety problem.

"Glass breaks all the time for all sorts of innocent reasons," Kuppens said.

Companies receive complaints about products that often don't trace back to a problem, and while they're investigating the potential issue, they're under pressure to report a possible defect to the CPSC — but when to report often comes down to a judgment call, Kuppens said.

"How late is too late?" Kuppens said. "If they decide you should have reported Jan. 1 and you reported Feb. 1, is that something you should pay a million dollars for?"

Part of the issue is that the CPSA, which established the agency, doesn't contain many criteria setting out how reporting should be done and what the level of the penalty should be, Charles Samuels of Mintz Levin Cohn Ferris Glovsky & Popeo PC said.

"It really behooves the commission and everybody to have some level of dialogue outside of a particular case to see if there can be some improvement in this regard," Samuels said. "Otherwise you're just left with the tea leaves of a press release and a settlement, which in hindsight is all 20/20 by necessity."

A more detailed analysis of how the agency made its determination of a penalty in a settlement agreement would allow outside parties to see how the CPSC thinks, Joern said.

"The CPSC often says that it is a data-driven organization," he said. "That being the case, then it would be helpful for them to release that supporting data within the confines of these settlement agreements."

Although cases such as Teavana's are fact-specific, more detail about the CPSC's process would allow for a clearer picture of its decision-making patterns, Samuels said.

"If there could be more discussion about those patterns — roundtables, meetings, guidance, draft guidance — we all would be better off," Samuels said. "For example, it used to be thought that a company would be given credit for self-reporting even if found in retrospect that it should have been earlier."

Now that factor doesn't seem to mitigate in favor of a company, he said.

But whether the agency will decide to draw back the curtain on its process for deciding on penalties will be up to its leadership — and in the current political climate, it may stay its course, attorneys said.

Currently, two Republicans, including Mohorovic, are CPSC commissioners.

"Until there's a change in the political affiliation of the administration and there's a majority of Republicans [on the commission], there isn't going to be a change, and that is unfortunately the battle Commissioner Mohorovic is fighting," Buchalter's Wolensky said.

--Editing by Mark Lebetkin and Philip Shea.

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