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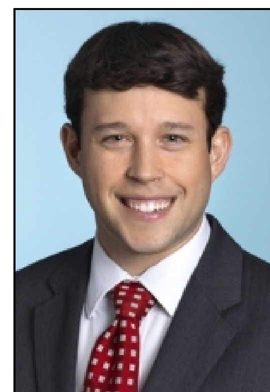
When Does A CPSC Late Reporting Violation First Accrue?


Matthew R. Howsare

Matthew Cohen

Law360, New York (May 12, 2016, 10:51 AM ET) -- After filing a Section 15(b) report and conducting a recall with the U.S. Consumer Product Safety Commission (CPSC), companies frequently ponder whether the CPSC believes the company timely filed its report under Section 15(b) of the Consumer Product Safety Act (CPSA) and, if not, whether the CPSC will launch an investigation that could lead to a civil penalty action. Unlike the experience of negotiating a recall where there is frequent contact with the CPSC within a defined time frame, the agency is usually silent and takes more time (sometimes years) to decide whether it will investigate whether a company met the statutory time deadline for filing the underlying Section 15(b) report.

In many cases, determining that a report was filed in such a manner to where the CPSC likely would not find reason for a timeliness investigation or civil penalty is relatively straightforward. In other cases where the timeliness of a report is more uncertain, however, only the CPSC's statute of limitations for pursuing a civil penalty can provide similar comfort.

So what is the CPSC's statute of limitations? The answer is not as straightforward as it may appear.

CPSC's Statute of Limitations

The CPSA does not contain an explicit statute of limitations that answers this question. Instead, the CPSC operates under the general statute of limitations for the government to bring an enforcement action for a civil penalty, 28 U.S.C. § 2462, which states the following:

> Except as otherwise provided by act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within *five years* from the date when the claim *first accrued*. (emphasis added).

The Supreme Court's Ruling in Gabelli v. SEC

The statute, 28 U.S.C. §2462, clearly states that any action must be commenced within five years. However, when a claim "first accrues" is less clear. In 2013, the U.S. Supreme Court held in Gabelli v. SEC that the U.S. Securities and Exchange Commission could not apply the "discovery rule" when bringing an enforcement action later than five years after the violation occurred (in that case, a fraud) and the claim "first accrued." The application of the discovery rule would have allowed the government to delay the application of the five

year statute of limitations until the SEC discovered (or should have discovered) the violation. But this position was unanimously rejected by the court in a 9-0 decision.

Should Gabelli or the "Continuing Violation Doctrine" Govern CPSC Late Reporting Cases?

In the wake of Gabelli, a major question has arisen about its application to the CPSC — when does a claim "first accrue" for a CPSC civil penalty enforcement action alleging a late reporting violation? Two companies, Michaels Stores Inc. and Spectrum Brands Inc. are currently litigating this question in two separate federal district court civil penalty proceedings.

Michaels and Spectrum have argued similarly that the CPSC's allegation in each case — there was a specific point in time when the company had sufficient knowledge of a potential safety issue such that a report to the CPSC was required — also means that the claims against those companies "first accrued" on that date. In each case, the date cited by the CPSC for the initial reporting violation is more than five years prior to the CPSC's initiation of a civil penalty proceeding in federal court. Citing the Supreme Court's ruling in Gabelli, Michaels and Spectrum assert that an enforcement action cannot be brought more than five years after the date CPSC alleges a company first violated the statute by failing to report.

The CPSC, meanwhile, is not relying on the "discovery rule" dismissed in Gabelli. Rather, the CPSC argues that the failure to report is a "continuing violation" of the CPSA. Specifically, the CPSC asserts that under the "continuing violation doctrine" the late reporting claim accrues each day the violation occurs and the five year statute of limitations does not begin to run until a company actually reports to the CPSC.

A Sampling of the Arguments Surrounding the Application of the Continuing Violation Doctrine

In the Spectrum case pleadings, the CPSC asserts two primary arguments and cites a past civil penalty case to argue for the application of the continuing violation doctrine to the CPSA.

First, the CPSC argues that the language of the CPSC's reporting statute establishes a continuing violation because it requires companies to report "unless [the company] has actual knowledge that the commission has been adequately informed." Thus, according to the agency, the violation begins when the company obtains reportable information and continues "unless" the company has actual knowledge that the CPSC was adequately informed (i.e., when the company files a Section 15(b) report or the staff otherwise receives the information).

In response, Spectrum argues that the agency is attempting to convert the word "unless" to "until" in order to establish a continuing violation and that the use of the word unless creates an exception to the duty to report rather than creating "a duty to report extending until the CPSC is adequately informed." Spectrum also argues that Congress explicitly created a separate continuing violation provision in the very next subsection of the CPSA and therefore, consistent with the canon of statutory interpretation whereby courts should presume such disparate treatment is intentional, the court should find that Congress did not intend to create a continuing violation for reporting violations.

Second, the CPSC argues that Congress intended for the reporting obligation to be continuing because the CPSA is intended to prevent harm to consumers by ensuring safety information comes to the agency in such a manner to where it can act as swiftly as possible. The agency argues that not applying the continuing violation doctrine would incentivize some companies to withhold safety information from the CPSC until the statute of limitations has expired. The CPSC also cites the Advance Machinery case from 1982, in

which a federal court found that the CPSA's reporting obligation is a continuing one and a contrary interpretation would mean that "a manufacturer could violate the reporting requirement without fear of punishment if it could successfully hide the evidence of the product defect from the [CPSC] for five years."

Spectrum argues in response that these are policy arguments and the place of Congress rather than the courts to decide. Spectrum also points to language in Gabelli and the post-Gabelli Seventh Circuit case Midwest Generation, in which the appellate court cited Gabelli when it rejected an argument that there was a continuing violation exception for Clean Air Act cases subject to the 28 U.S.C. § 2462 statute of limitations. Regarding the Advance Machinery case, Spectrum dismisses its application and precedential value to the current dispute because it predates Gabelli.

The Status of Current Litigation

Spectrum and CPSC have fully briefed this issue in a motion for partial summary judgment pending before the District Court for the Western District of Wisconsin. The court has not yet ruled but its eventual ruling (and any subsequent appellate decisions) will have a significant impact on the CPSC and companies that may face future civil penalty enforcement actions.

Michaels filed a motion to dismiss in its civil penalty action currently pending before the District Court for the Northern District of Texas. Although that court denied Michael's motion to dismiss, it is unclear whether the court's decision in that case was a substantive ruling on the law — that is when a claim "first accrues" under 28 U.S.C. § 2462. In the Spectrum litigation, the CPSC points to that denial for support that a continuing violation exists. Spectrum, on the other hand, views the denial as a procedural ruling based on pleading standards rather than a substantive decision on whether the CPSA allows for a continuing violation.

The Impact of Each Possible Outcome

It is unclear how long it will take this issue to be decided and for any appeals to provide a final determination and clarity on this important issue. During this time, the CPSC likely will continue to interpret the reporting obligation to be a continuing one.

The application or nonapplication of the continuing violation doctrine to these cases is immensely important to both sides. If the doctrine does not apply to 28 U.S.C. § 2462 for CPSC late reporting cases, then the CPSC's civil penalty lawsuit is time barred and will be dismissed in each of these cases. The CPSC will also be unable to prosecute any other civil penalty cases where more than five years has passed since the company was required to report to the CPSC. If the continuing violation doctrine does apply to reporting violations, then the current civil penalty cases will be allowed to proceed and the CPSC will have up to five years to a bring a civil penalty lawsuit against companies after a report is submitted to the CPSC.

—By Matthew R. Howsare and Matthew Cohen, Mintz Levin Cohn Ferris Glovsky & Popeo PC

Matt Howsare is a member in Mintz Levin's Washington, D.C., office, and formerly served as chief of staff of the CPSC from 2010 to 2013 and as the chairman's senior counsel in 2009.

Matthew Cohen is an associate in Mintz Levin's Washington, D.C., office.

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