



# THE PRODUCT CRISIS: STAYING AHEAD BY PLANNING AHEAD

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Product “crises” have gotten bigger, more expensive, and more complex with each passing year. They are the subject of media attention, regulatory scrutiny, political grandstanding, and, of course, lawsuits by class-action plaintiffs’ lawyers.

A product crisis can take many forms, from product recalls necessitated by real or claimed defects in the product design or manufacturing process to hoaxes and rumors concocted by criminals and miscreants. The fact that the internet has now become a staple of modern life means that claims—both true and untrue—about a company’s products spread rapidly. Every company, therefore, must contemplate the risk that it will one day face a product crisis, no matter how fastidious its design and manufacturing processes. And every company must have a plan for dealing with the crisis should that risk materialize. Having a plan in place *before* the crisis strikes is key to a company’s ability to emerge from the crisis successfully.

### PRODUCT CRISES TAKE MANY FORMS

Recently, product recalls, many relating to food, have been the subject of intense media, regulatory, and legal scrutiny. Westland/Hallmark recently undertook the largest meat

civil litigation followed (or, in some cases, may have preceded) the announcement of many of these recalls.

Product recalls due to alleged defects in design or manufacturing processes have not been the exclusive source of product crises. Over the past several decades, many well-respected companies have fallen victim to phantom crises, urban legends, hoaxes, and even criminal product tampering whose apparent purpose was to damage a company or its brands. The textbook example is the Tylenol tampering scare in 1982, when criminals injected Tylenol capsules with cyanide, which resulted in the deaths of several people. At the time, Tylenol, made by Johnson & Johnson, was one of the most respected brands in the world, and the over-the-counter painkiller was a major contributor to Johnson & Johnson’s profits, responsible for nearly 20 percent of the company’s profits in 1981. Ian Mitroff, *Managing Crises Before They Happen* 13–14 (2001). Johnson & Johnson’s reaction to this tragedy and crisis is offered as a case study in how a company *should* react in crisis situations. The company got out in front of the issue. Johnson & Johnson made clear that its sole concern was public safety, not protecting short-term profits. It immediately began working with the Food and Drug Administration

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recall in history—143 million pounds of beef—because the company’s employees purportedly violated federal rules by butchering sick cattle. Last year, Menu Foods recalled 60 million cans of pet food after wheat gluten in its products was linked to pet deaths across the nation, resulting in a public relations and legal nightmare. That recall reportedly cost \$56 million. Food-related recalls shared the spotlight with consumer product recalls, particularly those for children’s toys that were made in China or contained parts made in China. A visit to the Consumer Product Safety Commission’s web site (<http://www.cpsc.gov>) reveals numerous product recalls, from infant cribs to snowmobiles. As sure as night follows day,

(“FDA”) to recall the lots from which the poisoned capsules had come. It engaged in a public relations campaign to both inform and reassure the public, and its CEO was front and center during that campaign. *Id.* at 16. Remarkably, the company even ignored the advice of the FDA and recalled *all* of its Tylenol bottles worldwide—about 31 million bottles—at a cost of \$100 million. *Id.* The FDA, along with the FBI, had urged a more limited recall to protect against copycats. *Id.* Ultimately, changes were made to the way off-the-shelf medications are packaged to prevent such tampering. Johnson & Johnson suffered short-term damage, but it emerged triumphant, having regained public trust and, ultimately,

its dominant market position. Today, Tylenol has the largest market share of any over-the-counter pain reliever. *Id.* at 17.

Another famous example of a product crisis caused by external forces is the Diet Pepsi “syringe in the can” urban legend in 1993, in which some individuals falsely claimed to have found syringes in their cans of Diet Pepsi. There, Pepsi took an approach that differed from Johnson & Johnson’s a decade before. The company thoroughly investigated the matter and embarked on an aggressive public relations campaign aimed at demonstrating that there was no truth to the rumor. Its aggressive approach, executed to perfection, worked. The company publicly exposed the rumors as fiction and protected one of its leading brands from permanent damage.

The Diet Pepsi incident happened before the internet had become the real-time rumor mill it is today. Today, the World Wide Web allows for even greater mischief and more immediate threats to product manufacturers of all stripes. In 2005, for instance, a Nevada woman claimed that she had found a severed finger in a bowl of Wendy’s chili, which attracted nationwide media attention and threatened consumer confidence in the popular restaurant chain. This “urban legend” spread like wildfire, thanks largely to the internet, where bloggers, chatters, and online rumormongers exploited and bolstered the claim, giving the impression that it was true simply because it was ubiquitous. As with the Diet Pepsi episode a decade before, the claim was demonstrably false, but it was not exposed as a falsehood before doing economic harm to Wendy’s. According to media reports, Wendy’s lost \$2.5 million as a result of the claim, the copycat claims that followed, and the attendant bad publicity. The woman who made the claim recently was sentenced to 12 years in prison for attempted grand larceny and other charges, based on her false claim.

## THE VIRAL PRODUCT CRISIS

The internet—and the speed with which it allows information and misinformation to make their way across states, countries, and continents—means that a potential product crisis can become a real crisis in almost no time. More than 70 percent of U.S. adults use the internet at least occasionally. It is not surprising that a recent Harris poll found that 80 percent of U.S. adults were aware of recent recalls and that 50 percent of those surveyed said that they would

switch brands—at least temporarily—in response to a recall. “Consumer Concern Over Product Recalls High,” Harris Poll #53 (June 12, 2007).

Moreover, most companies sell not just in the U.S. but abroad as well. With internet usage numbers comparable in Europe and other industrialized countries, any company that sells products outside the U.S. may face a crisis that is not just domestic but international in scope, within hours of the first internet- or other media-generated rumor. In today’s cyber-parlance, the rumors “go viral”—that is, they spread ferociously, at a speed that would not even have been contemplated a generation ago. Once that happens, the company is on the fast track to a product crisis.

Before the next potential product crisis “goes viral,” becomes the subject of the blogosphere, winds up on CNN, and spawns class-action litigation, every company should have a product crisis plan in place. Scrambling to piece together a plan after a crisis starts makes no more sense than conducting business without a budget.

## PLANNING FOR PRODUCT CRISES: ONE SIZE DOES NOT FIT ALL

Product crises are obviously a risk factor for every company doing business, and the threat of a viral product crisis must be taken seriously. Even the most careful and fastidious company cannot completely control the risk that it will one day be the subject of an online hoax or the victim of criminal actions designed to harm it and its most important brands. While preventing crises may be next to impossible—they are bound to happen, whether due to external or internal causes—having an effective plan will help a company recover faster and minimize damage to its reputation and bottom line.

There is no one-size-fits-all plan for dealing with product crises. Every company is uniquely situated, and every company must tailor its plan to its particular situation. A company that sells products around the world will not have the same plan as a company that sells its products only in the United States or a region of the United States. A company that makes products composed of parts from foreign suppliers will not have the same plan as a company that makes all of the component parts itself. Offered here are guidelines and considerations, not prescriptions.

## THE THREE Cs: CAUTION, COMMUNICATION, AND COORDINATION

Every successful plan should be premised on the three Cs: caution, communication, and coordination. A company's plan must include measures and processes for exercising caution, communicating effectively, and coordinating both internally and with the third parties engaged in guiding the company through the crisis.

**Caution.** Exercising caution means avoiding rash or hasty decisions, to the extent circumstances permit. Once a course of action for dealing with a product crisis is undertaken, it is difficult to change. Caution, therefore, dictates that the company carefully consider the appropriate response to the crisis before it starts communicating with the various stakeholders, who may include regulators, politicians, consumers, and lawyers. Has the company investigated the problem thoroughly? Is the problem due to internal or external causes? Is there a chance that the company is responsible, or did third parties create or invent the problem? Is the company going to take an aggressive approach and try to show that the claims about its product are false, as in the Diet Pepsi and Wendy's examples? Or is the company going to engage in public contrition and do all it can to ensure that its customers are protected and that the problem is eliminated, as in the Tylenol example?

In other words, before the company starts talking about the crisis, it must have a firm grasp on what kind of crisis it is dealing with and, based on that, what course of action it will take. Time is of the essence. There will be no time for months-long investigations before the company has to start talking to the public, regulators, politicians, and opposing lawyers.

Ultimately, caution is not so much a stand-alone consideration as an important part of effective communication and coordination.

**Communication.** Once the company understands, first, what sort of potential crisis it is facing (internal or external; real or hoax) and, second, how it intends to approach the crisis, it must communicate its message to the various stakeholders. As one public relations consultant has explained, "Crisis management is storytelling." Eric Dezenhall, *Damage Control: Why Everything You Know About Crisis Management Is Wrong 4* (2007). A good story cannot be told unless it is communicated effectively. And effective communication has many components.

First and foremost, the company employees who will have some role in dealing with the product crisis must know what message they are to communicate. Second, the company must communicate that precise message, and must do so consistently. To that end, the company should generally have one of its senior officers serve as the face and voice of the company. Usually, that should be the CEO, or at least the executive in charge of the business unit that makes the product in question and who has the authority to make decisions about the course of the company's reaction, including whether to recall and to what extent (tempered, obviously, by obligations imposed by the regulatory agency with authority over the recall). See *id.* at 4. In the Tylenol tampering case, Johnson & Johnson's CEO, James Burke, was the "face" of the company.

In addition, if the company must communicate with audiences in different countries, it should take care to tailor its communications to account for language and cultural differences, not to mention differences in the governing regulatory and legal regimes. Effective communication in the United States may not be effective communication in another country. This issue requires careful thought well before a crisis looms.

A public relations consultant should be used to help guide the company's response, fine-tune the message it wants to communicate, and evaluate the best media for communicating its message. But the company should not cede control over its message or where and how the message is delivered to the consultant. The consultant's advice must be taken with a grain of salt. There is a tendency among public relations consultants to want to talk to the media, no matter what. Sometimes, however, it is better to say less and to say it less often. As one public relations consultant put it, "The advice crisis consultants give is often designed to benefit the consultant, not the client." Dezenhall, *Damage Control*, at 2.

**Coordination.** There are a lot of moving parts in any potential product crisis. The company must deal with its customers and investors, interact with lawyers filing or threatening claims, respond to media inquiries, and deal with a host of other stakeholders and interested parties. The company must coordinate its interactions with these stakeholders, constituents, and interested parties. You do not want the company's lawyers filing pleadings and briefs in court that are

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fundamentally at odds with what the company is telling consumers and the media. Mixed messages will cause the company to lose credibility, and where the company's reputation already is being questioned because of claimed product failures (whether real or imagined), the company cannot risk losing whatever credibility it may have left. It will need that credibility, along with some political capital, to fashion solutions to regulatory and legal challenges.

Moreover, the company must have a plan in place for executing its reaction to the potential crisis. If the matter involves a product recall, it must ensure that the employees responsible for dealing with the mechanics and logistics of the recall know what they are supposed to do and are confident in carrying out the instructions given to them. Distributors and retailers must also be instructed in the mechanics of the recall—*i.e.*, whether the retail outlets are to take the products and what they are supposed to provide the customers (vouchers, coupons, cash, or claim forms), how they are to respond to customer and media inquiries, the length and scope of the recall, and myriad other issues.

Mock-recall exercises may be something to consider, and some have suggested them. As a practical matter, however, mock-recall exercises present significant cost and other obstacles, not the least of which is that a mock recall may be mistaken as an actual recall, become a “viral” product crisis, and create the very crisis the company was planning for—and hoping to avoid.

Effective coordination and exercising caution work together. One area in particular concerns the interaction of the legal and public relations teams. There is often tension between the public relations and legal teams in what, when, how, and where to communicate about a product crisis or some aspect of it. Public relations consultants will often push corporate representatives to make a statement as early as possible to ease the fears of consumers, while the lawyers may insist that such a statement could open up the corporation to future legal liability. Clearly, legal strategy cannot trump business considerations completely, and business considerations cannot entirely trump legal strategy. Indeed, in bet-the-company litigation, the continued viability of the company

itself may turn on the outcome of litigation. But if the company wins the litigation while losing its entire customer base forever, the victory will be of little significance. A balance must be struck. There is no quick fix for resolving this inherent tension, but it must be acknowledged, and steps should be put in place for resolving these conflicts.

Another area where coordination and caution dovetail, and which also concerns the interaction of public relations consultants and attorneys, is the extent to which the attorney-client privilege applies to discussions about public relations strategy and planning. This is a potential minefield for those who do not think through the consequences in advance. Case law is divided over whether the company or its law firm should retain the public relations firm in order to protect the privilege. Similarly, case law is all over the map with respect to whether discussions with public relations consultants are protected from disclosure by the attorney-client privilege or attorney work-product doctrine. Careful evaluation of the laws of the relevant jurisdiction (or jurisdictions) should be undertaken. As a practical matter, the decision may already have been made, as most companies already have longstanding relationships with public relations firms, unless the company decides that a separate firm should be retained (by it or the law firm) for purposes of the product crisis it is currently facing.

Companies also should bear in mind that communications to the public may be used in regulatory and civil litigation proceedings. Anything a company says to the public may find its way into the litigation, and vice versa. And the impact of a company's public statements on investors must be taken into account as well. Anything the company does, including when it undertakes certain actions, may figure into the litigation or lead to litigation. Consequently, those communicating with customers must coordinate with the regulatory and legal teams.

Of course, as a practical matter, every member of every team in a product crisis cannot communicate with every member of every other team. At the very least, that would not be a very efficient system of communication. A point person should be identified for each of the responsible groups (manufacturing, customer relations, etc.). Care should be taken to ensure that you do not create a paralyzing bureaucratic structure of

committees, meetings, and endless discussions. A potential crisis requires a company to remain nimble, to be able to deal with a fluid situation. A formal committee structure is not a nimble one.

### **PLANNING FOR THE PRODUCT CRISIS: WHAT YOU CAN DO NOW**

Planning ahead is critical, but planning for every contingency is impossible. There is no such thing as a “crisis textbook” to guide you through every conceivable crisis a company might face. But there are steps every cautious company can take to deal with potential crises, and one planning tool every product manufacturer may wish to consider is a “crisis handbook.” The contents of such a handbook would vary, depending on the industry involved, the regulatory environment in which it operates, the geographic scope of product distribution, and a host of other factors. Below are a few suggestions that may help product manufacturers evaluate whether such a handbook would be a useful tool and what it might contain.

First, the handbook may include a short, general description of the protocol for dealing with different types of crises, including the chain of command for bringing a potential crisis to the attention of company officials before it becomes an actual crisis. It would also include instructions to employees on handling media and public inquiries and on logging and recording such inquiries. In addition, this section of the handbook might include synopses or summaries of the regulations and rules governing the conduct and timing of a product recall. Thus, the handbook of a toy manufacturer would contain rules and regulations of a recall under the Consumer Product Safety Commission (“CPSC”) but not the National Highway Traffic Safety Administration (“NHTSA”).

Second, the handbook may contain a “contact” list, which would include the key individuals in the company responsible for coordinating the company’s crisis response (more than one, in the event someone is not available when the crisis hits); contacts at the potentially responsible government agencies (CPSC, NHTSA, etc.); contacts at the company’s public relations and law firms; and other relevant information.

Third, the handbook could include an “FAQ” section, identifying questions that are likely to arise, including, for instance, to whom questions from the media should be referred, and dos and don’ts when dealing with a boiling crisis.

Fourth, if the company has dealt with recalls before, the handbook may be a good place to include template, or exemplar, documents, such as “litigation holds,” notices, and instructions to employees. Having such materials in a single, readily accessible source may be a tremendous help as the crisis develops.

### **JONES DAY’S PRODUCT RESPONSE TEAM**

Jones Day is particularly well suited to counseling product manufacturers about planning and preparing for product-related crises and assisting manufacturers facing the prospect of product recalls or similar challenges. The Firm has created an interdisciplinary Product Response team, consisting of experienced lawyers who can be quickly assembled and dispatched to counsel a product manufacturer facing a crisis and help it navigate through the regulatory and legal issues confronting it. Jones Day’s Product Response team lawyers can assist at every stage, from counseling to representing the company before regulatory agencies and Congress to defending the company against individual and class-action litigation across multiple jurisdictions. ■

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