Consumer Product Safety Concerns for Retailers: The 'New' Consumer Product Safety Commission Database and Its Implications

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The Consumer Product Safety Improvement Act was recently amended in a manner that is having a significant impact on U.S. retailers.

Pursuant to the amendments, the Consumer Product Safety Commission established the publicly available Consumer Product Safety Database effective March 1, 2011, which allows consumers to submit and to review "reports of harm" arising out of consumer products.

Since last March, many retailers have been named in reports of harm on this database, some of which have resulted in significant enforcement actions and fines.

Background

The *Consumer Product Safety Improvement Act* ("Act") became law in 1972 with a stated purpose that includes developing a standard to reduce or eliminate unreasonable risks of injury associated with consumer products. The Act also grants the Consumer Product Safety Commission ("CPSC") the authority to ban a product if there is no feasible standard, and gives the CSPC the authority to pursue recalls for products that present a substantial product hazard. Typically, the Act targets manufacturers of consumer products—or at least that was the common belief—but the Act has a much broader reach, which includes retailers.

Recent Amendments

The Act was recently amended in a manner that has a significant impact on retailers. Effective March 1, 2011, the CPSC established the publicly available Consumer Product Safety Information Database ("Database") that can be found at www.saferproducts.gov. The ostensible purpose of the Database is to serve as a publicly accessible tool for consumers to submit *reports of harm* arising out of consumer products. The Database also is intended to serve as a medium in which manufacturers can respond to reports and consumers can see any corrective action that has been instituted by the manufacturer about a given product. The Database, however, has proven to implicate companies—particularly retailers—other than manufacturers.

What is a Report of Harm?

The CPSC defines a report of harm as documentation of injury, illness, or death, or a potential risk of injury, illness, or death, caused by a consumer product. Under the amended Act, anyone can submit a report of harm. as long as it contains the required information (some of which is not made available to the public). The CPSC does not require independent verification of the truthfulness or accuracy of the report.

Opportunity to Respond

The Act provides that reports of harm will be transmitted to the manufacturer within five days. Once the information is received, the manufacturer has only 10 days in which to investigate the report, object to materially inaccurate information, claim that certain information is confidential, determine whether or not a response is warranted, and (possibly) post a response. If the information is deemed to be materially inaccurate or confidential, the CPSC can decline to post the report, remove the information or add information to correct the inaccuracy.

Why Should Retailers Be Concerned?

The CPSC and the Act focus not only on manufacturers of consumer products, but on retailers as well. In many circumstances, retailers have been named in reports of harm published on the Database; some of the reports have resulted in significant enforcement actions and fines to parties involved. Clearly, these developments warrant monitoring of the database by retailers, as well as thoughtful consideration of whether a response should be standard protocol.

Not Just a U.S. Problem

Unfortunately, retailers cannot limit their concerns in this arena to the United States and its territories. A number of other countries have enacted laws similar to those of the Act; these laws may require further compliance by retailers. If a retailer introduces goods into the stream of commerce in various other countries, that retailer must be aware of, and comply with, these laws. In some instances, the requirements for compliance with foreign laws are triggered notwithstanding that the offending product was not sold in the foreign country.

- ***Canada.*** Canada enacted the Canada Consumer Product Safety Act ("CCPSA"), which prohibits the manufacture, importation, advertisement or sale of any product that is a danger to human health or safety, or is the subject of a recall—voluntary or otherwise. The most notable aspect of the CCPSA, however, is the sweeping reporting obligations that it imposes on consumer product manufacturers both inside and outside of Canada. Unlike similar consumer protection laws in many other countries, the CCPSA requires manufacturers to report all incidents and/or defects, not just those that present a "substantial product hazard" (as defined under the Act). Further, the reporting obligations under the CCPSA are triggered by "near-miss" incidents or the potential for injury; actual accidents or injuries are not required. Finally, the reporting requirements apply to incidents and/or defects in Canada or *elsewhere*. Therefore, if a manufacturer (or presumably, a retailer) sells a consumer product in the United States, which results in a report of harm to the CPSC, and if that manufacturer/retailer also does business in Canada (even if the offending product is not sold in Canada), that manufacturer/retailer must comply with Canada's reporting requirements under the CCPSA.
- ***Australia.*** Australia enacted the Australian Consumer Law ("ACL"), which requires all entities in the supply chain to report to the Commonwealth Minister within 48 hours of becoming aware that a consumer product or related service caused or may have caused a death, serious injury or illness. This law is somewhat narrower than Canada's, and "near-miss" incidents do not trigger reporting requirements. However, as with Canada, the ACL applies regardless of the country in which the incident occurred.
- ***Europe.*** The European Union ("EU") regulates consumer products though the General Product Safety Directive ("GPSD"). However, this law only applies to consumer products placed in the EU marketplace. Generally, a company has 10 calendar days in which to report a risk, but if the product poses a "serious" risk, the company only has 3 days in which to report.
- ***Japan.*** Japan's consumer product safety law requires serious accidents associated with a consumer product to be reported to the Minister of Economy, Trade and Industry. That report then becomes part of a national, searchable database.

What Are the Implications of These Laws?

Any incident, regardless of where it occurs, now has the potential to create a reporting requirement in all countries where a manufacturer (and, potentially, a retailer) conducts business. Failure to comply with the reporting obligations can lead to significant penalties in multiple countries.

Additionally, no one can quite predict the other, less direct implications that may arise out of these types of databases. On the one hand, the existence of the Database and the availability of this information may accomplish its goals—to improve product safety and protect consumers. On the other hand, this type of unverified information is likely to be "mined" by the plaintiffs for use in litigation against manufacturers and retailers. Is a posted response admissible against the responding manufacturer or retailer? Will the information contained in the Database create a new cottage industry for the plaintiffs' lawyers? These types of questions and many more will be answered over the next few years. In any event, manufacturers and retailers must determine how the Database will affect their business, as well as how best to handle the opportunity to respond and manage the reporting requirements.

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