

# The Intersection of Antitrust with Product Safety— The Need for Greater Collaboration by Antitrust and Regulatory Lawyers When Counseling Corporate Clients

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For some companies, a single in-house counsel handles both product regulatory, including product safety issues, and antitrust compliance. In many law firms and corporate legal departments, however, lawyers who advise on food and consumer product regulatory issues and lawyers who handle antitrust issues often practice in separate worlds. They may never meet except on a social basis, since their normal clients and legal concerns would have no common nexus. Increasingly, however, regulatory attorneys are finding themselves in situations where antitrust guidance can be critical. As companies strive to manage the complex relationships and logistics implicated by product safety recalls and other public safety or environmental issues, their counsel must also be aware of and actively guard against some of the potential hazardous areas for inadvertent antitrust exposure.

## Different Constituencies and Concerns of Product Regulatory and Antitrust Specialists

To better understand the need for a collaborative approach to counseling corporate clients in these emergency regulatory areas, it is important to note that attorneys who specialize in regulatory fields and those who focus on antitrust issues generally have different skills and deal with different departments of the average corporate client. Corporate antitrust lawyers deal with an enormous body of case law interpreting a relatively small number of federal and state statutes. When representing global corporations, they need to be aware of the competition laws in many jurisdictions outside of the United States and be able to successfully collaborate with foreign local counsel. Antitrust specialists must also master the intricacies of complex economic theories and statistics. The antitrust litigators need to be highly skilled at marshaling facts and evidence and analyzing minute differences in factual situations that may determine the ultimate judicial outcome. The antitrust counselor often deals with marketing and sales managers, upper-level management, and boards of directors on structuring major transactions and business relationships.

Corporate food and consumer product regulatory lawyers, in contrast, spend much of their practice interpreting an alphabet soup of federal laws and regulations (FDA, USDA, CDC, CPSC, EPA, and FTC). They also deal with myriad state laws and regulations, such as Louisiana's country of origin labeling law for meats, and Illinois' Lead Poisoning Prevention Act for children's articles.<sup>1</sup> Even familiarity with local ordinances may be a necessary part of the legal expertise for product regulatory lawyers, especially lawyers representing retailers, restaurants, and other facilities serving the general public.<sup>2</sup>

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<sup>1</sup> LA. REV. STAT. § 51:613 (West 2007); 410 ILL. COMP. STAT. 43/1 et seq. (2008).

<sup>2</sup> Local ordinances contain a wide variety of restrictions or prohibitions for diverse articles and ingredients, such as firearms, replica firearms, fireworks, mercury thermometers, balloons, tobacco, alcohol, foie gras, and trans fats.

Product regulatory lawyers may have the first review of sourcing, design, manufacturing, production, operational and safety agreements, as well as policies and procedures, and be the first to counsel their clients on when and how to conduct product withdrawals and recalls. While they may later team up with litigators to defend their companies against product liability lawsuits, these attorneys often spend considerable time training their business clients on regulatory and safety compliance before any incident occurs. Their day-to-day client contacts are often food scientists, microbiologists, design, manufacturing and quality engineers, buyers, and other more technical employees. Their interaction with sales and marketing teams—in contrast to those of antitrust attorneys—is often much more narrowly focused on assuring that product marketing and advertising claims are consistent with product attributes.

While product regulatory lawyers clearly do counsel upper management and perhaps even the board of directors when company products are involved in a personal injury claim, safety issue, or a major recall, they tend to have greater, ongoing interactions with the client at the departmental or group level than antitrust specialists. The product safety lawyer's skills for interpreting precise and sometimes arcane regulations and working with scientists and engineers are obviously different from the skills needed for developing antitrust defenses and reining in enthusiastic marketing types negotiating new deals and customer relationships. Nevertheless, regulatory attorneys can greatly benefit from an awareness of potential antitrust problem areas, particularly in the early stages of counseling a client in a regulatory crisis.

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### **2007—The Year of the Recall**

We can now look back on 2007, which many people have called “The Year of the Recall,” and see that the past year was unprecedented in terms of both the number of food and consumer product recalls and in the attendant national and international publicity. In the fall of 2006 and throughout 2007, there were highly publicized food-borne illness outbreaks, food recalls, seafood import alerts, and consumer product recalls numbering in the hundreds. Spinach, lettuce, peanut butter, pet food, green onions, ground beef, chili, seafood, raw dairy products, and many other foods caused food-borne illness outbreaks and were recalled. On the consumer product side, recalls of millions of lead-painted and lead-filled toys and children's jewelry, magnetic toys, tainted toothpaste, and unsafe automobile tires, baby cribs, and even children's apparel have been among the products in the headlines. Both imported and domestic foodstuffs and products have been implicated in a global food and product safety crisis. Many of these product safety issues have created the impetus for greater coordination by industry participants.

With global supply chains, product quality and safety failures originating at overseas factories or farms can directly impact U.S. companies and consumers. For clients that produce, manufacture, distribute and sell food and consumer products, handling recalls and dealing with supply changes or shortages as new materials are substituted for problematic or prohibited materials may require collaborative actions with others, including in some cases, competitors. Even for clients who are not directly implicated in a recall, there may be increased interest in prophylactic coordinated activities to improve product safety or reduce consumer concern, such as new industry initiatives or consultation among suppliers in global supply chains to safeguard against a perceived concern.

With increased consultation and coordination of activities in dealing with the product safety and regulatory challenges, product regulatory counsel has a greater need to be sensitive to and aware of antitrust issues. In educating their common clients as to the bounds of permissible conduct in crisis situations, antitrust lawyers can develop new opportunities, in collaboration with their regulatory colleagues, to increase their value to their clients' businesses.

### Information Sharing Practices During Recalls

At the time a consumer level recall is publicly announced, it is not just the manufacturer of the recalled product that is involved. All of the manufacturer's distribution channels are directly impacted. When a manufacturer announces a recall of a popular product, its distribution and retail channels are also fielding questions and handling actual logistics of product returns and product destruction. There can be legitimate needs for concerted action in sharing information, for example, in tracing and identifying a supplier in the global supply chain that may be the ultimate source of the contamination or product defect. The legitimate business purpose in this tracing and identification activity is to remove end products from distribution channels and recall them from consumers' homes as expeditiously as possible.

While customers may be demanding refunds and trying to return products, there are usually additional pressures from other constituencies that lawyers must be prepared to handle. Often news media reporters and camera operators are cruising down aisles in retail stores trying to locate and photograph recalled products remaining on the shelves. Federal, state, and local government officials may be investigating and lawsuits may be being filed. A recall can be a very stressful period for business clients, whether they are a manufacturer, importer, distributor, or retailer. Manufacturers must notify their distributors and retail customers promptly when they discover product contamination or a safety hazard. They must treat big customers and smaller customers in an even-handed fashion, providing all customers with the same information.

Another less obvious issue for attorneys is the need to alert the product manufacturer or importer and its distribution chain on how to handle calls and e-mails from competitors on the logistics or impact of the recall. The manufacturer's or importer's business people may not see any harm in discussing all of this with competitors as, after all, they are just cooperating to assure consumer safety. They may feel that the entire industry needs to "pull together" in a time of crisis.

The antitrust laws do allow competitors to collaborate in a limited fashion for socially beneficial purposes like assuring food and product safety. The tension comes from the method of collaboration. The immediacy of the situation, however, may create an impetus for more informal collaboration. Conference calls between a small group of competitors should be discouraged, even in a crisis mode. The risk of telephone conversations or small gatherings of competitors in the wake of a recall is that the competitors may unwittingly cross over the antitrust line and start allocating the business among new suppliers or jointly negotiating prices with the suppliers of alternative products to the recalled product line. Of course, some collaboration within the confines of a duly constituted trade association with counsel present is usually permissible. The trade association, guided by counsel and in cooperation with a government agency, may work on new and improved industry responses to the safety concern. The California produce growers association, for example, followed this approach working with the FDA, the Centers for Disease Control, and the California Department of Health in formulating an industry initiative on growing, harvesting, sanitation, inspection, and testing in the wake of the 2006 spinach recall due to E.coli O157:H7 contamination.

Outside this context, however, the best way for counsel to communicate this message across the organization and any affiliated companies is to cover these issues in regularly scheduled, preventative legal training programs. That way when a recall crisis hits, it is hoped that the client's employees will already know how to behave and when to ask for more legal guidance as the crisis is unfolding.

One of the difficult challenges in this proactive training is teaching the various corporate business and scientific teams the nuances of when competitor information sharing is permissible under the antitrust laws and when it is not. There are two fundamental aspects of the collabora-

tion. One is the nature of the subject matter and the other is the forum for the collaboration. Lawyers can illustrate this idea using a color coded chart which graphically shows how the antitrust risk increases or decreases depending on the particular subject matter and the forum where it is discussed. For example, competitor companies meeting in a counsel-monitored trade association forum discussing methods to improve lead testing techniques for children's products could fall in a green ("go ahead") section of the chart. Two competitor product safety managers having a telephone conversation trying to identify the source of a product contamination in ingredients their companies both purchased from the same growing area might fall in a yellow ("consult the legal department before proceeding") section. Two procurement managers at large competitors getting together to discuss how to structure a reimbursement plan for the supplier who had announced a recall would fall in a red ("no go") area of the chart. Production managers at competing manufacturers meeting together to discuss the performance and pricing of industry suppliers, would also fall into the red area of the chart.

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Of course, all potential scenarios cannot be anticipated in training. Antitrust compliance programs can help employees spot issues and alert counsel. The regulatory counsel when consulted on a pending product safety issue, however, must continue to stress antitrust compliance to the business teams as various responses are being contemplated.

### **Development of Coordinated Responses to Address Product Safety Concerns**

Recalls and product safety concerns also directly fuel a push for coordinated action as companies strive to address these issues in a coordinated fashion, either as an industry initiative or in response to multi-faceted legislative or regulatory mandates. At the time of publication of this article, Congress is already working on new legislation to increase the powers and budget of the Consumer Product Safety Commission (CPSC).<sup>3</sup> On November 6, 2007, the Interagency Working Group on Import Safety presented to President Bush its Action Plan, which contains recommendations for improving the safety of imports crossing our borders. On January 25, 2008, the FDA announced that it intends to station inspectors throughout the developing world to improve the quality and safety of imported food and drugs flowing to the United States.<sup>4</sup>

On September 26, 2007, the American National Standards Institute (ANSI) held an open forum for all stakeholders in Washington D.C., entitled "Building Consumer Confidence." The purpose of the forum was to develop recommendations to help protect consumers from imported goods that do not meet U.S. standards for health and safety. Lydia Parnes, Director of the FTC's Bureau of Consumer Protection, addressed the forum. Her remarks praised the past work of industry self-regulatory organizations in complaint resolution, quality assurance, best practices, and standards that raise the level of industry compliance with laws enforced by the FTC. She indicated that the FTC stands ready to assist in the development of new self-regulatory programs in the area of product safety as well.<sup>5</sup>

With all of these governmental actors interested in safety issues, the push for an industry response to the legislative and regulatory pressures is likely. Industry groups also seek to self-

<sup>3</sup> S.2045, 110th Cong., 1st Sess. (2008) (CPSC Reform Act of 2007). This bill is currently on the Senate's legislative calendar. Another similar reform bill passed the House of Representatives last fall. *See* Consumer Product Safety Modernization Act, H.R. 4040, 110th Cong., 1st Sess. (2007). The House bill is a weaker bill from a consumer protection viewpoint.

<sup>4</sup> Gardiner Harris, *F.D.A. to Expand Scope of Foreign Inspections*, N.Y. TIMES, Jan. 25, 2008, at C3.

<sup>5</sup> Lydia Parnes, Director, Bureau of Consumer Protection, Federal Trade Comm'n, Remarks at the Building Consumer Confidence Forum (Sept. 26, 2007), available at <http://www.ftc.gov/speeches/parnes/070926ansi.pdf>.

regulate to be good corporate citizens. As member companies in various trade associations work to improve safety standards for products, such as toys and fresh produce, it is incumbent on their regulatory counsel to work closely with antitrust colleagues to help company participants understand the acceptable parameters of competitor cooperation in new industry standard development. This will assure that smaller companies are not left out or injured, intellectual property is appropriately protected, and that new standards promote overall product safety in the interests of consumer welfare.

### **Concerted Conduct in Context of Scarcity of Supply/Substitution of Materials**

Another area where businesses may perceive a need for concerted conduct is in the context of scarcity of supply or substitution of ingredients, chemicals, or materials. Closely related and often inseparable from the product safety issues discussed above, are environmental, social, and animal welfare concerns expressed by consumer advocates. Today's highly sophisticated consumer groups are closely examining all aspects of food and consumer product supply chains, product composition and contents, production and transportation methods, and environmental impacts. Americans now understand the concept of "food miles" and the calculation of how much carbon dioxide is released into our atmosphere during the raising of livestock and the production and transportation of foods from farm to fork. This trend has gained momentum as a result of California's Proposition 65,<sup>6</sup> influential food chefs and writers, animal welfare activists, former Vice President and Nobel Laureate Al Gore's educational work and advocacy on global warming, and other factors. Consumers are increasingly concerned about harmful chemicals and dangerous materials found in consumer products. With an increased emphasis on these operations and policies, many future-oriented companies are engaging in more information sharing and coordinated action to improve and further their corporate social responsibility agenda.

A prominent example of recent legislative action taken to address scientific and consumer concerns about chemicals and other materials found in household products is California's passage of Assembly Bill 1108,<sup>7</sup> which bans the use of a group of chemicals called phthalates, a type of plasticizer,<sup>8</sup> from toys and child care articles intended for children under the age of three. The concern is that these chemicals may cause cancer and reproductive defects.

When widely used chemicals or materials are banned or restricted in large markets like California, the manufacturers of the end-consumer products may have difficulty obtaining sufficient substitute chemicals or materials to continue production of the end product. In a case of a legislative ban on a critical product component or material, it is very easy to imagine a scenario where the procurement managers for two competitors with a combined 60 percent of the market get together to come up with a plan. If they decide to throw all of their business for a replacement plastic to the same supplier, and end up with the exact same pricing, or divide the market up and allocate their existing inventories accordingly, then they may be in violation of the antitrust laws.

In these situations, which I believe may happen more frequently in light of consumer trends, regulatory counsel needs to involve antitrust counsel from the beginning to address antitrust aspects of these emerging supply chain issues before new supply arrangements are implement-

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<sup>6</sup> The Safe Drinking Water and Toxic Enforcement Act of 1986, CAL. HEALTH & SAFETY CODE §§ 25249.5–25192 (West 2008), available at <http://www.oehha.ca.gov/prop65.html> (with list of prohibited substances).

<sup>7</sup> CAL. HEALTH & SAFETY CODE §§ 108935–108939 (West 2008). Governor Schwarzenegger signed the legislation on October 14, 2007.

<sup>8</sup> Plasticizers are various substances added to plastics to keep them pliable or soft.

ed. Perhaps the legal advice will be to enlist the relevant trade association to deal with the shortages on an industrywide basis and perhaps with the involvement of the government entity that implemented the ban in the first place. It is one thing to ban chemicals or materials that are deemed harmful. It is often more difficult to come up with workable substitutes, especially if the legislative action does not provide a reasonable transitional period.

Alternatively, perhaps the advice is that the competitors can get together if they invite all the industry players, even outside of a trade association context. Where time is of the essence, and there is no exclusion, the failure of some industry participants to participate may not be an insurmountable issue if counsel is present for all group discussions. Counsel could guide the meeting participants about what can and cannot be discussed, so that the meeting focuses on how to develop new materials, not impermissible topics, such as individual company pricing, quantities, sales figures, a division of markets or a group boycott of one of the plastic suppliers.

Regulatory counsel should also take into account market realities when faced with a scenario where a state (or other governmental entity) bans the use of a certain chemical, material, ingredient, or method of production for a product category, based on health, safety, social, or environmental reasons, and the client wishes to work with some, but not all, of the companies affected by the ban. What if two competitors control the supply of an alternative material and raised the prices, so that the substitute articles became either unavailable or very expensive and unaffordable for low income consumers? This is why regulatory and antitrust lawyers need to keep informed about trends in this area and work closely to make sure their clients are included as stakeholders in governmental and industry policy making.

### **Conclusion**

The key takeaway for our clients should be that promoting consumer safety and social and environmental responsibility are laudable goals for which all companies should strive, but that industry collaboration and concerted activities should be undertaken with caution and carefully vetted by counsel. Companies need to understand that competitor collaboration that violates the antitrust laws must be avoided even when pursuing these other important societal values. Where regulatory and antitrust advice is being given by different attorneys, regulatory counsel must gain greater awareness of the scope of the antitrust laws and understand the need for sensitivity to antitrust issues as they guide their corporate clients through industry standard making, product recalls, and supply chain disruptions and substitutions. ●