Recall Management – Understanding Best Practices and Identifying Your Risks
Why Talk About Recalls...

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~ 474 MM Units Recalled
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Impact on a Business
True Grit: To Recall or Not to Recall, and If to Recall, When?
Managing the Litigation Risk

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True Grit
Courtroom Lies
More Lawyers than a John Grisham Novel
Everyone has a Price
“Why Am I Paying You If Not to Have My Way?”
The Balancing Act

- Consumer Safety
- Regulatory Reality
- Litigation (and other financial & criminal) Risks
Companies Face Tough Choices In Deciding Whether and When to Issue Recalls of Their Products

- Failing to issue a recall where one is appropriate can lead to litigation
- Failing to conduct a recall in a reasonable manner can also be a basis for liability
- Recalls generate significant adverse publicity and reputational damage
- Recalls may be evidence of defect and causation in litigation
- Prevention of litigation-related risks is a critical concern in assessing whether and when to recall, the scope of the recall, and the communications relating to the recall
The Increasing Risk of Criminal Prosecution for Companies and Their Executives

Recent examples:

- Today: Chipotle has been served with federal criminal subpoenas
- Today: Blue Bell is the subject of a federal grand jury criminal investigation
- September 2015: Peanut Corp. of America executives, 28 years, 20 years and 5 years - felony
- May 2015: ConAgra (Peter Pan peanut butter), $11.2 million criminal penalties
- April 2015: Egg producers, 3 months in jail and $100,000 fine - misdemeanor
- January 2014: Cantaloupe producers, 5 years probation and $150,000 fine - misdemeanor
TIMING IS KEY!
It Comes Down to a Key Question

When was the company in the position where it “should have known” that the product should be recalled?
The Impact on Litigation:
Lessons Learned
Possible Litigation Risks Require Careful Consideration

- Issuing the recall can itself lead to litigation
  
  Example:
  A day after the makers of Similac issued a recall on infant formula, a federal class action was filed accusing the manufacturers of unfairly and deceptively promoting the product as having safe ingredients for infant consumption when the ingredients may cause diarrhea and other health problems.

- Recall may provide an end-date for potential claims; demonstrate that the company is acting responsibly

- But if you are not careful, statements contained in the recall notice can be construed as admissions of liability

- Public relations/media advice may or may not be covered by the attorney-client privilege protecting disclosure
Practical Considerations When Issuing A Recall

• Work with government regulatory agencies as much as possible; may help in defense against punitive damages claims
  • FDA, CPSC, etc.

• Seek voluntary recall as appropriate

• Avoid using language suggesting or admitting fault
Summary “Top Ten” List

1. Have a recall policy and a plan
2. Work with the appropriate government agency
3. Make the recall as “voluntary” as possible
4. Involve communications professionals hired by outside counsel early on
5. Do not admit causation in company statements
6. Ensure all company statements are thoroughly vetted
7. Choose one appropriate point of contact
8. Get and communicate the facts asap
9. Avoid creating inappropriate documents
10. Notify your insurance carrier
Questions?

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