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## **IN GROWING TREND, COMPANIES BEING WHIPSAWED BY REGULATORS AND COURTS**

**There's a new class action trend consumer product companies need to be aware of that is not only causing additional stress when faced with a recall, but also increased expense and adverse publicity.**

There are a number of regulatory and legal risks we have come to expect when a potential quality, defect or safety issue is identified, from regulatory investigations leading to product recalls and fines to standard product liability lawsuits.

But consumer product companies are facing a new wave of legal challenges related to recall programs negotiated with the U.S. Consumer Product Safety Commission. The strategy behind the cases is actually well-known to over-the-counter (OTC) pharmaceutical manufacturers and processed food companies: class action lawsuits based on unfair trade practices allegations that follow regulatory actions.

### **Sound strange?**

By way of background, here's a quick rundown of how this strategy played out for the OTC drug industry. Professional plaintiffs would look to Federal Trade Commission settlements to identify potential targets for their next lawsuit - companies facing allegations related

to the efficacy, safety, or quality of their products and/or labeling and warning issues. They would then take the information disclosed in the settlement and sue the company for the same issue, even when there was no admission of defect or wrongdoing. This type of activity was common, particularly in California, until Proposition 64 was passed 15 years ago requiring plaintiffs in consumer class actions to have evidence they suffered an actual injury, economic or otherwise.

Now we're starting to see plaintiffs deploy a similar strategy, levying the CPSC's recall process against consumer product companies.

A handful of these cases are already playing out in several jurisdictions across the U.S. They often take root in the interplay between the CPSC and companies entering into a voluntary, fast-track recall. A fundamental issue in these proceedings is that case law says that a company, entering into a recall with the CPSC is not immune from being subject to class action litigation for the identical issue. From that notion flow several critical issues, some of which are more concerning than others.

Companies in the midst of CPSC recalls and these lawsuits are feeling whipsawed. After spending hundreds of thousands or even millions executing a recall, they are reliving the nightmare in the courts. The only real difference is the latter can be significantly more expensive at the end of the day.

One reason for the expense is that these types of cases are generally not dismissed early. Many go all the way through to class certification, which costs on average seven figures in attorney fees. This estimate doesn't include your internal costs: time and resources spent by your full-time employees who are pulled from their daily responsibilities to support the legal strategy and defense.

This extraordinary burden, combined with the fact that most if not all claims in these types of cases are not covered by insurance, leads many companies to settle. Unfortunately, that can serve to invite similar lawsuits.

Let's go back to the OTC drug example for a moment. What history tells us is that the legal strategy used by these plaintiffs is here to stay, barring some legislative move that places guardrails on the types of lawsuits that can be filed. But we don't see any signs of such a movement taking place in California or anywhere else any time soon.

If there is going to be change, it needs to happen at federal level in the form of a mandate stating that a CPSC action pre-empts state actions as matter of law. It is worth mentioning that this action would also benefit the CPSC, whose reputation for safety will slowly and inevitably erode if its recall process is continuously viewed as ineffective.

But we can't count on a federal mandate. So, what can you do to try and limit your legal liability? It comes down to a strategy that is easier said than done: consider the CPSC's recall requirements the absolute floor – from your response to the first report of a potential issue through delivering a recall remedy to impacted consumers.

Plaintiffs will be searching for any one moment in your recall execution where they can offer an alternate approach they argue would be more effective. For example, one current lawsuit takes aim at a company that complied with CPSC recall requirements, but did not hire a class action administration company to provide recall notice that would pass muster of court.

We are just starting to see how some of these first cases are playing out. Regardless of the ultimate decisions, however, expect many more cases to be filed. Unfortunately, the business and recall challenges that companies are experiencing during the coronavirus crisis may only add fuel to the plaintiffs' fire.