

# Consumer Products: The Latest on the CPSIA, Recalls and Product Testing

Tuesday, September 28, 2010

Presented By the IADC Product Liability Committees

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# Moderator



Morgan S. Templeton

Elmore & Wall, P.A.

Charleston, SC

[Morgan.templeton@elmorewall.com](mailto:Morgan.templeton@elmorewall.com)

# Presenters



**Creighton "Chip" Magid**

Dorsey & Whitney, LLP  
Washington, D.C.

[Magid.chip@dorsey.com](mailto:Magid.chip@dorsey.com)



**David G. Wix**

The Wix Law Group, LLC  
Deerfield, IL

[dwix@wixlaw.com](mailto:dwx@wixlaw.com)



**DORSEY™**

DORSEY & WHITNEY LLP

USA CANADA EUROPE ASIA-PACIFIC

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# Consumer Products: The Latest on the CPSIA, Recalls and Product Testing

Chip Magid and David Wix

September 28, 2010

# CPSIA – Background

- Enacted August 14, 2008
- Applies generally to consumer products, but specifically to children's products
- Increased legal risk
- Phased-in implementation; continues to evolve

# CPSIA – Recent Developments

- Children's Products Containing Lead; Technological Feasibility of 100 ppm for Lead Content By August 14, 2011 Deadline – comments were due by Sept. 27<sup>th</sup>
- Safety Standards for Full-Size Baby Cribs and Non-Full-Size Baby Cribs; Notice of Proposed Rulemaking; Proposed Rule
- Final Interpretative Rule: Interpretation of Children's Product, August 25, 2010

# CPSIA – Recent Developments

- Final Rule for Infant Walkers under Section 104(b) of the CPSIA
- Final Rule for Bath Seats under Section 104(b) of the CPSIA
- Final Rule Interpreting Factors to be Considered When Seeking Civil Penalties

# Interpretation of “Children’s Product”

- “a consumer product designed or intended primarily for children 12 years of age or younger
  - Section 101(a) – lead
  - Section 102 – third party testing
  - Section 103 – tracking labels
- Will become a new CFR Part 1200, Definitions, under Subchapter B – CPSA Regulations

# Interpretation of “Children’s Product”

- CPSC will consider the following factors:
  1. A statement by a manufacturer about the intended **use** of such product, including a label on such product if such statement is reasonable
  2. Whether the product is represented in its packaging, display, promotion, or advertising as appropriate **for use** by children 12 years of age or younger
  3. Whether the product is commonly recognized by consumers as being intended **for use** by a child 12 years of age or younger
  4. The Age Determination Guidelines issued by the Commission staff in September 2002, and any successor to such guidelines

# Interpretation of “Children’s Product”

- “For use” – generally means that children will physically interact with such products based on reasonably foreseeable use and misuse of the product.
  - “By” not “with” children (i.e., diaper v. diaper bag)
  - Does not include child just coming into contact with an adult product
- “General use” and “Other products specifically not intended for use by children 12 years of age or younger”

# Interpretation of “Children’s Product”

- Product’s physical location - may be a factor in making an age determination, but is not determinative
- Additional features and characteristics
- Examples
  - Furnishings and fixtures
  - Collectibles
  - Jewelry
  - DVDs, Video games and Computers

# Interpretation of “Children’s Product”

## – Examples

- Art Materials
- Books
- Sporting Goods and Recreational Equipment
- Musical Instruments

# Beyond Lead

- Is Cadmium next?
  - Low cost substitute for lead
  - Subject to California Proposition 65 warning
- Green Chemistry Initiatives
- BPA and Phthalates
- State Regulation
  - California Proposition 65

# BPA and Phthalates

- CPSIA: bans children's toys and child care article containing more than 0.1% DEHP, DBP, BBP
- CPSIA prohibits DINP, DIDP, DnOP pending further study and review
- No exception or exemption for inaccessible phthalates (in contrast to lead)
- Sporting goods, other non-toys excepted
- CPSIA does not address BPA

# BPA and Phthalates

- MN and CT prohibit sale of children's products containing BPA; 20 other states considering similar legislation
- California Proposition 65 lists several phthalates
- Many states ban (CA) or regulate phthalates in "children's products"
- N.B.: some state laws are not limited to children's toys or child care articles

# Public Consumer Product Database

- March 2011 planned launch for Phase I of [www.saferproducts.gov](http://www.saferproducts.gov)
- Intended to provide consumers and manufacturers with unprecedented access to information about safety concerns and identified consumer product hazards.
- Immediate, searchable access to information now available only through a FOIA request

# Public Consumer Product Database

- Will include incident reports (unverified) filed after March, 2011
- Will include manufacturer comments
  - Speed of response, sensitivity of comments will be key
  - Incident reports will be posted 10 days after transmittal to manufacturer (within 5 days of receipt)

# Product Testing

“Reasonable” Testing Program – CFR Part 1107

**High Degree of Assurance:** an evidence-based demonstration of consistent performance of a product regarding compliance based on knowledge of a product and its manufacture.

**Five Essential Elements:**

1. Product Specifications
2. Certification Testing
3. Production Testing
4. Remedial Action Plan
5. Recordkeeping

# Product Testing

- Product Specification
  - Description of the product and listing of applicable, rules, bans, standards or regulations
  - May include photos, illustrations, model names or numbers, detailed bill of materials, parts listing, raw material selection and sourcing requirements
  - Must include component parts certified pursuant to 16 CFR Part 1109

# Product Testing

- Certification Tests
  - Samples tested must be identical to the finished product
  - Sufficient number “to provide a high degree of assurance that the certification tests accurately represent the product’s compliance with all applicable rules
  - Retesting after a “material change”

# Product Testing

- Production Testing Plan
  - Describes what tests must be performed and the frequency
  - Must contain:
    - Description of production testing plan (i.e., tests, intervals, sample size, basis for determining tests assure compliance with rules
    - Separate testing plan for each manufacturing site
    - Testing interval must be short enough to ensure that all untested product will comply

# Product Testing

- Remedial Action Plan
  - Description of steps to take if product or component part fails a test
  - Investigation and addressing the failure
    - Changes to the manufacturing process, equipment used, materials or design
    - Reworking the product
    - Other actions deemed appropriate to assure compliant products

# Product Testing

- Recordkeeping
  - Kept at manufacturers main office and available to CPSC upon request
  - Maintained for as long as product is being distributed, plus 3 years
  - Test records maintained for 3 years
  - Available in English

# Product Testing

- Recordkeeping (Cont.)
  - Must maintain:
    - General conformity certificate for each product
    - Each product specification
    - Each certification test
    - Records demonstrating compliance with product testing plan
    - Records of all remedial actions taken

# Product Testing

- Certification of Children's Products
  - Periodic Testing
  - Random Samples
  - Material Changes
  - Verification
  - Undue Influence
  - Remedial Action
  - Recordkeeping

# Recalls and Corrective Action Plans

- CPSIA provides CPSC with greater authority to dictate corrective action
- CPSIA provides CPSA with new authority to order manufacturers, distributors, and retailers to cease distribution, to notify state and local officials, and to provide public notice

# Product Recalls

- Guidelines and Requirements for mandatory recall notices – effective Feb. 22, 2010
  - Applies to recalls ordered by the CPSC or court
  - Guideline for voluntary recalls
- Designed to ensure that every recall notice effectively helps consumers and other persons:
  - Identify the specific product
  - Understand the actual or potential hazards
  - Understand all available remedies

# Product Recalls

- Recall Notices:
  - Language designed for and readily understood by the consumer
  - Targeted and tailored to the specific product and circumstances
  - Direct recall notice is most effective
  - Forms (i.e., websites, press releases, advertisements, etc)

# Product Recalls

- Recall Notice Content Requirements
  - Must include the word “recall” in the heading and text
  - Date
  - Product Description
    - Names
    - Intended or targeted use population
    - Colors and sizes
    - Model numbers, serial numbers, date codes, including location on product
    - Identification and locations of tags, labels and other identifying information
    - Product photographs

# Product Recalls

- Recall Notice Content Requirements (Cont.)
  - Description of actions being taken
  - Statement of number of product units
  - Description of substantial product hazard
    - Product defect, fault, failure or flaw giving rise to the recall
    - Type of hazard or risk
  - Identification of recalling firm
  - Identification of manufacturers
  - Identification of significant retailers

# Product Recalls

- Recall Notice Content Requirements (Cont.)
  - Region
  - Dates of manufacture and sale
  - Price
  - Descriptions of incidents, injuries and deaths
  - Description of remedy
  - Other information

# State Laws and Preemption

- CPSIA: leaves in place preemption provisions of existing consumer protection statutes
- States may regulate consumer products if state requirements are identical to federal requirements
- CPSIA prohibits CPSC from expanding the preemptive effect of the statutes it enforces through rulemaking
- Effect of *Levine* and similar pronouncements

# State Laws and Preemption

- ASTM F-963 for toys and children's products preempts state laws. States may petition for an exemption if:
  - State rules provide a “significantly higher degree of protection” and do not “unduly burden interstate commerce;” or
  - State laws were in effect by August 13, 2008, and notice was filed with the CPSC by November 12, 2008

# State Laws and Preemption

- State warning requirements that were in effect on or before August 31, 2003, are not preempted
- That includes California Proposition 65

# Enforcement: Prohibited Acts

- Manufacture, import, sell or distribute any non-conforming consumer product
- Manufacture, import, sell, distribute or export any consumer product subject to an order or corrective action, or any banned hazardous substance
- Knowingly import any consumer product with an unauthorized safety certification mark
- Exercise or attempt to exercise undue influence on a third-party testing agency

# Enforcement: Civil Penalties

- Up to \$100,000 per violation (up from \$5,000)
- Maximum civil penalty for a series of related violations increased to \$15,000,000 (from \$1,250,000)

# Enforcement: Criminal Penalties

- Up to 5 years of imprisonment (up from 1 year)
- May include forfeiture of assets associated with the violation
- Directors, officers and agents of the manufacturer do not need to have notice of a violation to be criminally liable

# Enforcement: States

- State attorneys general may seek injunctive relief to stop the sale of products that do not meet federal requirements
- By enacting state standards identical to the federal standards, states can increase flexibility (no need for 30 days' notice to CPSC or to avoid duplicating CPSC lawsuit) and can seek civil damages

# Office of Education, Global Outreach, and Small Business Ombudsman

- Launch of a new office within the CPSC to provide education and outreach to manufacturers, retailers, small businesses, consumers and foreign governments.
  - AIM: To provide help to businesses, particularly small volume producers, that have had problems complying with the CPSIA
  - The Office expects to focus on:
    - Quality assurance in the manufacturing process to enhance manufacturer compliance with relevant standards;
    - Ensuring that recall information is distributed “in a timely manner” and that retailers are informed about how to respond in a timely manner to CPSC-issued safety alerts;

# Office of Education, Global Outreach, and Small Business Ombudsman

## – FOCUS:

- Acting as a liaison between the agency and small businesses to offer guidance specifically for small-batch manufacturers on compliance with applicable requirements; and
- Working with foreign regulators to help them develop effective product surveillance strategies, product testing methods and voluntary and mandatory product safety standards.

# Questions for Presenters?



**Creighton "Chip" Magid**

Dorsey & Whitney, LLP  
Washington, D.C.

[Magid.chip@dorsey.com](mailto:Magid.chip@dorsey.com)



**David G. Wix**

The Wix Law Group, LLC  
Deerfield, IL

[dwx@wixlaw.com](mailto:dwx@wixlaw.com)



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