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CLIENT ALERT

Highlights from ACI's 2014 Consumer Products Regulatory & Litigation Program

June 19, 2014

The American Conference Institute held its Second Annual Consumer Products Regulatory& Litigation conference on June 11-12, 2014 in Chicago, Illinois. Here is a list of the key takeaways from this year's event:

On recent Commission activity:

- **While Commissioners at the Consumer Products Safety Commission (CPSC) may admit to having "erasers on their pencils" when it comes to looking at proposed rules, they need to see facts, science, and data — objectively presented — in order to be willing to use those erasers. The decision to postpone action on the pending 1110 rule and hold a stakeholder meeting shows the Commission's willingness to be responsive when concerns are raised. Without hard data and compelling arguments, however, you may just be viewed as part of the din of the CPSC bar "echo chamber."**

On corporate compliance plans:

- **Tackling the question of whether a product presents a safety defect requires interdisciplinary product safety teams and robust communication to avoid information silos. Senior management oversight of the risk assessment necessary to determine whether a defect may present a substantial product hazard can help a company avoid making the wrong call as to whether a series of incidents or complaints should be reported to the CPSC.**
- **The chain of authority and ultimate responsibility for decision-making on product safety defects need to be clearly delineated within your organization. Your product safety team must remain open to reassessing their prior decisions based on new or emerging information.**
- **Don't let the need to preserve attorney client privilege prevent you from telling your story at trial or in an agency penalty enforcement proceeding. Everyone — consumers, journalists, Congress, courts, and juries — will want to know what the record reflects in terms of corporate actions during an emerging product crisis. And courts have held that safety committee meeting minutes are not necessarily privileged even when an in-house lawyer participates as a committee member.**

Recent Happenings in APRM
June 2014

- Supreme Court Permits Lanham Act Challenge to Beverage Label Regulated by the FDA
- Highlights from ACI's 2014 Consumer Products Regulatory & Litigation Program
- Updates on the Accessibility Front
- Substantial Harm to Consumer Product Sector Expected Under Proposed Prop 65 'Reforms'
- New Opportunity to Influence CPSC's Proposed Certificates of Compliance Rules
- DOJ and FTC State that Antitrust is Not a Roadblock to Cybersecurity Information Sharing

On chemical regulation:

- **State activity on chemical regulation continues at a rapid pace, with 29 states introducing over 145 bills in 2014 focused on *inter alia,* chemical prioritization, ingredient/chemical disclosure, and single chemical bans. The State of Washington is particularly concerned about the amount of PCBs they found in consumer product packaging.**

- **Retailers face tremendous pressure from consumers to reduce or eliminate certain chemical constituents in their products. Companies making green/environmental claims may face serious class action risks if they do not substantiate those claims and follow the FTC's Green Guides. While there are pressures to label products with mere trace amounts of chemicals "free of" or "non-toxic," these claims present challenges given the FTC's reliance on considerations of the "consumers' perception" of the risk in deciding whether trace amounts of chemicals matter.**

On class actions:

- **Class action settlements in the "all natural" food cases have imposed injunctive relief terms that look very similar to the independent testing and certification requirements of the CPSC for consumer products companies. These injunctive terms, which apply to a variety of food products sold at retail to all consumers, could set a standard of care well beyond the federal regulatory scheme.**

- **Media notice alone has been held to have inadequate reach in class action settlements, and direct notice drives claims rates higher. Retailers and consumer product manufacturers need to recognize the relationship between ascertainability of the class for class certification purposes, as discussed in decisions such as *Carrera v. Bayer Corp*., and the drive toward direct consumer notification, whether in product recalls (as required by the CPSC proposed voluntary recall rule) or class action settlements.**

On civil penalty defense:

- **Companies facing a penalty action from the CPSC should carefully consider their statute of limitations defense in light of the Supreme Court's decision in *Gabelli v. Securities & Exchange Commission*, which held that the discovery rule does not apply to the accrual of actions for fraud under the SEC's statute. The Court found that the cause of action for fraud accrues *when it occurs* and not when the SEC discovers the fraud. Noting the parallels to the CPSC's statute and citing to the decision's language that the discovery rule historically has not been applied in civil enforcement proceedings brought by the government, practitioners believe that *Gabelli,* and subsequent cases such as *U.S. v. Midwest Generation* (7th Cir. 2013), bear on the statute of limitations defense in CPSC civil penalty cases.**

- **The government lawyer provided a more cautionary interpretation of the opinion, commenting that a court may see a distinction between the intent of the statutory schemes, *i.e.* that the discovery rule as applied in the SEC fraud context might be interpreted differently when compared to the CPSC's statutory reporting scheme. The government**

suggested that a court may see the discovery rule as more relevant in a CPSC timeliness case where the enforcement action is focused on a failure to report matters of public safety in a timely manner.

On online auction sites:

- **CPSC now requests some recalling entities to monitor online auction sites as part of corrective action plans. The statute provides that the Commission can require a recalling company to cease distribution and provide notice to the distribution chain and anyone to which the product has been "sold" that they should "cease immediately distribution of the product." It does not appear that language, written before Internet distribution of products became a marketplace reality, creates an ongoing responsibility to identify sellers in the secondhand auction market years later and notify them of a recall. Rather, the Commission has the authority to penalize those resellers up to $100,000 for each violation of the prohibition against the sale of a recalled product. While the requirement to police online auction sites may go beyond the CPSC's statutory scheme, monitoring auction sites may mitigate overall liability for potentially defective products depending on the product and hazard. A recent Texas case held that manufacturers can be liable for the implied warranty of merchantability with respect to a used product sold in the secondhand market.**

On e-discovery and litigation holds:

- **Focusing discovery from the outset of litigation to only those issues in dispute can narrow the scope of electronic discovery and help to minimize disagreements. The CPSC's procedures in administrative cases are designed to narrow the factual issues for discovery from the start. Clients play a critical role in ensuring cooperation between counsel in electronic discovery disputes. Particular attention should be paid to the scope of litigation holds given recent decisions in *In re: Actos (Pioglitazone) Products Liability Litigation* (MDL No. 6:11-md-2299, *W.D.La.*, Jan. 27, 2014) and *In re: Ethicon, Inc. Pelvic Repair Systems Product Liability Litigation* (MDL No. 2:12-md-2327, S.D.WV, Feb. 4, 2014).**

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Cheryl A. Falvey
Partner – Washington, D.C.
Phone: +1.202.624.2675
Email: cfalvey@crowell.com