

Business Connections

A Business Law Update

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Consumer Product Safety Commission Fines Manufacturer \$4 Million for Failure to Report

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On March 22, 2005, the Consumer Product Safety Commission announced a provisional settlement agreement with the nation's largest children's product manufacturers for a record \$4 million. The settlement was reached after penalty proceedings began against Graco Children's Products, Inc., for failure to report its potentially dangerous products to the Consumer Product Safety Commission.

Under the Consumer Product Safety Act, 15 U.S.C. § 2051, *et seq.*, a civil penalty may be imposed for failure to report product defects or risks. While the penalty may not exceed \$6,000, it may be imposed for *each* violation. The Ninth Circuit Court of Appeals has recently held that to mean that the maximum penalty that may be imposed is one for each such unit in the stream of commerce, not just those that have actually caused injury. United States v. Mirama Enterprises, Inc., 387 F.3d 983 (9th Cir. 2004). In the Graco case, there were 12 million such units in the stream of commerce.

The Consumer Product Safety Act governs more than 15,000 types of consumer products, such as toys, cribs, power tools, cigarette lighters and household chemicals. The Consumer Product Safety Commission ("Commission") is the enforcement agency for the Consumer Product Safety Act ("Act"). Given the broad purview of the Act, and the amount of the penalty that may be imposed for violations of the Act, it behooves all manufacturers of consumer products to know and understand the rules that govern them.

The goal of the Act is to keep dangerous consumer products out of the marketplace. It accomplishes this goal in part through its reporting requirement. The Act requires manufacturers, distributors and retailers to inform the Commission promptly about defective products — products that have failed to comply with established rules or voluntary safety standards and potentially dangerous products.

More specifically, the Act requires that every manufacturer, distributor, and retailer of a consumer product distributed in commerce (a "subject firm") report to the Commission when it

obtains information that the product contains a defect which could “create a substantial product hazard.” A defect may be the result of a manufacturing or production error, or it may fail to perform in accordance with its design. Defects can occur in a product’s contents, construction, finish, packaging, warnings and/or instructions; it may also arise as a result of improper labeling and marketing. For example, shoes labeled and marketed for long-distance running that caused or contributed to a muscle or tendon injury to the long-distance runner would be considered defective, due to the labeling and marketing of the shoe. Because not all products which present a risk of injury (for example, a knife which has a sharp blade is capable of seriously injuring someone but is not defective) will render the product defective, the Commission will consider several factors (such as the utility of the product, the nature of the risk of injury, the necessity of the product, the population exposed to the product and so on) in determining whether any further action is necessary.

The Commission also requires reporting of failures to comply with an established rule or a voluntary consumer product safety standard. Under the Act, the Commission may rely on voluntary standards instead of developing mandatory ones. Voluntary standards are those developed by the industry and may generally be found on the Commission website (www.cpsc.gov).

A subject firm also has an obligation to report when it obtains information that its product creates an unreasonable risk of serious injury or death. Such information usually comes in the form of customer complaints. In determining whether a product presents an unreasonable risk of serious injury or death and is therefore reportable, the subject firm should examine a variety of factors, including the utility of the product, the level of consumer exposure to the risk, and the nature and severity of the hazard presented, among others.

Once the decision to report has been made, it must be made by the chief executive officer of the subject firm within 24-hours after the subject firm has obtained information which reasonably supports the conclusion that the consumer product violates a safety rule or voluntary consumer standard, contains a defect, or creates an unreasonable risk of serious injury or death. However, the Commission allows a certain amount of time for information to reach the chief executive officer. It also allows the subject firm a reasonable amount of time for investigation and evaluation if the information received does not clearly indicate that the product is reportable.

The Commission urges a subject firm to report a potential defect even if it is in doubt as to whether or not a defect exists.

The Commission does not ordinarily make reports available to the public until the staff has made a preliminary hazard determination. After the staff has made its preliminary hazard determination and regardless of whether or not the staff preliminarily determines that a product presents a substantial product hazard, the information will be made available to the public in the Commission’s public reading room. Therefore, any subject firm making a report to the Commission should request exemption from disclosure for trade secrets, confidential commercial or financial information, or information of which the disclosure would constitute an unwarranted invasion of personal privacy, if such information is included in the report. This information will

not be released to the public, provided that an appropriate request for exemption from disclosure has been made.

No manufacturer, distributor or retailer sets out to manufacture, distribute or sell consumer products that pose a risk to the consuming public. However, mistakes are sometimes made. When that happens, appropriate loss control measures must include prompt reporting to the Consumer Product Safety Commission for the safety of the consuming public and the financial well-being of the subject firm.

*The author of this article, **Emilia Sweeney**, has defended product liability claims involving medical devices, agrochemical products, sophisticated electronic and hydraulic systems, and consumer products. She has also defended consumer product manufacturers in regulatory actions brought by the Consumer Product Safety Commission, and advises clients on compliance with rules and regulations set out by the Commission. Emilia can assist in determining whether, when and/or how to report a product that fails to comply with a rule or voluntary standard, or a defective or potentially dangerous product. She can be reached at sweeneye@lanepowell.com or 206-223-7087.*

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