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PRACTICE TIP

Flawed CPSC Product Hazard Database

By Victor E. Schwartz and Cary Silverman

A divided Consumer Product Safety Commission (CPSC) approved a final rule in December that will initiate a new online public database of reports of injury or risks of harm from consumer products. *See* Publicly Available Consumer Product Safety Information Database, 75 Fed. Reg. 76,832 (Dec. 9, 2010). As designed, this tool may unnecessarily alarm both consumers who rely on the CPSC to provide accurate information, and manufacturers whose reputations will be tarnished by rumors, unfounded allegations, and outright fabrications. Mandated by Congress's enactment of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), the database was scheduled to go live at www.safeproducts.gov on March 11, 2011.

It is important that manufacturers and product sellers familiarize themselves with the database and develop a quick-response system to address submitted reports. Ultimately, the 112th Congress should enact legislation to correct flaws in the CPSC's final rule and incorporate needed safeguards. Such an amendment might be included in legislation addressing other problematic aspects of the CPSIA, particularly where excessive, rigid regulatory

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Food-Related Liability

Part One of a Two-Part Article

By Sarah L. Olson

No one could really blame the food industry for being a little paranoid. Over the past two years, food producers, processors and restaurants have increasingly been in the cross-hairs with legislators, regulators, public health advocates and the plaintiffs' bar. The nation's obesity problem, consumer concern over the methods by which food is mass-produced and marketed, and recent widespread contamination incidents have made the industry vulnerable to a multi-pronged attack. Companies and their product liability counsel can expect an upward trend in both traditional and innovative food-based cases, as well as expanded civil and criminal statutory exposure. Individual product liability suits and incidents of contamination will unfold against this backdrop of litigation, legislation and regulation, making it imperative that food producers defend their products on many different levels. This article examines recent notable lawsuits involving packaged and restaurant food items. A companion article concerning food legislation and regulation will follow in an upcoming issue.

Contamination and Consumer Fraud Suits

The most numerous product-related litigations involving food arise out of incidents of contamination. Salmonella in eggs and peanut butter, E. coli in hamburger and a number of other incidents have generated significant "tainted food" class action litigation over the past two years. Plaintiffs' complaints generally rest on traditional product liability, negligence and consumer fraud grounds. Defenses revolve around avoiding class certification, defeating plaintiffs' causation theory and the validity of expert testimony.

While contamination cases proliferate, there can be problems inherent in demonstrating causation in many instances. As a result, consumer fraud claims increasingly have been plaintiffs' theory of choice in recent years. In many cases, plaintiffs try to capitalize on affirmative statements or graphics that allegedly mislead the consuming public. So, for example, Sheree Shepard sued Applebee's International for allegedly misrepresenting the amount of fat and calories contained in its meals. *Valiente v. Dineequity, Inc.*, slip op., No. 08-2415-KHV (D. Kansas Apr. 7, 2010) (dismissing

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of health problems," which makes defendant's advertisement that Yoo-hoo is "good for you" deceptive. *See also Peviani v. Hostess Brands, Inc.*, slip op., No. 10-cv-2303 (C.D. Cal. Nov. 3, 2010) (dismissing on preemption grounds a complaint alleging that Hostess 100 Calorie Packs are deceptively marketed based on presence of partially hydrogenated oils).

Mr. Dahl claimed he purchased Yoo-hoo "at a premium price," which he would not have paid had he known that Yoo-hoo was not "nutritious, healthy and better than similar products." Complaint at par. 10. The complaint sought to compel defendant to destroy advertising that the plaintiff considers deceptive and misleading; to either compel disclosures and/or disclaimers of nutritious character on defendant's labels and/or to "redesign" the product by removing partially hydrogenated oil; to provide restitution and disgorgement of profits; to obtain compensatory and punitive damages; and more. The "redesign" remedy, in particular, reflected the product liability nature of this complaint. This complaint has now been voluntarily dismissed.

Childhood Obesity and 'Consumer Fraud'

Emboldened by public concern over childhood obesity, some are distorting the law of consumer fraud even further. For example, the Center for Science in the Public Interest (CSPI) threatened to bring, and apparently recruited an individual to bring, consumer fraud claims against McDonald's because including toys in its Happy Meals and advertising allegedly "lures" and "unfairly and deceptively markets" to children, a charge the company vigorously denies. *Parham v. McDonald's Corporation*, No. CGC-10-506178 (Ca. Super. Ct. San Francisco County Dec. 15, 2010); http://chicagobreakingbusiness.com/2010/07/mcdonalds-ceo-stands-up-for-happy-meal-toys.html (last accessed Feb. 4, 2011). Ms. Parham asserts that "McDonald's exploits very young California children and harms their health by advertising unhealthy Happy Meals with toys directly to them." Complaint, ¶ 2. Plaintiff asserts that McDonald's advertising amounts to exploitation because children "eight years old and younger do not have the cognitive skills and developmental maturity to understand the persuasive intent of marketing and advertising." *Id.* Anticipating the common-sense inquiry about the whereabouts of parents in this equation, plaintiff alleges that McDonald's intends to subvert parental authority over purchasing decisions by enticing children with toys. *Id.* at ¶ 10. This litigation and a concurrent San Francisco ordinance banning toys in children's quick-serve meals rest on the premise that parents are not responsible for what their children eat, if advertising allegedly causes their children to beg for certain kinds of food.

Conclusion

Companies facing food-based complaints, whether serial, mass, class or one-off, need to keep the larger picture of litigation trends in mind. The pressure to settle these kinds of suits quickly can be great, given the general economic climate and the cost of defense. Prudent companies will consider the long-term strategic impact of settlement on the overall product line, the likelihood that settlement will encourage further suits, and the public perception that the company has done something wrong.

Part Two of this article will discuss legislative and regulatory trends impacting food litigation and business in general.

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requirements do not improve product safety, but force some responsible businesses out of the market.

Three Reasons to Be Concerned

Manufacturers and retailers have long had an obligation to report promptly to the CPSC information suggesting the possibility of a product hazard from any source, such as a customer complaint, quality control data, reports of injury, product liability lawsuit, or test report. This responsibility arises when:

- The manufacturer learns of information that reasonably supports the conclusion that its product fails to comply with an applicable consumer product safety rule or voluntary consumer product safety standard;
- Contains a defect that could create a substantial risk of injury to the public; or
- Creates an unreasonable risk of serious injury or death.

These reports, known as "Section 15(b)" incident reports, are not automatically released to the public. The public typically learns of such information after the manufacturer or CPSC verifies the danger and recalls the product or takes some other remedial action. Some consumer groups have criticized this process as taking too long to alert the public of product hazards.

The CPSC is now implementing a new government-sponsored online database that swings the pendulum far in the opposite direction. The purpose of the database is to provide the public with an early warning system on dangerous products. What appears likely to result, however, is a "moderated blog-like" system in which anyone can submit, and the CPSC will publish, vague or unfounded reports questioning the safety of a product, so long as the report meets minimal requirements. Given the lack of specificity and potential inaccuracy of such submissions, the database is likely to have little value to consumers. Rather than purchase a perfectly safe product, due to a questionable report, consumers may be drawn to buy a less-safe or lower-quality product. From the perspective of those who make or sell consumer products, the new database may lead to malicious accusations from competitors, plaintiffs' lawyers, or disgruntled employees with self-interested motivations, or simply contain information that is plainly wrong, which will unjustly harm the company's reputation.

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As CPSC Commissioner Nancy Nord, one of two members to vote against the final rule, recognized, "the database will not serve its purpose if it is a 'garbage in/garbage out' grab bag of unsubstantiated complaints from any source." Here are three of the major flaws in the final rule.

1. Lack of Helpful Information

An essential element of a useful database is the ability of consumers to look up a particular product and determine whether it has posed a danger to those using it. The final rule, by requiring little detail in identifying the product at issue, fails to provide this very basic level of utility.

The rule requires a report to contain the name of the manufacturer, a description of the product, a description of the harm or risk of harm, and the date of the incident. All the description of the product must contain is "a word or phrase sufficient to distinguish the product as a consumer product, a component part of a consumer product, or a product or substance regulated by the Commission." Other information, such as the brand or model name, serial number, manufacture date, where and when the product was purchased, or a photograph, is not necessary. The database will prompt users for at least some of this information. Although the final rule recognizes that additional details are "helpful," the CPSC will post reports online with a bare minimum description of the product.

How vague is too vague for the database? A presentation by CPSC staff noted that the Commission would not publish a report that identifies a product as "hot appliance" and describes the incident as "my son's hand was severely burned when our appliance overheated." A report needs only slightly more detail to go online. Under the CPSC's "word or phrase" standard, an individual may submit a report that states no more than "my Mr. Coffee™ coffee maker leaked and burned me."

Such vague descriptions provide little value to consumers and can tarnish a manufacturer's entire product line. It does not tell the consumer if the product is a 20-year-old model that has far surpassed its expected life, or a current model that is on store shelves. Even if the report involves a recently purchased product, the report does not identify which of the company's numerous models has a problem or provide an understanding of the nature of the leak — was the lid not secure, did the glass break, or did the leak come from the machine itself? Without such information, consumers cannot make an informed choice about a product, and the manufacturer does not know how to address the issue.

2. Reports Lacking First-hand Knowledge

Reports may not only lack useful information, they may also be inaccurate because an assortment of people who did not use the product, or who may have ulterior motives, may file reports.

Congress explicitly authorized five categories of people to submit reports to the database: 1) consumers; 2) local, State, or Federal government agencies; 3) health care professionals; 4) child service providers; and 5) public safety entities. As Congress understood, permitting categories beyond individuals who themselves have been harmed by a product, government agencies that have a statutory obligation to protect the public, licensed health professionals who treat injured individuals, and child care service providers, diminishes the reputability of information contained in the database. The final rule strays from legislative intent by so expansively interpreting these terms that nearly anyone may attack the safety of a product on a website that comes with the credibility of the CPSC. By redefining the terms "consumer" and "public safety entity," the CPSC has permitted personal injury attorneys, consumer advocates, consumer advocate organizations, investigators, professional engineers, trade associations, even friends of someone who uses a consumer product and "observers of the consumer products being used" to submit reports claiming a product they did not use harmed someone else or carries a risk of injury.

These categories are not included in the statutory text and for good reason. Inclusion of these additional filers will lead to submissions by those without firsthand knowledge of the product at issue or what occurred, duplicative reports, and reports by those with political agendas or financial motives. Even competitors, who seek to gain a business advantage, and personal injury lawyers, who may wish to tarnish the public's perception of a litigation target in the press or otherwise set the stage for a lawsuit, can file reports. The identity of who submitted a report will be kept from the public.

3. Everything Goes Up, Nothing Necessarily Comes Down

Opening up the database for nearly anyone to file reports is not the only factor that will facilitate questionable information in the database. Given the click-of-a-mouse speed at which users may submit reports, it is inevitable that reports will sometimes have mistakes. The final rule makes it unlikely that inaccurate information, even when caught before it goes online, will be kept out of the database and provides no incentive for CPSC staff to correct errors or remove inaccurate information in a timely fashion.

Upon submission of a report online, the CPSIA provides that the Commission must give the manufacturer 10 days' notice before it makes the report available to the public. This gives the company a brief window in which it can flag information contained in the report as inaccurate or confidential, or submit comments in response that would concurrently appear online when it publishes the report.

The CPSIA requires the Commission to decline to add, correct, or remove materially inaccurate information submitted to the database. Given this responsibility, prior drafts of the database rule recognized the Commission's discretion to withhold publication of questionable reports, allowing a reasonable opportunity to verify information flagged by manufacturers as inaccurate. The final rule, however, eliminated this discretion. It mandates that the Commission post each and every report received online within ten days, even if there are legitimate and serious questions raised that the CPSC does not resolve in that short period.

Moreover, since the final rule does not provide any timeline for initiating an investigation or determining whether a report is inaccurate, such reports may remain online indefinitely.

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Only after finding a report inaccurate does the CPSIA impose an obligation on the CPSC to remove or correct the information within seven days. It is uncertain how much staffing resources the CPSC will be able to commit to investigating questionable reports. In a follow-up meeting on implementation of the public database in November, Commissioner Anne Northup asked CPSC staff, "Have you estimated how many hours CPSC staff will have to spend to investigate a claim of inaccuracy by a manufacturer?" They did not have an answer.

Be Prepared: A To-do List

Those who make or sell products that fall within the CPSC's jurisdiction should develop a procedure for quickly receiving and responding to reports filed through the online database. This plan should include:

1. Assigning staff members with responsibility for receiving, investigating, and responding to reports submitted to the database. Have protocol in place to ensure someone is always available to review reports and take action.
2. Registering on the "Business Portal" at www.saferproducts.org. Firms may designate one official as the point of contact for receiving reports related to the company's products and up to five additional contacts. Ensure that these points of contact, and their e-mail addresses, are kept up to date.
3. Quickly responding (or choosing not to respond) to reports. Upon receiving a report, the CPSIA mandates that the CPSC pass it on to the identified manufacturer "to the extent practicable" within five days. This transmission will most likely occur instantaneously via e-mail, if a company has registered online. If a firm does not register an electronic contact, then the CPSC will transmit the report by mail, which could delay its reaching the appropriate staff and reduce the already short time available to respond. Once it obtains a report, the firm should be prepared to: a) Flag material as "materially inaccurate." The final rule provides that the CPSC will "expedite" its investigation if the firm's submission is five pages or less; b) Draft and submit an early comment responding to the report so that it immediately appears alongside the report when it is made available to the public. Comments must relate to information contained in a specific harm report, but may include general statements, such as the firm's overall commitment to safety, a telephone number for customer service, or an offer to refund or exchange the product. In developing a general policy, or deciding a course of action for responding to an individual report, the firm will need to consider the matter carefully from a staffing resource, regulatory, litigation, and public relations perspective; c) Quickly seek redaction of confidential business or trade secret information.
4. Routinely monitoring the database. Some reports may not be communicated to the manufacturer due to an misidentification error in the report. They may get lost in an e-mail spam folder or during staff turnover, or not make it to the proper official for any number of other reasons. It is also important to keep in mind that there is no "statute of limitations" on when an individual can submit a report, even as there is a presumptive one-year time limit for manufacturers to submit a comment in response. For those reasons, firms should periodically "Google" themselves and their products on the CPSC database to find any reports that they might have missed.

Congress Should Take Action

The CPSC rejected, by a three-two vote, an alternative rule proposed by Commissioners Nancy Nord and Anne Northup that would have alleviated some flaws in the final rule. At this juncture, it may fall upon Congress to address problems with the new database. It can do so by amending the CPSIA in the following ways:

1. Require additional detail on the product at issue, such as the brand or serial number, approximate date of purchase, and place of purchase.
2. Define "consumer" and "public safety entity" in accordance with common usage so that only those who are injured by a product or have a statutory obligation to protect the public may submit reports; and
3. Clarify that the CPSC, at minimum, has discretion (or an obligation) to withhold publication of a report when a manufacturer has raised legitimate questions regarding the accuracy of material information until the CPSC has an opportunity to verify the information. In addition, legislation might clarify that if potentially inaccurate material is already online, the Commission may remove the material until it verifies the accuracy of the information.
4. If material challenged as inaccurate is permitted to remain on the public database, Congress should require the CPSC to place a notation on the report informing consumers that its accuracy is under investigation and require the CPSC to resolve the issue within an established period.

Conclusion

Congressional action on the database might be included in a broader package of amendments to the CPSIA that addresses other areas that have proven problematic in implementation of the groundbreaking law. These include an inflexible lead standard, expensive third-party testing requirements, and an unclear and potentially unduly broad definition of "children's products." These provisions of the new law as implemented by the CPSC have posed havoc, particularly on small businesses, while providing no true safety benefit for consumers.

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