

Products Liability Update

CONSUMER PRODUCT SAFETY

A NEW AGE OF ENFORCEMENT DAWNS

BACKGROUND

The Federal Government first stepped into the arena of consumer product safety in a comprehensive way in 1972 when it passed the Consumer Product Safety Act (CPSA) and created the Consumer Product Safety Commission (CPSC) as an independent federal agency. The CPSC's charter was written broadly to enhance product safety through mandatory safety standards where necessary, and (especially after amendments passed in 1981) via cooperative (i.e., working along with the related industry associations), voluntary safety standards promulgation where that was more effective and/or efficient. Due to any number of factors, including funding shortages and inadequate staff time and expertise, CPSC generally deferred to the industry-driven voluntary standards process.

In addition to its standards-setting functions, the CPSC was given authority to require manufacturers, distributors, and retailers to report to the Commission whenever a product that they manufactured, distributed, or sold: (1) did not comply with a safety rule issued under the CPSA (this was limited to the product safety rules issued to enforce provisions of the CPSA and did not include safety rules enforcing other Acts under the Commission's jurisdiction); or (2) contained a defect that could reasonably create a substantial risk of injury to the public, or presented an unreasonable risk of serious injury or death. Upon receiving notice from a manufacturer/seller, or from a third party, that a product presented such a safety risk, the CPSC could and regularly did require the manufacturer and retailers to conduct some sort of corrective action plan, which could include the ultimate remedy of a full-blown recall.

In practice, industry self-reporting of defective and unreasonably dangerous products was, in the view of product safety advocates, marginal at best, and from time to time the CPSC did pursue litigation against the worst offenders. Substantial fines were often the result. These instances frequently arose out of personal injury products liability litigation in which large damages verdicts had been returned by jurors. Over time, the plaintiffs' personal injury bar developed a seemingly symbiotic relationship with CPSC staff and functioned as whistleblowers in furtherance of alerting the CPSC to allegedly problematic products/manufacturers. Nevertheless, staff and funding shortages, along with a varying political climate and even occasional quorum problems at the Commissioner level, cooperated to impede the CPSC's activities in furtherance of its legislative mandate.

This status quo was fundamentally altered as a result of a series of well-publicized recalls of tainted or defective products imported from overseas, primarily China. One direct result was the passage of the Consumer Product Safety Improvement Act of 2008. The major provisions of that Act are discussed below.

THE CONSUMER PRODUCT SAFETY IMPROVEMENT ACT

Signed by the President on August 14, 2008, the Consumer Product Safety Improvement Act of 2008 (CPSIA) will dramatically affect the landscape of product safety enforcement in the United States. This legislation imposes

a number of stricter requirements with broad-reaching impact. While a major focus of the CPSIA is, according to its preamble, to “establish consumer product safety standards and other safety requirements for *children’s* products” (emphasis supplied), many of its strictures encompass every consumer product or substance that has heretofore been regulated by the CPSC under any of the Acts the Commission enforces. The CPSC has jurisdiction over seven different safety-related regulatory Acts (identified below) and has issued standards or other rules or regulations covering over 175 categories of products or substances.

Moreover, in order to supplement the efforts of the CPSC, the Act creates new enforcement mechanisms by empowering state attorneys general to enforce its provisions, and by encouraging greater private whistleblower involvement through the establishment on the CPSC’s website (“subject to the availability of appropriations”) of a public, searchable database which must be up and running by August 10, 2010 which will accept and make available reports of deaths, injuries, illness, or the risk of same related to consumer products and other substances regulated by the Commission.

New Product Bans

- The Act bans the sale of children’s products (defined as “consumer products designed or intended primarily for children 12 years of age or younger”) containing lead in excess of approved limits. Lead content limits phase in as follows: 600 ppm 180 days after enactment (Feb. 10, 2009); 300 ppm one year after enactment (Aug. 14, 2009); and 100 ppm three years after enactment (Aug. 14, 2011), unless this limit is technologically infeasible. Some exemptions are available where the lead-containing part is not accessible, or bodily absorption does not occur. Note that the CPSC has taken the position that this ban is retroactive. It applies to all products in existence on February 10, 2009—that is, it applies to inventory. It is not limited to products manufactured on or after February 10.
- The Act substantially lowers existing limits for lead paints and surface coatings. On and after August 14, 2009, lead paint and other surface coatings whose lead content is more than .009 percent by weight are banned, as is any furniture article or any toy or other article intended for children bearing such paint or surface coating. The current limit is 0.06 percent. Thereafter, at least every five years, the Commission must reevaluate and lower the lead content limit to the lowest level then technologically feasible.
- Effective February 10, 2009, the Act bans children’s toys and child care articles (“a consumer product designed or intended by the manufacturer to facilitate sleep or the feeding of children age three and younger, or to help such children with sucking or teething”) which contain certain phthalates—DEHP, DBP, or BBP—in concentrations greater than 0.1 percent. In addition, the CPSIA bans on an interim basis three other phthalates—DINP, DIDP, and DnOP in concentrations higher than 0.1 percent—for use in child care articles and children’s toys that can be placed in a child’s mouth, subject to further study and promulgation of a final rule establishing permissible use, if any. Unlike in the case of lead content in toys, this ban does not cover inventory but applies only to products manufactured on or after February 10, 2009.

Durable Infant and Toddler Products—New Mandatory Standards

- On or before August 14, 2009, the CPSIA requires the CPSC to commence formal rulemaking under the CPSA to promulgate new consumer product safety standards that are substantially the same as, or more stringent than, any voluntary standards currently applicable to durable infant or toddler products (defined to mean “a durable product intended for use, or that may be reasonably expected to be used, by

children under the age of five, and specifically including cribs, toddler beds, high chairs, booster chairs and hook-on chairs, bath seats, gates, play yards, stationary activity centers, infant carriers, strollers, walkers, swings, bassinets and cradles”). The significance here is that these will be mandatory, rather than voluntary, standards. Indeed, the CPSIA specifically prohibits the manufacture, sale, or resale of noncomplying cribs, which if done knowingly and willfully, exposes the actor to criminal penalties under the CPSA.

- The Act also requires the CPSC to promulgate, on or before August 14, 2009, rules which will require manufacturers of durable infant or toddler products to provide to each customer a postage-paid registration form in order to develop and maintain a product registration database (to be kept for a minimum of six years after the date of manufacture) for use in the event of a recall or safety alert.
- The Act adopts the ASTM Voluntary Standard F963-07, heretofore a voluntary safety standard for toys, as a mandatory CPSC standard effective Feb. 10, 2009.

Product Certification Requirements for Regulated Products

- *Effective as of November 12, 2008*, the CPSIA requires (as implemented by rule recently issued by the CPSC), with respect to all products produced or imported on or after November 12, 2008 that are subject to any consumer product safety rule, ban, standard, or regulation promulgated under any Act enforced by the CPSC, the manufacturer in the case of domestically produced products, and the importer in the case of imported products, to certify that any such product complies with all rules, bans, standards, and regulations applicable to the product. The acts enforced by the CPSC are the CPSA as amended by the CPSIA, the Federal Hazardous Substances Act (FHSA), the Poison Prevention Packaging Act (PPPA), the Flammable Fabrics Act (FFA), the Refrigerator Safety Act (RSA), the Children’s Burn Prevention Act (CBPA), and the Virginia Graeme Baker Pool and Spa Safety Act (PSSA). The Commission’s list of regulated products, which includes regulated children’s products, can be found at <http://www.cpsc.gov/businfo/reg1.html>, along with citations to the particular Act and the specific rules or regulations applicable to each such product.
- The CPSC’s rule makes clear that at this time only the manufacturer and the importer are subject to these newly imposed certification requirements. (It also makes clear that the CPSC is not altering certification obligations already in existence under rules in effect before the enactment of the CPSIA, which may be broader.) According to CPSIA language applicable to all regulated products, the certificate “shall certify, based on a test of each product or upon a reasonable testing program, that such product complies will all rules, bans, standards, or regulations applicable to the product” and “shall specify each such rule, ban, standard or regulation.”
- Under the Act, the certificate of compliance “shall accompany the applicable product or shipment of products covered by the same certificate and a copy of the certificate shall be furnished to each distributor or retailer of the product.” Imported products or shipments that are not accompanied by a certificate cannot enter the United States and must be destroyed (unless permitted by the Secretary of the Treasury to be reshipped out of the country in lieu of destruction). According to regulations recently issued by the CPSC, these requirements can be satisfied through electronic access via the Internet. “CPSC staff believes that an electronic certificate is ‘accompanying’ a shipment if the certificate is identified by a unique identifier and can be accessed via a Web URL or other electronic means, provided the URL or

other electronic means and the unique identifier are created in advance and available with the shipment.” In the case of imported products, the electronic certificate must be available to the CPSC no later than the time when the product or shipment is available for inspection in the U.S. For domestic products, the certificate must be available to the CPSC prior to introduction of the product or shipment into domestic commerce. The CPSC also takes the position that the requirement to “furnish” the certificate is satisfied “if you provide your distributors and retailers a reasonable means to access the certificate.”

- Under the CPSC’s regulations interpreting the CPSIA’s certification requirement, in addition to certifying compliance with all applicable rules, bans, standards, and regulations, each certificate must provide the following information in English: (1) identification of the product covered by the certificate; (2) the names, addresses, and phone numbers of the manufacturer or importer issuing the certificate, and of any third party on whose testing the certificate depends; (3) the date (at least month and year) and place (city, state, country, or administrative region) where the product was manufactured, and the date and place of testing; (4) citation to each applicable rule, ban, standard, or regulation to which the product is being certified; and (5) contact information for the person maintaining test records, including name, e-mail and full mailing address, and telephone number.
- The more stringent testing provisions that apply only to regulated children’s products require that before any such products are imported or warehoused or distributed in commerce, the manufacturer or importer of the regulated children’s products must submit them to testing by an accredited independent third-party “conformity assessment body” for compliance with all applicable product safety rules, effective within 90 days after the CPSC establishes and publishes notice of accreditation requirements for such testing facilities.
- Under the CPSIA, the CPSC was and is required to publish notice of accreditation requirements for third-party testing bodies as follows: (1) within 30 days of enactment for lead paint testing (Sept. 15, 2008); (2) within 60 days for testing of cribs and pacifiers (Oct. 13, 2008); (3) within 90 days for testing of small parts compliance (Nov. 12, 2008); (4) within 120 days for testing of children’s metal jewelry (Dec. 12, 2008); (5) within 210 days for testing of baby bouncers, walkers, and jumpers (Mar. 12, 2009); and (6) within 10 months after enactment for all other children’s products (June 14, 2009). The Commission substantially met these requirements, and published testing laboratory accreditation requirements applicable to lead paint on Sept. 22, 2008; to cribs and pacifiers on Oct. 22, 2008; for small parts compliance on Nov. 17, 2008; and to metal jewelry on Dec. 22, 2008. As noted above, manufacturers and importers have 90 days after the accreditation requirements are published to begin testing products.

Tracking Labels and Certain Web or Catalog Sales

- Effective August 14, 2009, all children’s products must be labeled with “permanent, distinguishing marks, to the extent practicable” that will enable identification of recalled products, including name of the manufacturer or private labeler, the location and date of production, and “cohort information” (including batch, run number, or similar identifier). Both product and packaging must comply.

- By December 12, 2008, web-based advertising of children's products subject to section 24 of the FHSA (requiring cautionary language relating to choking hazards associated with small parts, small balls, marbles, and balloons) must contain the same cautions that accompany the product itself if sales can be made on-line. Catalogs and other printed materials in existence on or before February 10, 2009 may be distributed without such cautions. Catalogs and printed materials which provide direct means of purchase that are printed after Feb. 10, 2009 must incorporate any such cautions, as must all such catalogs and printed materials distributed after August 9, 2009.

Penalties and Enforcement Issues

- The Act has substantially increased penalties. Civil penalties for individual violations (each noncomplying product is a separate violation) are increased to \$100,000 from \$5,000, and penalties for aggregate violations increase from \$1.25 million to \$15 million. These increases are effective August 14, 2009, or on the date that the Commission issues final regulations setting forth civil penalty criteria, whichever is earlier. Maximum criminal penalties for knowingly and willfully engaging in "Prohibited Acts" were increased from three to five years effective immediately.
- The CPSC's authority to issue and enforce product recalls is enhanced, and the Act empowers state attorneys general to enforce the Act via civil suits seeking recovery of civil fines for violations of the Act.
- The CPSIA includes whistleblower protections, providing that an employer may not discharge or otherwise discriminate against an employee who provides information or testimony regarding a violation of the Act.

CONCLUSION

There can be little doubt that consumer goods manufacturers must pay special attention to the many changing requirements that have or will become effective as a result of the passage of the CPSIA. The landscape will continue to change as these requirements are tested and fine-tuned. For more information about the CPSIA or other consumer protection legislation, please contact Ludwig E. Kolman at 312-609-7566 or lkolman@vedderprice.com.

VEDDERPRICE®

222 NORTH LASALLE STREET
CHICAGO, ILLINOIS 60601
312-609-7500 FAX: 312-609-5005

1633 BROADWAY, 47th FLOOR
NEW YORK, NEW YORK 10019
212-407-7700 FAX: 212-407-7799

875 15th STREET NW, SUITE 725
WASHINGTON, D.C. 20005
202-312-3320 FAX: 202-312-3322

www.vedderprice.com

About Vedder Price

Vedder Price P.C. is a national business-oriented law firm with over 260 attorneys in Chicago, New York and Washington, D.C. The firm combines broad, diversified legal experience with particular strengths in labor and employment law and litigation, employee benefits and executive compensation law, occupational safety and health, general litigation, corporate and business law, commercial finance, financial institutions, environmental law, securities, investment management, tax, real estate, intellectual property, estate planning and administration, health care, trade and professional association and not-for-profit law.

Manufacturers' Liability

Vedder Price manufacturers' liability attorneys provide a full range of services, from counseling on accident prevention and claims avoidance to alternative dispute resolution and/or traditional trial practice, culminating in a defense verdict or appeal, if needed. We are highly experienced in all matters involving the Consumer Products Safety Commission, including preventive counseling to help our clients avoid CPSC-mandated "corrective action programs" such as product recalls. Our attorneys are science-educated, litigation-savvy, and trial-experienced. Vedder Price attorneys practice both locally and nationally, and always cost-effectively. In every step of the process, we will work with you to determine your claims exposure, your tolerance for risk, and your long-range goals for products liability

defense consistent with your overall business objectives. In addition to Vedder Price's broad experience in the area of manufacturers' liability for individual claims, we have also handled a number of class action claims and acted as national and regional counsel on cases involving multi-risk business exposures, OSHA and repetitive stress injury litigation.

© 2009 Vedder Price P.C. The PRODUCTS LIABILITY UPDATE is intended to keep our clients and interested parties generally informed about important case law. It is not a substitute for professional advice. For purposes of the New York State Bar Rules, this bulletin may be considered ATTORNEY ADVERTISING. Prior results do not guarantee a similar outcome. Reproduction is permissible with credit to Vedder Price P.C. For additional copies or an electronic copy of this bulletin, please contact us at info@vedderprice.com.

Products Liability Update**Editor-in-Chief**

Ludwig E. Kolman..... 312-609-7566

Questions or comments concerning the bulletin or its contents may be directed to the firm's Litigation Practice Chair, Karen P. Layng (312-609-7891), or the Managing Shareholder of the firm's New York office, Neal I. Korval (212-407-7780) or, in Washington, D.C., Theresa M. Peyton (202-312-3360).