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Product Liability & the Consumer Product Safety Commission

I. Background Concerning The Consumer Product Safety Commission (CPSC)

The Consumer Product Safety Commission (CPSC) regulates the sale and manufacture of various consumer products within the United States and is charged with protecting the public from unreasonable risks of injury or death associated with the use of the thousands of types of consumer products under the agency's jurisdiction. The CPSC is charged with ensuring that proper minimum safety standards are developed and identifying those products that fail to meet those standards.

A. The Consumer Product Safety Act of 1972 & the Consumer Product Safety Improvement Act of 2008

The Consumer Product Safety Act (CPSA) was enacted in 1972. It is codified at 15 U.S.C. §§ 2051–2084. This law established the Consumer Product Safety Commission and defined the CPSC's basic authority. The CPSA authorizes the CPSC to develop standards and bans. It also gives the CPSC the authority to pursue recalls and to ban products under certain circumstances. The Act and the power of the CPSC was expanded through the consumer Product Safety Improvements Acts of 2008. The 2008 Act imposed new testing and documentation requirements and set new acceptable levels of substances that may be within certain products, such as children's toys.

B. The Purpose of the CPSC is to Protect Consumers from Defective or Unreasonably Dangerous Consumer Products

In the CPSA, Congress directed the CPSC to "protect the public against unreasonable risks of injuries and deaths associated with consumer products." The CPSC has broad power to regulate products and entities under its manufacture. The CPSC works to reduce the risk of injuries and deaths from consumer products by: (1) developing voluntary standards with industry; (2) issuing and enforcing mandatory standards; (3) banning consumer products if

no standard would adequately protect the public; (4) obtaining the recall of products and arranging for their repair, replacement or a refund; (5) conducting research on potential product hazards; and (6) informing and educating consumers through the media, state and local governments, private organizations, and responses to consumer inquiries

C. Priorities of the CPSC: 16 CFR § 1009.8

While there are millions of products that could potentially fall under CPSC's jurisdiction, the CPSC has identified certain priorities to better achieve its mandate. These priorities are set forth as follows: (1) frequency and severity of the injury; (2) causality of injury; (3) chronic illness and future injuries; (4) cost and benefit of the CPSC action; (5) unforeseen nature of the risk; (6) vulnerability of the population at risk; (7) probability of exposure to the hazard and (8) other miscellaneous concerns.

D. Jurisdiction over Manufacturers, Importers, Distributors and Sellers

The CPSC has jurisdiction over not only products that are sold in the United States, but also over manufacturers, importers, distributors and sellers of those products. In certain circumstances, a manufacturer of a product is overseas such that it is beyond the reach of the CPSC. In those instances, the CPSC can pursue product bans or recalls through importers, distributors or sellers.

Most consumer products under the CPSC's jurisdiction are imported into the United States. Yearly, approximately 80% of recalls involved products manufactured outside the United States. The CPSA sets forth several prohibited acts involving importation and provides penalties for parties that engage in these acts. Under the CPSA, importers of finished products manufactured outside the United States must certify that the products comply with all rules, bans, standards or regulations applicable to the product.

E. Products Subject to Regulation

Under the Act, the term "Consumer Product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, otherwise, or (ii) for the personal use, consumption, or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation or otherwise. However, the CPSA does not apply to certain products, including tobacco, motor vehicles or motor vehicle equipment, pesticides, firearms and ammunition, aircraft or aircraft component parts, boats and other marine vessels, drugs, medical devices, cosmetics or foods. In addition, the CPSC lacks jurisdiction to regulate a risk

of injury associated with a consumer product if such risk could be eliminated or reduced by actions taken by the Occupational Safety and Health Act, the Atomic Energy Act or the Clean Air Act. Lastly, the CPSC lacks authority to regulate the risk of injury associated with electronic product radiation emitted from electronic products if such risk is subject to regulation under the Public Health Service Act.

II. Developing Rules and Standards

A. Voluntary Consensus Standards

CPSC staff promotes safety by monitoring or providing technical support for voluntary standards activities for a wide range of consumer products. Through collaboration with voluntary standard organizations (like ANSI, ASTM, CSA, UL, and others) safety standards are developed for consumer products. In many cases these standards bring industry groups, government agencies, and consumer groups together to agree on best consumer product safety practices. A good example of the CPSC getting involved in developing voluntary standards relates to standards that apply to clothes dryers. In November of 2011, the CPSC requested that UL form a study group to improve the safety of dryers. At that time, it was recognized that there were upwards of 7,000 structure fires per year associated with dryers. Through these voluntary efforts, the standard governing dryers, UL 2158, has been modified to require fire containment within dryers and more active warnings systems so that dryer users can be alerted to problems before a fire occurs. Similar efforts are also underway concerning rechargeable batteries.

B. Advisories and Product Warnings

The CPSC tracks product failures through a variety of inputs. The CPSC also tracks injury statistics and technical reports by injury categories, including fire, carbon monoxide, pediatric poisonings, chemicals, electrocution, non-pool submersions, older adult accidents and public facilities and products. Often times, the CPSC can identify trends and risks. When it does, the CPSC will issue bulletins to warn the public of the danger. An example of this relates to spontaneous combustion fires associated with clothing saturated with vegetable oils, which occurs regularly in the restaurant industry. Many times these clothes end up being washed, but not all the oils are removed during the cleaning process. The CPSC identified a series of spontaneous combustion fires that occurred in this fashion and issued a bulletin.

C. Identify Types of Defects

The most common types of defects that lead to recalls or CPSC action are as follows: (1) manufacturing; (2) production/assembly; (3) design; (4) materials

used; (5) construction; (6) finish; (7) packaging; (8) warnings; (9) instructions and failure to operate as intended.

D. Circumstances Necessary for a Recall

The CPSC will take steps to initiate a recall if a product fails to comply with an applicable consumer product safety rule, which creates a substantial risk of injury to the public. The CPSC will also take steps to initiate a recall if there is a defect, which creates a substantial risk of injury to the public, even if the product satisfies applicable industry standards. Manufacturers are required to bring these issues to the CPSC once they become aware of an issue.

However, this has proven to be the exception rather than the rule. Once the CPSC determines that a recall may be necessary, it will work with the manufacturers so that the manufacturer can issue a voluntary recall. If the manufacturer refuses to initiate a voluntary recall, the CPSC can bring a lawsuit to force the manufacturer to issue a recall.

III. Enforcement of CPSC Rules, Regulations and Recalls

The CPSC has established the office of Compliance and Field Operations to help track products and trends that may endanger people or property.

A. Office of Compliance and Field Operations

The Office of Compliance and Field Operations consists of divisions responsible for defect investigations, regulatory enforcement, import surveillance by port, and field investigations.

B. Field Investigation Staff

The field investigation staff divides the country between the eastern and western branches. There are approximately 80 field agents located throughout the United States. These agents are responsible for conducting market surveillance, import surveillance and in-depth product investigations. They are also involved in developing corrective action plans, making penalty referrals and providing advice and guidance to manufacturers, sellers and others who manufacture or sell products that are subject to the CSCP's jurisdiction.

C. Regulatory Enforcement Division

The regulatory enforcement division is responsible for identifying non-complying products that are being imported into and sold throughout the United States. Under Section 15 of the CPSA, manufacturers have an obligation to self-report issues with their products. The Regulatory Enforcement Division is responsible for making sure these reports are

properly submitted and investigated. Once a manufacturer agrees to issue a recall, the Regulatory Enforcement Group will oversee the recall to ensure that it is properly handled.

D. Defect Investigation Division

The Defective Investigation Division may also get involved in preparing Section 15 reports. This division also is involved in recall monitoring and gets involved in incident and data investigations. Lastly, the Defect Investigation Division will get involved in scene examinations and laboratory examinations, where appropriate. The CPSC has a state of the art laboratory, where it is capable of conducting a litany of tests. The laboratory utilizes an integrate team of mechanical engineers, electrical engineers, chemical engineers, combustion and flammability scientists, and children behavior specialists.

E. Sources of Data

The CPSC has established a myriad of data collection portals throughout the United States, including through hot line reports, public database review, attorneys, retailers, hospitals, media, police and fire reports (National Fire Institute Reporting System) and through its own field investigators.

F. CPSC Compliance Investigation Process

The process will typically begin with a field investigation. Thereafter, Compliance initiates contact with the manufacturer and data searches are performed. Next, engineering performs testing (both failure mode testing and performance testing) and a preliminary determination will be made whether a recall is needed. Lastly, the scope of the recall will be negotiated and consumers will be notified.

IV. Subrogation Litigation and the CPSC

A. Identifying recalls

When dealing with a product failure that has caused damage, a subrogation attorney should check to see if a recall has been issued. The CPSC maintains a searchable database that is easy to use. In addition, there are two separate agencies in Canada that can issue recalls. While the Canadian and American agencies work well together, there have been instances where recalls in Canada have not been reported in the United States and vice versa.

B. Rights of Manufacturers, Importers, Distributors and Sellers

Manufacturers, importers, distributors and sellers are mandated to comply with CPSC requests. Section 6(a)(2) prohibits the CPSC from disclosing information that is a trade secret or that contains commercial or financial information obtained from a manufacturer, importer, distributor or seller. Section 6(a)(2) incorporates Exemption 4 of the FOIA, 5 U.S.C. § 552(b)(4).

C. The Effect of a Recall in Litigation: Questions of Admissibility

Recalls, especially volunteer recalls, are admissions. However, many times those admissions will not be admissible at trial because they may be considered post-sale remedial measures. However, properly crafted expert disclosures and pointed questioning of corporate witnesses for the manufacturer can be used to lock-in a manufacturer defendant that has issued a recall. Lastly, a good subrogation attorney needs to make sure that the recall actually fits within the forensics of the specific loss.

D. Use of Subpoenas and Freedom of Information Requests

The file created by the CPSC can be very useful to a subrogation attorney pursuing a product liability claim against a manufacturer. However, the Act makes it clear that the CPSC does not have to respond to subpoenas. Rather, all subpoenas are treated as Freedom of Information Requests. Since information provided by manufacturers during a recall investigation may contain trade secrets or other confidential information, the CPSC must give the manufacturers notice of any FOIA requests it received. Before responding to a FOIA request, the CPSC will provide the manufacturer with responsive documents and will allow the manufacturer to redact information. The net result typically will be that the documents provided in response to the FOIA request will have all relevant and meaningful information redacted. If you are in litigation, the clever subrogation attorney will issue a production response to the manufacturer for a full, complete and unredacted copy of the CPSC file. Any claims the manufacturer has regarding trade secrets or confidential information can be handled through protective orders.

E. Second and Third Restatement of Torts

Product liability law as we know it today was essentially born in the 1950's and 1960's. The American Law Institute (ALI) included rules pertaining to products liability in the Restatement (Second) of Torts, which was officially promulgated in 1965. Since the 1960s, the law of products liability has continued to expand and develop to include the idea that a manufacturer should be strictly liable for products that are defectively designed or manufactured. The Second Restatement created strict liability using what has come to be called the consumer expectation test. "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to

his property is subject to liability for physical harm.” In deciding whether a product is unreasonably dangerous, the jury applies its knowledge to the evidence to determine whether it is “unreasonably dangerous.”

With the advent of medical devices and advances in medicines, many courts began to see limitations in the consumer expectation test because many of the issues associated with developing these products and benefits and risks associated with their use were outside the scope of the ordinary consumer. As a result, the ALI developed the Third Restatement of Torts.

Restatement (Third) of Torts provides three different categories for a potential product defect. In determining whether a product is defective in design, Restatement (Third), Subsection 2(b) provides a product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. More specifically, a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

The Comment section to Restatement (Third) provides additional guidance as to the application of Subsection 2(b). In describing the general considerations to be given to design defects, the Comment provides: “Subsection (b) adopts a reasonableness (“risk utility balancing”) test as the standard for judging the defectiveness of product designs. More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design by the seller or a predecessor in the distributive chain rendered the product not reasonably safe.

F. Application and Use of Standards and Definitions

Establishing product liability claims mirror in many ways the standards followed by the CPSC. The CPSC relies on many of these consensus standards, which can also be used to establish a product is defective. If the CPSC requires a recall, regardless of whether your jurisdiction utilizes the Second or Third Restatement of Torts, it will be very difficult for a manufacturer to avoid liability.

V. Real World Recall Examples

A. Dishwasher Recall

B. Heat Recovery Ventilator Recall

C. Battery Charger Recall