



PRODUCT SAFETY & LIABILITY



REPORTER

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RECALLS

PRODUCT SAFETY

Following reports in 2010 that cadmium may have been used in children's glasses sold at McDonald's restaurants, a series of swift and careful actions—including a massive recall—turned what could have been a perfect storm into a non-event for McDonald's and the product manufacturers, says attorney D. E. Wilson Jr. in this BNA Insight. The author recounts the events surrounding the recall of 12 million glasses, and offers practical advice to companies that may face similar circumstances.

A Fairytale Ending to a Consumer Product Recall: Lessons Learned From McDonald's Recall of Shrek® Glasses

By D. E. WILSON JR.

In the world of product recalls, staying ahead of the process makes all the difference between a successful, fairytale ending or a nightmare that will have your shareholders screaming. In June 2010, Mc-

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Donald's recalled 12 million glasses with Shrek®¹ figures encased in glass on the outside.² The reason for the recall was an allegation that cadmium was used in the figures and that this substance would leach out, poisoning people—including children—using the glasses. Initial reports tied the SHREK glasses to earlier instances of high levels of cadmium in children's jewelry manufactured in, and imported to, the United States

¹ SHREK is the property of DreamWorks Animation LLC.

² The formal term is "vitrified," a "process that permanently traps harmful chemicals in a solid hunk of glass-like material." EPA, *A Citizen's Guide to Vitrification*, EPS 542-F-01-017.

from China.³ While the recall was not cheap, it was the ending, for once, and not the beginning of protracted litigation, for McDonald's and its suppliers.

Below are five actions that were instrumental in turning the scenario from a potential perfect storm for the companies involved into a non-event.

Act Swiftly to Remove the Product, Even If You Are Certain It Is Safe

McDonald's immediate recall of the SHREK glasses set the tone for the rest of the proceeding. By showing McDonald's first concern was for its patrons' health and safety, this action protected McDonald's brand name. The story moved immediately from the issue of whether McDonald's was going to recall the glasses, to whether a recall was necessary. Second, it allowed McDonald's to focus attention on getting out the truth. McDonald's swift action removed the drama from the story and allowed science to prevail—eventually. In addition, similar actions by companies in the supply chain of the SHREK glasses, apparently unconnected to McDonald's measures, fostered a scientific resolution to this issue in a relatively brief time.

Be Ready for a Multi-front Proceeding

In this day and age, any product recall raises the potential for concurrent proceedings in different legal arenas: Congress, corporate, securities, products liability litigation, and regulatory. Failure to address each of these areas effectively can result in considerable damage to a company, even if the company has done nothing wrong. Each field requires a different skill set. A successful resolution of these multiple proceedings requires an appreciation by the company of the importance of coordinating activities on each front.

Congress. Congress has a keen interest in performing its oversight function when children's products are involved. Failure to engage the investigating committee's staff on a timely, respectful basis, preferably with someone experienced in congressional investigations, is an invitation for a subpoena and a (verbal) public flogging, later to be shown on prime time television.

If, despite one's best efforts, you must testify, experienced counsel can assist you to make the most of the opportunity.

Corporation. Public companies face significant issues in the product recall situation. The company should follow its internal crisis management procedures and monitor developments regularly with regard to any disclosures required under the securities laws. At the same time, the company should build its case, demonstrating the company's lack of wrong-doing. The threats from failure to follow sound internal corporate procedures, to make disclosures to shareholders as necessary, and to prepare for shareholder derivative actions are substantial. The company should monitor and log all share-

holder requests for information and provide consistent, planned responses.⁴

Products Liability Litigation. Immediately upon a product being recalled, it is usual to see advertisements by law firms looking to represent individuals allegedly adversely affected by the product. The company should monitor such advertising and use these ads to help prepare the "company case," documenting the company's internal controls and compliance with them.

Regulators. In the products game, regulators come in four basic forms: federal; state; state attorneys' general; and other governments' regulators.

■ *Federal Regulation.* The first issue is determining which agency has jurisdiction. The next is bringing in attorneys who know the agency to help prepare for subsequent proceedings. In the SHREK matter, the choice was between Consumer Product Safety Commission or Food & Drug Administration jurisdiction. Companies involved in the manufacturing chain for the SHREK glasses analyzed which agency would (or should) have jurisdiction and then mobilized attorneys with agency-specific skill sets. The CPSC became the agency with jurisdiction and the companies involved immediately made contact (see "Transparency" below).

■ *State Regulation & State Attorneys General.* The major state concern is usually Proposition 65 in California, although a number of states have substantive regulations and active regulators. The California law requires businesses to notify Californians about significant amounts of chemicals in the products they purchase for their homes or workplaces, or that are released into the environment. Not only does the California Attorney General enforce this law, but any district attorney or city attorney (for cities with populations exceeding 750,000) may also enforce Proposition 65. In addition, any individual acting in the public interest may enforce Proposition 65 by filing a lawsuit against a business alleged to be in violation of this law. As the number of potential plaintiffs is very large, Prop. 65 draws yet another skill set into the fold—products liability skills with California experience.

■ *Other Governments' Regulators.* The primary regulator under this category is the European Union. In the SHREK glasses case, it turned out that the pigments for the glasses—the component containing the cadmium—were imported from the EU. This brings the need for counsel conversant in EU regulations to the table as well as environmental counsel familiar with the regulations in both jurisdictions (EU and United States) concerning the manufacture, handling, shipping, and storage of potentially toxic substances.

Distinguish Your Product

Demonstrating that your product is different from (and, hopefully, safer than) other recalled products containing the same substance reduces the attention devoted to your product. For example, a key factor in letting the air out of the SHREK glasses balloon was distinguishing the glasses from cadmium-containing children's jewelry manufactured in China. In the

³ *Walmart Pulls Children's Jewelry After Probe About Cadmium*, Associated Press, Jan. 10, 2010; *Walmart's Miley Cyrus Jewelry Contains Cadmium*, Associated Press, May 19, 2010.

⁴ Privately held companies, particularly ones which borrow money, should be aware that the suggestions of this paragraph frequently apply to them through bond covenants.

SHREK glasses matter, several key differences were identified, validated, and released:

Cadmium Not a Substitute for Lead. The prior cadmium jewelry cases involved products where cadmium, a dangerous product with no established use limits, had been substituted for banned lead. In the SHREK case, the cadmium was not a substitute for lead; it was an ingredient in the pigments and was required to produce certain shades of red, yellow and green.

Cadmium-containing Ingredients Not From China. The fact that the cadmium-containing pigments were manufactured in the EU by a well-established company having strong internal controls and conforming to EU regulations went a long way to reducing the “buzz” about the SHREK glasses recall in every forum, particularly Congress.

Cadmium-containing Glasses Not Made in China. Finally, the fact that the glasses were manufactured in the United States by a well-known and well-regarded company helped to demonstrate that McDonald’s, and the SHREK glasses, should be given a presumption of compliance.

While each recall is different, it is important to focus attention on the manufacturing safeguards and testing applicable to the product being recalled. This will demonstrate the care given to protecting consumers, particularly children.

Be Transparent

A critical factor in successfully weathering a product recall storm is a commitment to transparency. This starts long before a product is recalled, but is just as important after a recall begins.

Transparency in Corporate Affairs. The ability to point to good corporate governance, a history of sound, well-established counterparties, and day-to-day transparency with the public, investors and regulators, gives a company an immediate head start on minimizing the adverse effects of a product recall. McDonald’s is a good example of this. The company’s website has a

wealth of information demonstrating its commitment in each of these areas.

Transparency in the Recall. A company must be, and be seen to be, as open to the public as possible concerning threats potentially posed by the recalled product consistent with regulatory, corporate, and products liability risks faced by the company. In the SHREK glasses matter, this turned out to be a relatively easy requirement to meet as McDonald’s immediately established contact with the CPSC and made its position public concerning the safety of the glasses from the beginning of this matter.

Know the Science

Knowing the science involved is the final factor crucial to withstanding the potential liability associated with a product recall. In the SHREK glasses matter, this impacted the result in two major ways:

McDonald’s. McDonald’s immediately commissioned a preeminent, independent company to test the glasses, eventually confirming McDonald’s initial position, that the glasses posed no, or so slight a, risk of consumer exposure that the recall was not necessary.

The Manufacturing Companies. The fact that the companies involved in the manufacture of the glasses had decades of experience with the cadmium-containing materials, and reputations for high safety and quality standards bolstered McDonald’s position. These companies have substantial research and development arms and are seen as industry leaders and experts.

The stature of each company enhanced the perception, eventually confirmed by independent testing, that the SHREK glasses met all applicable standards. Few product recalls will proceed to the positive outcome reached in the SHREK glasses matter.

For example, only rarely will an election turn out a majority of one party and, thereby, end a congressional investigation. But these lessons, while neither new nor unique to this situation, have application far beyond the SHREK glasses matter and serve as a reminder of the care to be taken when a product recall is required.