

# Analysis & Perspective

## Consumer Product Safety Improvement Act of 2008

Following a series of high profile consumer product recalls, Congress passed, and President Bush earlier this year signed into law a measure designed to reform the Consumer Product Safety Commission. In this article, attorneys Victor E. Schwartz, Cary Silverman and Christopher E. Appel say whether the law reduces or encourages litigation depends on the actions of the CPSC, state attorneys general, the courts, and manufacturers.

This article is the sixth in a series on the CPSIA that examine the law from different perspectives. Previously, Eric Rubel addressed the act's notification requirements under Section 15 (36 PSLR 1068, 10/27/08). On Oct. 20, John B. O'Laughlin Jr. addressed the preemptive effect of the act (36 PSLR 1037, 10/20/08). On Oct. 6, professor James T. O'Reilly examined the statute's effect on small business and foreign companies (36 PSLR 974, 10/6/08). On Sept. 29, attorneys David Arkush and Graham Steele discussed the law's impact on product safety (36 PSLR 940, 9/29/08). An analysis of the CPSIA, by attorney Kerrie L. Campbell, appeared Sept. 22 (36 PSLR 908, 9/22/08).

## Consumer Product Safety Reform Could Mean a Boon for Safety or a Boondoggle For Plaintiffs' Lawyers: It's Up to the CPSC, State AGs, the Courts, and You

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**O**n August 14, 2008, President Bush signed into law the Consumer Product Safety Improvement Act of 2008 (CPSIA),<sup>1</sup> a landmark bipartisan act which seeks to revitalize an overextended Consumer Product Safety Commission (CPSC). The legislation came about as part of a perfect storm. An underfunded, understaffed CPSC, lacking a quorum to act, found itself in

<sup>1</sup> See H.R. 4040, 110th Cong. (2008) (Pub. L. No. 110-314) (codified at 15 U.S.C. §§ 2051-2084).

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the midst of a crisis in which children's toys imported into the United States from China had unsafe levels of lead. The national attention following the product recalls exposed serious deficiencies in the CPSC's regulatory authority and oversight, bringing about long-needed Congressional action.

The Act's purpose is to provide the CPSC with the tools to act more quickly and effectively. Yet, when legislation comes out of such a politically-charged environment, there is the potential for excess and overreaching. Some elements of the Act may distort the law's important goal of strengthening consumer protection by unnecessarily catering to special interests, particularly the plaintiffs' bar.

Trial lawyers have spent millions lobbying Congress to include provisions to help assure a steady flow of product liability litigation for their trial lawyer members. For example, the American Association for Justice (AAJ) (formerly the Association of Trial Lawyers of America), spent nearly \$3 million on federal lobbying in the first two quarters of 2008 alone.<sup>2</sup>

<sup>2</sup> AAJ spent \$2.87 million between January 1 and June 30, 2008. See American Ass'n for Justice, Lobbying Report, filed Apr. 15, 2008 (First Quarter), filed July 8, 2008 (Second Quarter). AAJ's Third Quarter Lobbying Report showed

In federal lobbying reports filed with Congress, AAJ disclosed a particular interest in the CPSC reform legislation, and specifically in provisions related to preemption of state law and any amendments offered that would prohibit state attorneys general from entering into contingency fees when enforcing the Consumer Product Safety Act (CPSA).<sup>3</sup> The trial lawyer hand, however, stretches beyond these areas and touches many sections of the bill.

Congress did not accord with AAJ's full agenda, and the result is a law that could still travel two very different paths. The Act may strengthen product safety and communication with the public in a responsible manner that reduces the burden on the court system, or it may provide a foundation for encouraging and expanding baseless litigation against product manufacturers. The answer will primarily depend on how the CPSC implements its publicly-accessible product information database, how state attorneys general assert their limited enforcement role, and how courts interpret the Act's preemption and whistleblower provisions, and how companies themselves comport with the new law.

### Increased Resources, Strengthened Standards, and Higher Potential Penalties

The Act's increase in resources for the CPSC represents a laudable effort and a major step forward in protecting consumers. The Act provides a substantial increase in funding from \$80 million in 2009,<sup>4</sup> to \$118 million in 2010, and to over \$136 million by 2014.<sup>5</sup> This increase in resources is accompanied by a mandated staff increase from less than 400 full time equivalent (FTE) employees in early 2008 to at least 500 personnel by late 2013.<sup>6</sup> The Act further provides more stringent standards for lead levels in products,<sup>7</sup> including a significant reduction of lead content in products marketed to children, greater regulation for product imports, and improved interagency information sharing.<sup>8</sup>

Effective for one year following enactment, two commissioners, so long as they are from different political parties, constitute a quorum to conduct business.<sup>9</sup> This will immediately allow the CPSC to take action such as ordering mandatory recalls. In addition, the CPSIA reinstates a five-member commission, rather than the current three-member commission, to prevent future absences of quorum.

The Act also establishes more severe penalties across the board. The new law increases civil penalties from \$8,000 to \$100,000 per violation.<sup>10</sup> It increases the maximum civil penalty for a related series of violations from \$1,825,000 to \$15,000,000.<sup>11</sup> The new law also increases the maximum term of imprisonment for know-

\$1,320,000.00 in lobbying expenses and the Consumer Product Safety Improvement Act, but it did not show the specific amount of lobbying expenses collected to that legislation.

<sup>3</sup> See *id.*

<sup>4</sup> See 2009 Performance Budget, U.S. Consumer Product Safety Commission, Feb. 2008.

<sup>5</sup> See Pub. L. No. 110-314, § 201(a) (2008) (to be codified at 15 U.S.C. § 2081(a)).

<sup>6</sup> See *id.* § 202(c).

<sup>7</sup> See *id.* § 101(f).

<sup>8</sup> See *id.* § 232.

<sup>9</sup> See *id.* § 202(a).

<sup>10</sup> See *id.* § 217(a) (to be codified at 15 U.S.C. § 2069(a)).

<sup>11</sup> See *id.*

ing and willful violations from one year to five years,<sup>12</sup> and provides the CPSC with new authority to require forfeiture of assets associated with criminal violations.<sup>13</sup>

### Provisions to Watch

Beyond the Act's core provisions, however, are personal injury sections sought by trial lawyers. Because of effective policing by a number of members of Congress and their staff, these sections are far less pernicious than in earlier drafts of the CPSIA. If not properly interpreted and applied, however, this law which seeks to strengthen product safety could provide new-found litigation tools to target responsible manufacturers, and ultimately harm consumers.

### The New Online Product Hazard Database

One major addition to the CPSC that will set the tone for whether the Act delivers on its goal of improving product safety or is, instead, used as a means to incite litigation, is the mandated creation of a publicly available searchable Internet database.<sup>14</sup> This online database will provide consumers, government agencies, health care professionals, child service providers, public safety entities, and other nongovernmental sources, basically, anyone, with the opportunity to post online reports of injuries, illnesses, or deaths, or a risk of such incidents.

While such a system is well intentioned to foster greater communication with the public about product dangers, it may allow the posting of reports without any reasonable safeguards to ensure accurate information. It is easy enough to unintentionally misidentify the product's manufacturer, the product model, or the cause of the injury. If poorly implemented, the database may misinform consumers, discourage use of safe products, and cause undue harm to the reputation of manufacturers. At worst, a database without adequate safeguards could create a government-sanctioned forum for plaintiffs' lawyers or their surrogates to defame manufacturers, or an online shopping mall to search for potential lawsuits. Unsubstantiated database reports may also permit plaintiffs' lawyers to launch "fishing expeditions" against manufacturers in discovery and give rise to product liability lawsuits based on rumor and designed solely to extort settlement funds. These superfluous costs, in addition to unjustly harming the product manufacturer, may inflate product prices for consumers.

The law requires the CPSC to provide manufacturers with notice of a submitted report within five business days of receipt. The manufacturer may then submit a comment on the report, seek removal of inaccurate information, or request redaction of any confidential information. While this opportunity to comment is triggered before the product complaint is published online, the law requires publication of the report online no later than 10 business days of transmitting notice to the manufacturer. In this short window, the manufacturer must review the report, verify its validity, and discern if it implicates any confidential information or trade secrets. Put simply, the manufacturer must respond immediately to any dubious charge if it will have even a

<sup>12</sup> See *id.* § 217(c) (to be codified at 15 U.S.C. § 2070(a)).

<sup>13</sup> See *id.* § 217(d) (to be codified at 15 U.S.C. § 2070(c)).

<sup>14</sup> See *id.* § 212(a) (to be codified at 15 U.S.C. § 2055A(a)).

chance of publishing corrective information or an explanation before the report is made public.

Given the CPSC's limited staff resources to verify reports and responses, the online database is highly likely to include inaccurate information. The CPSC regulates over 15,000 different types of consumer products, and the potentially enormous level of resources needed to process every report and response could create lengthy delays. Indeed, the Act provides no time period in which the CPSC is required to publish a manufacturer's responsive comments with the product report in the database. Rather, the Act provides only that the CPSC is to make a manufacturer's comments available online "as soon as practicable."<sup>15</sup>

Perhaps even more importantly, the law provides no set period in which the CPSC must verify the accuracy of challenged information, potentially leaving inaccurate accusations indefinitely online to irreparably damage a manufacturer's reputation. Even if the CPSC determines information posted online is indeed inaccurate, the damaging information may remain for all to view for an additional seven business days of such a finding.<sup>16</sup> Moreover, while the Act requires the individual submitting the product information to verify its accuracy, it specifies no consequence for providing inaccurate information. In fact, the Act requires the CPSC to provide a disclaimer online noting that the Commission "does not guarantee the accuracy, completeness, or adequacy of the contents of the database."<sup>17</sup> Regardless of the gradual increase in CPSC staff and resources, it is likely that false or inaccurate information will find its way into this database. Should this occur, it may mislead consumers and cause tremendous harm to a company that may have done nothing wrong.

Fortunately, there is still time and opportunity for both the CPSC and its regulated community to avoid pitfalls with regard to the database. Under the Act, the CPSC must submit a plan for developing the database by February 2009,<sup>18</sup> and the database is to be up and running no later than 18 months after the submission of the plan. By appreciating how inaccurate information may seep into the database and how some plaintiffs' attorneys may use it as a tool to drum up litigation or improperly sway the court of public opinion, the CPSC can more efficiently design a system to process reports and responses given the agency's resource constraints. The CPSC could place its "disclaimer" in bold eye-catching letters so as to warn consumers that the reports do not represent the views of the agency but are untested assertions from potentially biased sources. Product manufacturers, for their part, would also be wise to develop a rapid-fire mechanism to respond expeditiously and accurately to any private assertion posted on the CPSC Web site.

### State AG Enforcement: Is It About Safety or Expanded Business for Personal Injury Lawyers?

In addition to establishing the online database, the new law explicitly authorizes state attorneys general to

<sup>15</sup> See *id.* § 212(c)(3)(B) (to be codified at 15 U.S.C. § 2055A(c)(3)(B)).

<sup>16</sup> See *id.* § 212(c)(4)(B) (to be codified at 15 U.S.C. § 2055A(c)(4)(B)).

<sup>17</sup> See *id.* § 212(b)(5) (to be codified at 15 U.S.C. § 2055A(b)(5)).

<sup>18</sup> See *id.* § 212(a)(2), (3) (to be codified at 15 U.S.C. § 2055A(a)(2), (3)).

bring an action in federal court on behalf of residents of their states for injunctive relief to enforce certain rules and orders issued by the CPSC.<sup>19</sup> Some observers of federal consumer protection law believe that the CPSC already had such authority under Section 24 of the Act, which authorizes "any interested person (including any individual or nonprofit, business, or other entity)" to bring an action for injunctive relief in federal court to enforce a consumer product safety rule or an order.<sup>20</sup> To our knowledge, however, state attorneys general had not brought claims under this provision and, if they had clear authority to do so, it would be unnecessary to amend the Consumer Product Safety Act (CPA).

Under the CPSIA, state attorneys general can file claims after providing the CPSC with 30 days notice, during which time the CPSC may intervene in the case. A state attorney general may also proceed with an injunctive action any time after the CPSC provides consent. Of more concern for potential mischief, however, is that the CPSIA authorizes state attorneys general to merely "notify" the CPSC and then seek an injunction if the attorney general believes a "substantial product hazard" exists.<sup>21</sup>

Underlying this seemingly innocuous enforcement provision is the concern that the CPSC will not have the time or manpower to provide adequate oversight of 51 state attorneys general, many of whom are elected and more susceptible to political pressure than the nonpartisan commission. Without proper supervision by the CPSC, state attorneys general may wield substantial federal authority and unfettered discretion to target manufacturers. While the state attorney general is only permitted to seek injunctive relief pursuant to the Act, there is no constraint on combining additional claims. An attorney general could, for instance, use this federal authority to bolster subsequent state claims which allow monetary damages, such as allegations under state consumer protection laws.

Another source of the business community's unease with deputizing state attorneys general to enforce federal law is the rising practice of states contracting with private personal injury lawyers on a contingency fee basis to bring claims on behalf of the state, which adds a profit motive to the litigation. The new law is ambiguous as to whether state attorneys general can contract with private attorneys to bring claims on a contingency fee basis,<sup>22</sup> an outcome likely stemming from intensive AAJ lobbying. Permitting contingency fee agreements in this context would be an odd result, since an Execu-

<sup>19</sup> See *id.* § 218(b) (to be codified at 15 U.S.C. § 2073(b)).

<sup>20</sup> 15 U.S.C. § 2073(a).

<sup>21</sup> Pub. L. No. 110-314, § 218(b).

<sup>22</sup> The current language of Section 24 of the Act provides that attorneys' fees must be "determined in accordance with section 11(f)" of the Act." Section 11(f), in turn, provides that reasonable attorney's fee is "a fee (1) which is based upon (A) the actual time expended by an attorney in providing advice and other legal services in connection with representing a person in an action brought under this section, and (B) such reasonable expenses as may be incurred by the attorney in the provision of such services, and (2) which is computed at the rate prevailing for the provision of similar services with respect to actions brought in the court which is awarding such fee." This language remains within paragraph (a) of amended Section 24 applicable to suits by "any interested person," but is not included in new paragraph (b), which applies to state attorney general enforcement

tive Order precludes the CPSC and other federal agencies from entering into contingency fee agreements.<sup>23</sup> Other protections on the use of private attorneys to enforce federal law did make it into the final legislation, such as a prohibition on sharing information gleaned in discovery in a federal suit to support private litigation.<sup>24</sup>

Earlier versions of the legislation gave state attorneys general broad powers to interpret what constitutes violations of the various acts enforced by the CPSC, seek monetary damages, and bring claims in state as well as federal court.<sup>25</sup> Congress ultimately rejected this expansive authority to prevent state attorneys general from operating independently of and potentially inconsistently with the federal agency responsible for consumer safety. Nevertheless, the CPSC will likely need to keep a watchful eye over state attorneys general who bring claims under the Act. Of even more importance is the hope and trust that state attorney generals will respect that their grant of authority was purposefully limited to enforce CPSC rules and orders, not to supplant, circumvent, modify or otherwise intrude upon the decisions of the CPSC. Our judgment is that most state attorneys general will respect the nature and purpose of the CPSIA, but past experience cautions that actions of a few state attorneys general pursuing private agendas (along with their allies in the plaintiffs' trial bar) could overshadow the benefits of most who are protecting the public interest.

### Judicial Interpretation of the Preemptive Effect of CPSC Action

A final, critical element to assure that the Act's principal objective of improving product safety does not take a back seat to outside interests is its interpretation by courts. The new law, however, makes judicial interpretation more challenging with respect to the preemptive effect of the CPSC's rules and regulations. The law prohibits the CPSC from expressing an opinion on whether its exercise of regulatory authority preempts state law; an explanation that traditionally provides courts with guidance as to when conflicting state laws, regulations, and lawsuits may stand as an obstacle to fulfilling the agency's mission.

Current law states that the CPSC is responsible for setting the necessary product safety standards, and that any corresponding state standards must provide an "identical" or "higher degree of protection."<sup>26</sup> Yet, what is a "higher" or stricter standard in the product context is often not black and white, but many shades of gray. Often, measuring "safety" is a complex judgment as a product made safer for some situations may become more dangerous in others. For example, the Supreme Court has recognized that state laws requiring all vehicles to come equipped with airbags may appear to be a "higher" standard than a range of choices set by the Department of Transportation (DOT), but such a mandate may discourage use of more effective seat belts and airbags, and may pose a risk to children.<sup>27</sup>

<sup>23</sup> Protecting American Taxpayers From Payment of Contingency Fees, Exec. Order 13433 (May 16, 2007).

<sup>24</sup> See Pub. L. No. 110-314, § 218(b)(6).

<sup>25</sup> See Consumer Product Safety Commission Reform Act of 2007, S. 2045, 110th Cong. § 21 (2007).

<sup>26</sup> 15 U.S.C. § 2075(b).

<sup>27</sup> See *Geier v. American Honda Motor Co.*, 529 U.S. 861, 869-74 (2000).

The CPSC engages in the same type of balancing with respect to regulation of consumer products. For example, in 2006, the CPSC approved a heightened regulatory standard for mattress flammability estimated to annually save about 270 lives and reduce related injuries by 84 percent.<sup>28</sup> The CPSC believed this was a balanced, effective national standard and included express preemption language in the regulation to that effect.<sup>29</sup> The result of the agency stating its position ultimately led to special interest groups, like the plaintiffs' bar, to push for a provision explicitly stating the mattress flammability standard is not preemptive.<sup>30</sup> The Senate included this provision in an early version of the legislation, but the reversal did not find its way into the final law.<sup>31</sup>

Nevertheless, Section 231 of the enacted legislation effectively places a gag order on the CPSC from expressing an opinion as to whether any action it takes is in tension with, and therefore should preempt, other state laws. This provision deprives courts of the substantial benefit of the agency's interpretation of its own rules and regulations, and the impact of potentially conflicting state laws on its statutory responsibility to protect consumer safety, which the Supreme Court has recognized as particularly helpful.<sup>32</sup> Courts should recognize that the new law, however, does not generally alter the agency's authority to promulgate safety standards that preempt state law.<sup>33</sup> Moreover, as a matter of public policy, courts may defer to CPSC product safety standards as setting the standard for tort liability in appropriate cases.<sup>34</sup>

<sup>28</sup> See CPSC Approves New Flammability Standard for Mattresses, Consumer Product Safety Commission, at <http://www.cpsc.gov/cpsc/pub/prerel/prhtml06/06091.html>.

<sup>29</sup> See *id.*

<sup>30</sup> See Caroline Mayer, *Rules Would Limit Lawsuits*, Wash. Post., Feb. 16, 2006, at D1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/02/15/AR2006021502382.html>.

<sup>31</sup> See S. 2025, § 18(b), 110th Cong., 2d Sess. (2008).

<sup>32</sup> See, e.g., *Spreitsma v. Mercury Marine*, 537 U.S. 51, 66-67 (2002) (instructing federal agencies that, if they find that state law claims would conflict with the accomplishment and execution of the full purposes and objectives of Congress, they need to say so in an "authoritative" manner); *Hillsborough County v. Automated Med. Labs. Inc.*, 471 U.S. 707, 718 (1985) (recognizing that "because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretative statements, and responses to comments, we can expect that they will make their intentions known if they intend for their regulations to be exclusive").

<sup>33</sup> Several other provisions of the CPSIA address preemption in particular areas. The ASTM-F963 standard for toy safety, which the CPSIA makes mandatory rather than voluntary, now has preemptive effect, however, states may apply for an exemption from the federal requirements if their rules provide a "significantly higher degree of protection" and do not "unduly burden interstate commerce." Pub. L. No. 110-314, § 106(h)(1). Existing state laws and regulations regarding consumer product safety remain in effect provided the state files a copy of those requirements with the CPSC within 90 days of enactment. *Id.* § 106(h)(2). The new standards for phthalates, lead paint and content, and ATVs preempt state law. Finally, the Act states that it does not preempt state warning standards implemented before August 31, 2003. *Id.* § 231(b).

<sup>34</sup> The Restatement Third suggests that a product should not be considered defective as a matter of law "when the safety standard or regulation was promulgated recently, thus supply-

### Whistleblower Claims: The Department of Labor and Courts Must Protect Against Abuse

Under the new law, any employee who believes he or she was discharged or discriminated against for providing information that he or she reasonably believes is a violation of any order, regulation, or rule under the CPSA, or other law enforced by the CPSC, may file a complaint alleging retaliation with the Department of Labor (DOL). The DOL may require affirmative action to abate the violation, reinstatement, back pay, and compensatory damages, plus all costs and expenses reasonably incurred, including attorney and expert witness fees. If unsatisfied with the result, the employee can appeal the DOL order to federal appellate court.<sup>35</sup> The earlier House version of the legislation did not include a whistleblower provision and none of the testimony leading up to adoption of the CPSIA demonstrated a need for this new protection.

While certainly well-intentioned, this provision, improperly restrained or interpreted by courts, provides a means for any employee of consumer product manufacturers, distributors, and retailers, to threaten or bring lawsuits to prevent disciplinary action or termination by claiming knowledge of a product safety violation. The provision could also provide disgruntled employees with a powerful incentive to report preliminary, errone-

ing currency to the standard therein established; when the specific standard addresses the very issue of product design or warning presented in the case before the court; and when the court is confident that the deliberative process by which the safety standard was established was full, fair, and thorough and reflected substantial expertise." See Restatement Third, Torts: Products Liability § 4 Rpt. Note, cmt. (d) (1998). Conversely, the Restatement acknowledges that this liability protection would not apply "when the deliberative process that led to the safety standard . . . was tainted by the supplying of false information to, or the withholding of necessary and valid information from, the agency that promulgated the standard or certified or approved the product. See *id.*

<sup>35</sup> Pub. L. No. 110-314, § 219(b).

ous or unsubstantiated information as an alleged product safety violation in order to insulate themselves from disciplinary action for reasons entirely unrelated to product safety. It will, therefore, be up to the DOL and the courts to carefully screen these claims to prevent misuse. Again, this provision can either enhance product safety or foster lawsuit abuse.

### Striking the Right Balance

The Consumer Product Safety Improvement Act of 2008 can and should prove a boon for product safety. The Act provides stricter regulations in a variety of areas, multiplies existing penalties, and, most importantly, increases the agency's funding by almost 50 percent in a year. But this is not to say that the new law's success is guaranteed. True, the CPSC will have more resources, but it will also have more responsibilities. Some of these responsibilities, such as managing an accurate product hazard report database and monitoring state attorney general enforcement actions, present uncharted territory and new challenges. Success in these areas will play an important role in determining whether the law accomplishes its fundamental purpose to further consumer product safety or is twisted into an avenue for unfounded lawsuits.

The CPSC is not alone in guiding the law's successful implementation. State attorneys general must resist the temptation to overstep their limited authority, and courts must respect the need for preemption in appropriate circumstances and remain vigilant in preventing abuse of the Act's whistleblower provisions. Product manufacturers must also assist the CPSC by timely responding to product complaints and drawing the agency's attention to any inaccurate information posted by consumers. Only with these entities acting in concert and taking appropriate responsibility will this law achieve what Congress intended and what consumers demanded. The AAJ and trial lawyers appear to have made a heavy investment in the CPSIA. Hopefully, that investment will benefit the public and not the monetary interests of the personal injury bar.