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Preventing Liability for Foreign Products – A PLP Primer

by Kenneth Ross

Recently, there have been news stories almost every day about new and continuing safety issues with Chinese made products, including food for pets and humans, car tires, toothpaste, and consumer products, especially toys.



According to the U.S. Consumer Product Safety Commission (“CPSC”), more than 40% of all consumer products recalled this year were made in China, including all toys recalled this year. And last year, 79% of all toys last year were made in China.

For non-consumer products, it is hard to know how many Chinese products were recalled. And, even if we had a number, I’m sure it would be understated in that it probably wouldn’t include U.S. made products which contain Chinese component parts or raw materials that caused the recall.

Given this reality, there are a number of issues that manufacturers and product sellers have to face when trying to prevent future product safety and product liability problems for foreign made products.

The first issue is whether it is advisable to buy safety critical products or component parts or raw materials from China or any other country with a less sophisticated and robust safety and quality system. Certainly, U.S. manufacturers or product sellers do not buy from foreign sources to buy better quality products. They hope to have an acceptable level of quality and safety at a cheaper price.

So, given the increased risks, and increased costs of dealing with foreign manufacturers, especially those not known for producing high quality products, can you save enough money by buying from foreign manufacturers to justify the risk? Given product margins, you can spend most or all of your profits with one product liability case or recall, if the foreign supplier does not take care of the entire cost, including administrative costs for your employees. And, this doesn’t include damage to the U.S. manufacturer’s or retailer’s reputation in the marketplace.

Despite all of this, U.S. manufacturers and retailers will continue to buy all kinds of raw materials, component parts, and finished products from China and elsewhere. And these numbers will continue to increase, as long as there is no backlash from consumers. In that case, U.S. manufacturers need to be prepared to provide assurances to their customers and the ultimate customer about the safety and quality of these products.

In light of the above, U.S. manufacturers and retailers need to take extra precautions to minimize the risk to an acceptable level and to be prepared to convince government agencies and consumers that its products are safe. So, let’s examine some well-known prevention techniques and see what else should be done when foreign made products are being imported into the U.S.

Contracts and Insurance

U.S. manufacturers and retailers should have more detailed contracts and specifications when dealing with foreign suppliers. Most contracts and specifications for U.S. and foreign suppliers are inadequate when dealing with some safety issues, such as recalls. However, since a U.S. based supplier can be sued here, it is a bit easier to deal with issues that are not in the contract and to get their attention if something bad happens.

With foreign manufacturers who have no assets in the U.S., and therefore no jurisdiction to be sued, it is harder to enforce contracts in general and certainly harder to deal with issues not explicitly set forth in the contract.

Some of the issues that could be included in such contracts and specifications involve required certifications or other safety and quality testing, the documentation that must be sent to the U.S. in English to support the certifications and testing, and confirmation of the foreign manufacturers understanding of U.S. safety

regulatory issues and when must they tell you about a post-sale safety or quality issue.

You should be sure to include in the contract remedy and damage provisions that are acceptable to you. For example, you may not want the foreign manufacturer to disclaim consequential damages or to provide that repair or replacement is the only remedy. This is especially true for component parts, where the additional costs of repair, replacement, or refund can be enormous. In addition, do you expect the foreign manufacturer to pay for all costs of a recall? If so, be sure it is clearly set forth in the contract.

Of course, the foreign manufacturer should indemnify you and hold you harmless in the event of a product liability claim or lawsuit. However, do you really want them defending the case, or do you want to make it clear that you control the defense or at least are able to participate in it, even if their insurance applies? Their insurance company should be U.S. based and be financially capable of responding in the future. And, you should require a relatively low self-insured retention.

You should think about how you are going to enforce this contract if necessary. Will you have to sue in China? Or, will they agree to jurisdiction in the U.S. And, is the foreign company financially capable of paying for any recall or any deductible in an insured matter? If the company goes bankrupt or closes its doors, the insurance premium isn't paid and there is no one other than the U.S. manufacturer to pay for the recall. Maybe the foreign manufacturer should be required to post some type of bond with provisions for when the U.S. manufacturer can access the proceeds of the bond.

And the foreign manufacturer needs to agree to cooperate with the U.S. manufacturer in all respects during production, during any product liability case, and during any government inquiry. They need to timely provide documents in English and provide personnel who can explain in a U.S. court of law or in a deposition why their product was reasonably safe.

Design and Manufacturing Procedures

Safety and quality procedures for foreign manufacturers shouldn't be any different than for U.S. based manufacturers. However, it is more important that you know what the foreign manufacturer is doing and how they are documenting the results.

Some additional questions that could be asked include:

- Do they do a hazard analysis, a failure mode and effects analysis, a design review? Do they document these procedures? Do they train their personnel in how to do them? What level of safety is acceptable? Is it up to the foreign manufacturer to decide on levels of safety or do they need your approval for the final design?
- Do they get certifications from respected testing agencies? Do they give these agencies all necessary information? Are they possibly supplying misleading or incomplete information so as to jeopardize the certifications? Is it possible that these certification agencies are inappropriately or incorrectly certifying the product as a result of bribes or incompetence? Should these certifications be done in the U.S. or Canada?
- How do you know that the foreign manufacturer continues to comply with the design approved by the certifying agency? Do you confirm compliance on a periodic basis?

Manufacturing Issues

What type of quality testing do they do – full, partial, random? What do they consider a product that meets specifications? Do they believe that “close enough” is acceptable? Is that acceptable to you?

Should you do full, partial, or random incoming inspection testing of the product or component part? Do you confirm that the foreign manufacturer has not changed the raw material in the part or product they sell you after you have approved or the certifying agency has approved? There are many horror stories of this happening.

Should you have full-time people at the plant in the foreign country monitoring their manufacturing and quality control processes?

Warnings and Instructions

Do you review and “approve” the warnings and instructions provided by the foreign manufacturer? Do you require them to utilize the services of a competent native English speaker to draft the warnings and instructions? Do you require them to retain a competent U.S. based lawyer to provide advice on the adequacy of the warnings and instructions?

The U.S. based manufacturer should not generally undertake the rewriting of the warnings and instructions of a supplier, U.S. or foreign. Doing that makes them more potentially liable. It is better to require the foreign manufacturer to utilize competent people to assist them. They know their products best and should be required to provide you a component part or finished product that is safe in its design, manufacture, and warnings and instructions.

Post-sale Issues

The foreign manufacturer needs to have competent personnel in-house to receive and evaluate post-sale safety and quality issues. They have to agree to allow you to review this information if it is appropriate. And there should be some agreement on when it is appropriate.

For example, if a Chinese manufacturer sells the same component to 10 manufacturers and has a problem with products sold to one or more of those manufacturers, it should be required to tell you, even if you haven't had any problems with their component. The goal is for you to be able to prevent problems before they happen.

Certainly, you need to be immediately notified if the component part has been inserted into a product not made by you and has been recalled anywhere in the world. And, you should be sure that the supplier's personnel, or their advisors, are familiar with the U.S. governmental reporting responsibilities, and know what to tell you and when.

The foreign manufacturer's design and manufacturing processes should enable them to narrow the potential universe of problem products so as to allow you to correct or retrieve only those products that need to be dealt with. This includes traceability and marking procedures that are appropriate for the risk level of the particular product.

Defending the Product

U.S. manufacturers don't want to be in a position where their only defense is blaming a foreign supplier. This is especially true if the manufacturer is not in the courtroom with you.

So, even while you are evaluating who to do business with and what procedures you want them to adhere to, think about how they will appear in court if they have to defend the adequacy of their part or product. Are they sincere, can they speak well (preferably in English)? Do they have documents that have been written carefully and correctly discussing what they did to be sure they produced a safe and quality product? Will your witnesses be able to understand and use these documents to defend the adequacy of the product or part?

Conclusion

All of the techniques and concerns mentioned above are also important for U.S. based suppliers. However, given the reality of what manufacturers are producing products with problems, it is even more important to go the extra mile with Chinese and possibly other foreign suppliers.

Ultimately, the manufacturer or product seller gets to make a business decision on whom to buy from and what to require them to do. Since it will be impossible to get a Chinese or other foreign manufacturer to do all of these things, the company will need to decide what is most important and what preventive techniques are priorities. In that way, it will be better prepared to make a rational business decision and assume the future risk which it deems acceptable.

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