

PRODUCT LIABILITY

February 2011

IN THIS ISSUE

Leta Gorman and Lisa Grimm discuss the Consumer Product Safety Commission's Consumer Product Safety Information Database, which officially launches in March 2011. The newsletter describes the details of the Database and provides concrete suggestions for how your clients can and should prepare.

The CPSC's Consumer Database Officially Launches in March 2011: Are Your Clients Ready?



ABOUT THE AUTHORS

Leta E. Gorman is a Shareholder in the Portland, Oregon office of Bullivant Houser Bailey, PC. Her practice focuses on the defense of product manufacturers. She is currently the Chair of the IADC's Product Liability Committee.



Lisa Grimm is an associate in the Seattle, Washington office of Bullivant Houser Bailey, PC. Lisa represents manufacturers, retailers, private developers, contractors, and business owners in cases involving claims of defect, personal injury, property damage, and breach of contract.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership.

Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:



Jennifer Haltom Doan

Vice Chair of Newsletters

Haltom & Doan

(903) 255-1000

jdoan@haltomdoan.com

The International Association of Defense Counsel serves a distinguished, invitation-only membership of corporate and insurance defense lawyers. The IADC dedicates itself to enhancing the development of skills, professionalism and camaraderie in the practice of law in order to serve and benefit the civil justice system, the legal profession, society and our members.

The Consumer Product Safety Commission has established a Publicly Available Consumer Product Safety Information Database (the "Database"). The Database officially launches in March 2011. Are your clients prepared?

What is the Database?

The Database allows consumers to not only submit reports of harm but to also conduct searches for reports of harm. The Database will collect reports on manufacturers of consumer products, importers of consumer products, and owners of a brand or trademark of a consumer product that bears a private label. The rule includes not only all consumer products, but also other products or substances regulated by the CPSC, including drug product packaging.

How Does it Work? The Nuts and Bolts of the Process

The Consumer Products Safety Consumer Improvement Act of 2008 and the final rule relating to the Database establish a framework for collecting reports, communicating with key parties regarding those reports, and determining which reports should be published to the Database. This framework differs significantly from the reporting and disclosure rules previously in place under the Consumer Product Safety Act. Here is how it works:

"Reports of harm" can be filed by any "consumer," including the user of the product, as well as any family member, guardian, friend, or observer of the use, and "others" such as health care providers, child service providers, public safety entities, or consumer advocates, regardless of whether or not the submitter has first hand knowledge. All reports of harm must be submitted to the CPSC using the required incident report form either online, by telephone, by email, or by mail. Each report of harm must contain, at a minimum, the incident date, the category of submitter, a description of product, the identity of the manufacturer or private labeler, a description of harm, contact

information (of submitter), consent (to inclusion in the Database), and verification (that "the information is true and accurate to the best of my knowledge"). The name of the "victim" is not required. Although the submitter's contact information will not be published publicly, it is a requirement, and anonymous reports will not be included in the Database. The submitter must include, at a minimum, his or her name and address.

Submitters "may" also include "optional" information such as the location of incident, the severity of the injuries, and whether the manufacturer has been contacted. They may also upload photographs of the product or the injuries and other related attachments such as medical records. The CPSC also requests, but does not require, that the submitter retain the product for 30 days to allow a CPSC investigator a chance to inspect the product, if necessary.

Within five days of receiving the report of harm, the CPSC will, where practicable, notify the manufacturer and/or labeler identified in the report of harm. If a manufacturer or labeler is registered with the "Business Portal," the CPSC will send notice of reports of harm to the registered account user and any additional recipients so designated. If it has not registered, notification will be sent by mail to the principal place of business. The notification will include all information that is not private and is subject to publication.

Manufacturers and labelers are then given a chance to "comment" on the report of harm. If the report of harm meets the statutory minimum requirements noted above, the CPSC must publish the report no later than the tenth day after transmission of notice to the manufacturer or labeler, regardless of whether or not comments have been received. Reports of harm will remain on the site indefinitely.

Nitty Gritty Details Every Manufacturer and Private Labeler Should Know

What “Reports of Harm” Will Be Published in the Database?

“Reports of harm” can include not only actual injury, illness, or death, but also what the consumer or submitter perceives to be a “risk” of injury, illness, or death. They cannot include complaints about the quality of the product or its cost. Submitters may enter reports of harm regardless of when the incident occurred. This means that some submitters may enter reports of incidents that occurred long before the Database was initiated and potentially many years after the incident when there is no opportunity for further investigation. Submitters are also permitted to enter reports of harm related to a product whether they bought the product new or used. With regard to used products, it may be impossible to know whether any changes had been made to the product since its original sale.

Who Can Comment and How?

Only the manufacturer and/or labeler who receives notice of the report of harm from the CPSC is permitted to comment on a report of harm. Other members of the industry or public will not be given an opportunity to comment. Comments are to be submitted by regular mail, electronic mail, or online via a Business Portal to which the manufacturer or labeler must register. Comments submitted within ten days will be published in the Database at the same time as the report of harm, if the minimum requirements are met. The comment meets the minimum requirements if it specifically relates to the report of harm, contains a unique identifier assigned to the report, has been verified by the manufacturer or labeler, and affirmatively requests and consents to publication. Companies may submit comments at any time; however, comments received more than a year after notification of the report of harm may be excluded from publication if they

are not in the public interest to publish the comments.

What is the “Business Portal”?

The Business Portal has been established to allow manufacturers and private labelers to view details of the report, to notify the CPSC if the product does not belong to the recipient of the notice, to point out material inaccuracies to the CPSC, and to submit “comments” to the report of harm, all online. Only the registered account user will be permitted to comment. The portal is secure and comments posted there are submitted directly to the CPSC, not to the Database.

When and Why You May Contact a Person Submitting a Report of Harm?

Persons submitting reports of harm may opt to check a box to consent to sharing their contact information with the manufacturer or labeler to facilitate further evaluation of the complaint. Even if a submitter consents to sharing contact information, the CPSC has narrowly drawn the legitimate uses of that contact, however. A manufacturer may only use the contact information to “verify” the details of the report of harm, including the identity of the submitter, the identity of the product, a description of the incident, and a description of the harm or risk of harm.

The incident report form also permits submitters to include email addresses and telephone numbers, but this is not required. Given the very short time manufacturers and labelers have to respond, it is highly unlikely that they will be able to confirm the report before the response is due unless that information has been provided. This could pose a significant problem in cases where the “description of product” in the report of harm meets only the minimum requirement of “a word or phrase sufficient to distinguish the product.” Submitters are encouraged, but not required, to include a product name, brand

name, model number, serial number, where the product was purchased, and/or the date of manufacture when filing the report.

What Will the CPSC Exclude From Publication in the Database?

The CPSC claims that it will review each report before posting to ensure they meet the minimum statutory requirements described above. If a report is incomplete and fails to meet the statutory minimum, the CPSC will not publish it to the Database (although it will notify the manufacturer or labeler anyway). Reports regarding products that are not within the CPSC's jurisdiction, such as food and drugs, will be filtered out by CPSC staff and not included in the Database. Additionally, the CPSC will not publish the following information without express consent: contact information for the submitter, the name of victim, private photographs, private medical records, confidential information, materially inaccurate information, retracted reports, consents and verifications, and any other information that the CPSC determines is not in the public interest.

What Is Materially Inaccurate Information and How Is It Excluded?

Materially inaccurate information is defined as "information that is false or misleading, and which is so substantial and important as to affect a reasonable consumer's decision making about the product. Requests for removal of materially inaccurate information can be made both before and after publication. A request for expedited review can be made if the request is less than five pages long. Information in either the report of harm or the responding comments that is determined to be materially inaccurate will not be published or will be removed from the Database if already published. The requester bears the burden of proof. Once it is determined that information is materially inaccurate, the CPSC has three options: (1) decline to publish the report in the Database, or

if already published, remove the report from the Database, (2) correct the information and publish a corrected report of harm or comment, or (3) add information to the report of harm or comment in order to correct it.

How Can Confidential Information Be Protected?

Manufacturers may include in their comments a request that confidential information be redacted from a report of harm. Such requests must be timely made and should be conspicuously marked. In addition, the requestor must certify in writing that the request is made in good faith and that it will assist in the defense if necessary. If all of the statutory requirements are met, the CPSC must publish the material subject to appropriate redactions. If additional time is needed to make a determination as to the confidentiality of designated information, the CPSC will redact the information and continue with publication until a final determination can be made. The burden of proof with regard to confidentiality matters lies with the manufacturer or labeler.

Are There Any Restrictions on the Size of Reports or Comments?

Manufacturers and labelers should beware of filing oversize responses. Although the CPSC has not specifically defined a set size limit for reports of harm or comments, it reserves the right to limit the size of the reports, comments, and attachments where their size will negatively impact the performance of the system.

What Other Information Will the CPSC Include in the Database?

In addition to publishing reports of harm and comments, the CPSC will also publish, and make searchable, information in both voluntary and mandatory recall notices. The CPSC shall also include in the Database "additional information it determines to be in the public interest." The CPSC will "associate" reports if

it can determine that multiple users have filed reports of harm about the same incident. Likewise, comments will automatically be “associated” with the corresponding report of harm so that anyone searching the Database will always pull up both, assuming both meet the requirements for publication.

Three Actions All Manufacturers and Labelers Should Take Today

Designate a Point Person

If your clients do not already have an employee charged with the responsibility of responding to consumer complaints, now is the time for your clients to designate one. It may be a full-time position or a minor part of someone’s job, depending on the size of your client’s organization and the volume of your client’s production. If your client is using the Business Portal, it will need a single account user to handle all responses. This person will need to have the ability to react quickly to new reports. Ideally, the person needs to be able to respond well before the expiration of the ten day period so that any confidentiality or material inaccuracy requests can be processed by the CPSC before publication.

Register on the Business Portal

All of your manufacturer and private labeler clients should register on the www.saferproducts.gov website immediately. The short timeframes for responding to reports simply do not give your clients the luxury of waiting for snail mail! Registering will allow businesses to receive prompt notification of

reports posted to the Database. A business can designate one “account user” as well as any other people that it would like to receive the notification. Businesses can then respond online by posting official comments to the reports. Both U.S. and foreign companies are permitted to register.

Set Up Systems to React Fast

Manufacturers and labelers who are ready and can react to reports of harm quickly have the best chance of avoiding any reputational harm that could result from the Database. Advise your clients to be prepared to point out any and all confidential information and material inaccuracies as quickly as possible. Submitting these requests on the ninth or tenth day may not allow the CPSC sufficient time to consider the request before publication. The CPSC has determined that meeting the ten day statutory publication deadline is paramount. The CPSC cannot and will not withhold publication pending a determination of these issues!

Links

Final Rule available at <http://www.cpsc.gov/businfo/frnotices/fr11/database.pdf>

Consumer Database Homepage - <http://www.saferproducts.gov/>



PAST COMMITTEE NEWSLETTERS

Visit the Committee's newsletter archive online at www.iadclaw.org to read other articles published by the Committee. Prior articles include:

JANUARY 2011

Canada's New Consumer Product Legislation: A Shield or a Sword?
Peter J. Pliszka and Richard D. Butler

DECEMBER 2010

Did We Settle This Case or Not? Don't Risk Letting the Court Decide
Stephanie M. Rippee

JUNE 2010

Assumption of the Stewardship Duty – What Manufacturers Should Consider Prior to Responding to a Potential Products Claim
Brad Dixon

MAY 2010

Foodborne Illness: The Other Product Liability Claim
Carol P. Michel and Jeffrey N. Amason

APRIL 2010

Generic Preemption Defense: Recent Case Trend
Stephanie Rippee and Ceejaye Peters

MARCH 2010

Arkansas Tort Reform – Who Rules the Rules?
Darby V. Doan and Morgan D. Vaughan

FEBRUARY 2010

The South Carolina Supreme Court Reaffirms the Economic Loss Doctrine
Curtis Ott and Sam Sammataro

DECEMBER 2009

Missing the Link: Speculation Does Not Equal Causation
Edward A. Kendall, Jr. and Robert A. Curley, Jr.

NOVEMBER 2009

One Less Arrow in the Quiver ... Ninth Circuit Court of Appeals Prohibits the Use of Implied Preemption to Show Fraudulent Joinder
Jack B. McCowan, Jr. and Patrick S. Salceda

OCTOBER 2009

Texas Chooses Uniformity on E-Discovery Standard: High Court Enforces Existing Rules as a Means of Change
Jack E. Urquhart and Laura E. De Santos