ARTICLES

Reporting to the Consumer Product Safety Commission—When Does It End?

By Charles E. Joern Jr. – August 31, 2017

The Consumer Product Safety Commission (CPSC) enforces consumer product safety laws, among them the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2051 et seq. The CPSC is charged with protecting the public "against unreasonable risks of injury associated with consumer products." 15 U.S.C. § 2051 (a)(3). To achieve this goal, section 15(b) of the CPSA requires manufacturers, retailers, and distributors to self-report information to the commission that reasonably supports the conclusion that a consumer product contains a defect that could create a "substantial product hazard" or create an unreasonable risk of serious injury or death. 15 U.S.C. § 2064(b).

Failure to timely report to the CPSC under section 15(b) is a violation of the CPSA and is the primary basis by which the commission imposes civil penalties. Such late-reporting violations (or failure to report) can result in fines of over $15 million for a series of violations. Businesses subject to the CPSA must therefore carefully adhere to these reporting obligations. Compliance with reporting obligations, however, can be difficult where only incomplete guidance exists.

There is a limited amount of actual case law that interprets section 15(b)'s reporting rules. Recently, however, a federal district court in Wisconsin issued a wide-ranging opinion on this subject. *United States v. Spectrum Brands, Inc.*, No. 15-CV-371-MV (W.D. Wis. Nov. 17, 2016). The court found that Spectrum Brands failed to timely report defective products that could create a substantial product hazard in violation of section 15(b). In doing so, the court ruled on several issues critical to how section 15(b) applies to the regulated community. Although the decision was issued by a lower level federal district court and thus is limited in its authority, the court did extensively analyze and construe CPSA reporting rules, and it also discussed areas not previously ruled on directly. The *Spectrum Brands* case provides helpful direction to manufacturers, distributors, and retailers of consumer products on their CPSC reporting duties. This article focuses on the statute of limitations issue in particular.

Background of the Case

The U.S. Department of Justice—on behalf of the CPSC—previously initiated a complaint against the defendant Spectrum Brands for failing to timely file a report with the CPSC under section 15(b) of the CPSA. The government alleged that Spectrum Brands should have years earlier filed a report of defective coffee pots that were breaking at the handle and injuring consumers. The complaint alleged that, between 2008 and 2012, Spectrum Brands (and predecessor company Applica) received some 1,600 reports of the coffee pots breaking, resulting in burns and lacerations to consumers, but delayed in informing the CPSC.

The government moved for summary judgment on its section 15(b) late-reporting claims against Spectrum Brands, and Spectrum Brands moved for dismissal of the government's claims as time-barred under the statute of limitations. Spectrum Brands also moved for summary judgment on a number of grounds, including that (1) section 15(b) reporting requirements are unconstitutionally vague; (2) the CPSC did not provide fair notice a report was required, considering the outcome of other CPSC investigations into Spectrum Brand–distributed coffee makers; (3) the CPSC was arbitrary and capricious in its determination that the defendant violated reporting requirements; (4) the CPSC was already "adequately informed" in the meaning of section 15(b) and, as a result, Spectrum Brands had no obligation to report to the CPSC; and (5) CPSC's claims for injunctive relief were not authorized by the CPSA.

Summary Judgment on the Duty to Report
On the central issue, the district court granted the government's summary judgment motion and found that Spectrum Brands violated section 15(b) reporting requirements. The court reviewed the facts, beginning in November of 2008, when the first customer report of a broken carafe handle was reported, through the history of numerous subsequent similar complaints and injuries, internal company investigations, CPSC notices to the defendant of additional complaints and injuries, and other relevant information. The court found that "[o]n these facts, no reasonable jury could find that the defendant 'immediately' informed the CPSC about 'information which reasonably supports the conclusion' that the carafes 'contain[ed] a defect which could create a substantial product hazard.' 15 U.S.C. § 2064(b)." *Spectrum Brands*, No. 15-CV-371-MV, slip op. at 45.

The Statute of Limitations Ruling
During the course of its opinion, the court addressed the various defenses raised by the defendant. The statute of limitations was a key defense raised by Spectrum Brands and denied by the court. In rejecting the defense, the Wisconsin federal district court gave clarity to an important issue that has been the subject of great concern in the regulated community.

Both the government and Spectrum Brands agreed that because the CPSA does not have its own statute of limitation, the general statute of limitations for civil penalty enforcement applies. Under 28 U.S.C. § 2462, "an action, suit or proceeding for the enforcement of any civil fine, penalty . . . shall not be entertained unless commenced within five years from the date when the claim first accrued. . . ." Similarly, there was no dispute about the language of section 15(b) requiring a regulated party to "immediately" inform the CPSC of a product defect "unless [it has] actual knowledge that the Commission has been adequately informed of such defect[.]" *Spectrum Brands*, No. 15-CV-371-MV, slip op. at 34.

The parties disagreed on when a reporting violation ended pursuant to the statute of limitations. Spectrum Brands argued that the time for the CPSC to bring a claim began to run when Spectrum Brands first obtained reportable information and ended five years after the obligation to report first arose. Under the defendant's interpretation, the five-year statute expired before the government filed its complaint.

The government by contrast, maintained that a 15(b) violation begins when a defendant fails to file a required report and continues until the 15(b) report is filed or unless the defendant has actual knowledge the CPSC has been adequately informed. The government argued that a reporting violation can be ongoing—in other words, Spectrum Brands' failure to report was not complete; rather, it was a "continuing violation" that extended the statute of limitations beyond its usual five years.

Spectrum Brands cited two cases in support of it proposition that the statute of limitations should not be tolled by a "continuing violations" doctrine. The defendant looked to the U.S. Supreme Court case of *Gabelli v. Securities & Exchange Commission*, 133 S. Ct. 1216 (2013), which had reversed a lower court's application of the "discovery rule" to toll the civil penalty statute of limitations. In addition, Spectrum Brands cited *United States v. Midwest Generation, LLC*, 720 F.3d 644 (7th Cir. 2013), which also rejected the application of the "continuing violation" doctrine to extend the statute of limitations.

The government responded by pointing to two federal district court cases: *United States v. Advance Machine Co.*, 547 F. Supp. 1085 (D. Minn. 1982), and *United States v. Michaels, Inc.*, No. 3:15-cv-1203, WL 1090666 (N.D. Tex. Mar. 21, 2016). Both cases supported the government's continuing duty/continuing violations argument tolling the statute of limitations for CPSA reporting violations.

The *Spectrum Brands* court distinguished both *Gabelli* and *Midwest Generation* by focusing on the *completion*, rather than the initiation, of the underlying violation. *Spectrum Brands*, No. 15-CV-371-MV, slip op. at 36–39. The court decided that the five-year statute-of-limitations clock begins to run only when the violation is complete, not when it begins. Under this "continuing violations" approach, the statute of limitations is tolled and only begins to run when the underlying violation is complete.

After extensive analysis, the court agreed with *Advance Machine* and *Michaels* and found that "a cause of action under § 2064(b) for a company's alleged failure to make a timely 15(b) report accrues not when the company first fails to report, but rather when its reporting obligation ends—that is, when it eventually reports or gains actual knowledge that the government is actually informed." *Spectrum Brands*, No. 15-CV-371-MV, slip op. at 39. The *Spectrum Brands* court thus held that the government's claim for civil penalties was timely.

Conclusion

The *Spectrum Brands* ruling gives important guidance on the extent of section 15(b) reporting obligations under the CPSA. This case stands for the proposition that the duty to report can be ongoing. A regulated business that fails to file a timely 15(b) report can commit a "continuing violation" and cannot "wait it out" until the five-year statute of limitations expires. The CPSC is not precluded from reaching back and holding a company liable for failing to timely report violations just because some of those early violations matured outside the applicable statute of limitations.

In a way, it ain't over until it's over.

Charles E. Joern Jr. is the principal of the Joern Law Firm in Oak Brook, Illinois.