



Strictly Speaking

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Product Liability Committee

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Piece by piece. Fact by fact. Getting to the Big Picture.

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when you walk into court isn't
unfair, it's just smart.

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Leadership Note

From the Chair: Austin, Here We Come!

By Nick Pappas



It's time to register for the 2019 Product Liability Conference, to be held February 6-8 in Austin, Texas. The program will feature many topics on advanced trial tactics presented by some of the best trial lawyers in the country.

And more than 25 in-house counsel will contribute to presentations on the main stage and in specialized litigation group breakout sessions.

This will be our committee's first seminar in [Austin](#), and we plan to take full advantage of everything Austin has to offer. We will have on-site and off-site networking events every night of the seminar. Our blockbuster networking event will be at "The Speakeasy," a unique Prohibition-era lounge that is one of Austin's most celebrated event and entertainment venues. We'll enjoy live music and a new wave '80s show by *The Spasmatics*. In addition to traditional dine-arounds, attendees can have appetizers and local craft beer tasting at Austin Beerworks, a local Austin craft micro-brewery. We're also offering a free tour of the Lyndon B Johnson presidential library. The last day of the seminar will feature a dinner cruise on Lady Bird Lake. Finally, seminar registration will automatically include free registration for a Product Liability Caselaw update webinar, which will be presented by our committee's young lawyers' members. The webinar will take place in late February.

Many companies have already planned panel counsel meetings at the conference. Panel counsel meetings offer

corporations the opportunity to host meetings of their counsel in conjunction with the conference. This results in substantial savings for the companies, which no longer bear the expense of "fly-in" meetings. Companies can earn incentives, such as free seminar registration and certain travel expenses, depending on the number of seminar registrants who attend their meeting. If you are in-house, or if you have a client who might be interested in hosting a panel counsel meeting, please contact our Panel Counsel Chair Maureen Bickley (mbickley@fbtlaw.com) for details.

Please check out the Product Liability Conference brochure [here](#), and register for the seminar right away.

I look forward to seeing you in Austin!

Nicholas C. (Nick) Pappas is a trial lawyer who concentrates his practice in product liability and commercial litigation. Nick serves as national lead trial counsel for a major construction and agricultural equipment manufacturer. He represents clients in lawsuits in state and federal courts throughout the United States and has tried cases to successful defense verdicts in Alabama, Indiana, Iowa, Kentucky, South Dakota and Wisconsin. Nick also advises clients regarding Medicare reporting issues. Nick is also the chair of the DRI Product Liability Committee, which is DRI's largest substantive law committee and has over 3,300 members.

Feature Article

Managing Product Recalls: What to Do During a Recall

By Derin Kiykioglu and Jonathan Judge



You put countless dollars and hours into making the best possible product, and it becomes a hit. But something goes wrong, and consumers may be getting hurt. A recall becomes necessary. As part of our series on managing product recalls, this post focuses on important steps companies can take during a product recall.

The first step, as we wrote in part one of the series, is to be prepared for a recall. We explained some strategies for how to get prepared in our last article on this topic.

Most publicly announced recalls tend to go through the Consumer Product Safety Commission (CPSC). Although the CPSC can mandate recalls if a company does not take action on its own, many recalls are officially voluntary. If a company obtains information that a product fails to

comply with safety standards or creates unreasonable risk of serious injury or death, the CPSC requires a company to immediately report—within 24 hours—that the product violates a safety standard, or could be unacceptably harmful to consumers. These reports are commonly described as “Section 15 reports,” a reference to the section of the Consumer Product Safety Act (CPSA).

Brief reporting delays are sometimes allowed for further investigation, but that route is best pursued under the guidance of experienced regulatory counsel. Too often, “brief” delays in reporting end up not being brief enough for CPSC, thus exposing the company to a substantial civil penalty, which tends to be a minimum of seven figures when imposed.

It is important to note that companies are required to report potential defects and safety hazards even if they do not believe the situation warrants a recall. CPSC has made clear that it is the agency’s job, not that of the company, to ultimately decide if a recall is warranted, and CPSC cannot make that determination if it is not made aware of the situation. The majority of Section 15 reports do not actually result in recalls, meaning that it is often prudent to err on the side of reporting and explaining in the report why the company does not believe a recall is warranted under the circumstances.

Report to Authorities

Voluntary recalls can be “fast tracked” if the company (1) agrees to conduct a recall up front, and (2) must be prepared to implement a recall plan within 20 working days. Regardless, CPSC will typically expect a so-called “full report” of the alleged defect or hazard, which should include:

- Manufacturer information and product descriptions

- Units involved and where they might be located
- Product recovery/remedy plans
- Any communications to retailers and consumers about the problem
- A Corrective Action Plan describing the company’s proposed remedial action

In addition to the 14 questions companies must always answer, CPSC staff often add questions of their own. If CPSC approves the proposed recall remedy, or successfully negotiates a different one, the recall will typically be approved for Fast Track implementation. In exchange for this cooperation, CPSC will not evaluate the product formally for the existence of a defect, a reward that may have some value in litigation or public relations down the road.

If the reporting company is not inclined to voluntarily recall the product, or if CPSC and the company cannot agree on an appropriate remedy, the case will proceed through the normal investigation process, culminating in either a preliminary determination of defect by the agency, or an eventual closure of the file.

Communicate Effectively

Maintaining consumer trust during a recall is key. The best approach is for companies to communicate effectively by being (1) transparent, (2) consistent, and (3) responsive. When paired with swift action to remedy the situation, companies with a carefully crafted recall message increase the chances of maintaining – and potentially even surpassing – prior levels of consumer satisfaction. For example, Fitbit recalled its Force device in 2014 after consumers reported skin irritation related to wearing the tracker, but the company rebounded by taking the Force off the market and marketing new devices later that year. It later became

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the first wearable fitness company to go public with a 2015 initial public offering (IPO).

Companies must first communicate to consumers that a recall is happening. Managing recall communications is not unlike other marketing campaigns. Companies can use existing communications platforms to publicly acknowledge the recall, apologize, and reinforce their commitments to consumer safety. Social media postings or placing notices in marketing materials helps get the word out, such as using parent-to-parent blogs to bring attention to toy and other juvenile product recalls. Other companies form partnerships with entities already in contact with the consumer base. For example, Maryland has implemented a Department of Motor Vehicles (DMV) notification system to spread the word about automobile recalls.

Companies need to be transparent in their communications with consumers or media. Transparency involves quick and candid responses in the face of a recall. Johnson and Johnson's 1982 recall of cyanide-laced Tylenol is a business school case study, not only because it succeeded in removing the product from shelves and maintaining consumer trust, but because its CEO, James Burke, received the Presidential Medal of Freedom and was named one of history's greatest CEOs by Fortune magazine after serving as the figurehead for the recall. Burke cited trust as the cornerstone of business. After seven Tylenol consumers died, he rebuilt that trust by proactively discussing the recall and the company's problem-solving strategy.

Be Responsive

Companies that acknowledge and act on consumer concerns show their responsiveness. As we last wrote, companies may want to designate a recall team with a chain of command similar to that of a marketing team, except its end goal is to retrieve a product as opposed to distributing it. It is better to do this before there is even a recall issue, but companies should put one in place for a recall even if they did not previously create one.

The recall team's first "marketing" strategy should be to evaluate the situation and determine the speed, scale, and type of recall. Recalls can take several forms and most often include a fix of some kind; less often, products are replaced or refunds are offered. In a study conducted by researchers at the Georgia Institute of Technology and

the University of Manitoba analyzing toy recalls between 1988 and 2007, for example, researchers determined that manufacturing defects take less time to recall than design defects because the source of the problem is easier to identify. Additionally, the study found that reactive recalls, those undertaken after a consumer's death or serious injury, are more likely than preventative recalls to lead consumers to seek exchanges. In other scenarios, companies may want to delay a proposed recall to conduct further or parallel investigation. In 2016, the National Highway Traffic Safety Administration allowed General Motors to delay its recall of air bags to give it time to prove that its product was as safe as marketed.

Like any effective marketing campaign, a recall campaign should continually look at how the process is going and check in with consumers to remain responsive. Are consumers aware of the recall? What do they—or other companies—recommend to fix the problem? What is the general sentiment toward the company in light of the recall? Social media can help companies answer some of these questions. General Motors used social media to stay connected with dissatisfied consumers in the midst of its 2014 recall of 1.6 million cars. Ikea actively communicates with consumers through social media and recently used it to share updates about its recall of collapsing Malm dressers. Companies that meet consumers where they are will be better poised to experience a more effective recall process.

Derin Kiykioglu is an associate in the San Francisco office of Schiff Hardin LLP, working on a range of litigation and product liability matters.

Jonathan Judge is a partner and trial lawyer in the Chicago office of Schiff Hardin LLP. With a focus on consumer products and the automotive sectors, he advises companies on CPSC compliance and defends them during CPSC investigations. Mr. Judge is frequently asked to handle challenging juvenile products cases that involve serious or fatal injuries to others. Mr. Judge acts as national coordinating counsel for companies seeking comprehensive product liability representation, and also specializes in the application of statistics and data science to legal problems.

NOTE: This article is Part 2 of a three-part series that was previously published by Law360 on April 4, 2018.

DRI Vendors Conduct Live Burn During 2018 Fire Science Seminar

By Scott E. Dillon



As part of the 2018 Fire Science and Litigation Seminar, DRI decided to do something a little different. Four vendors working in the area of fire investigation (Crane Engineering, Exponent, JENSEN HUGHES and S-E-A) sponsored, developed, and led a live fire training program on the day prior to the seminar.

The goal of the program was to provide attendees with hands-on experience related to several aspects of fire investigation. Attendees were divided into groups of two to three and participated in several learning stations including:

- Investigation of four fire scenes – two identical bedrooms (with different fire causes), a kitchen and a living room
- Fire debris sifting and evidence collection
- 3D laser scanning and virtual reality demonstration
- Computer fire modeling demonstration
- Spontaneous combustion demonstration

The finale of the program was a live flashover demonstration where attendees were given the opportunity to see and feel the heat from a room fire transitioning to flashover.

To kick off the seminar the next day, experts from each of the four vendors presented the vital aspects of each fire scene. In a real investigation, investigators and

attorneys rarely get a chance to see what the scene looked like immediately prior to the fire or during fire growth. Consumption of materials and destruction of the evidence due to the fire and fire-fighting activities may inhibit their understanding of the scene. The detailed layout of the rooms was described and contrasted with the post-fire scene. The effects of a dynamic fire inside a compartment were then illustrated through live videos of the room fires. The data compiled from these room fires was enhanced through application of fire dynamics models and the experience of the vendors.

The event was well received by the attendees and feedback for the event was extremely positive. Several attendees were amazed at the intensity of the radiant heat from the fire in the flashover demonstration felt from over 40 feet away.

Scott E. Dillon, P.E., CFEI, is a licensed professional engineer with Crane Engineering in Plymouth, Minnesota. He has more than 16 years of experience in the areas of fire and explosion investigation, fire protection engineering and fire science. Scott provides clients with expert consultation regarding fire protection and alarm systems, life safety, fire dynamics, fire testing as well as compliance with codes and standards. Scott has extensive experience performing investigations of fires involving fuel-gas systems, residences, vehicles and industrial facilities.



