

## **The Consumer Product Safety Improvement Act of 2008: Deputizing State Attorneys General and Plaintiffs' Lawyers**

**November 3, 2008**

On August 14, President Bush signed the Consumer Product Safety Improvement Act of 2008 (the Act), imposing more stringent standards for consumer product safety. The Act specifically addresses children's products that may contain lead and phthalates; requires third-party testing of products subject to children's safety rules; includes additional requirements for tracking, registering, and advertising children's products; and enhances the Consumer Product Safety Commission's (CPSC) authority to issue product recalls and strengthens its enforcement authority. The Act also allows the CPSC to promulgate new requirements for recall notices.

Notably, Section 218 of the Act, codified as 15 U.S.C.A. § 2073, authorizes state attorneys general to enforce the Act by bringing civil actions seeking injunctive relief for violations of the Act. Further, it allows state attorneys general to deputize private attorneys to assist in the actions. Unless the federal government already has initiated an action, the state will be able to sue for injunctive relief on behalf of the residents of their state to:

- Stop the sale of products that violate CPSC-issued safety standards
- Stop the sale of certain recalled products as announced by the CPSC
- Stop the sale of banned hazardous substances
- Stop the sale of children's products that have not been certified as tested by third-party laboratories once those certification requirements go into effect
- Stop the sale of children's products that lack tracking labels once that requirement goes into effect
- Enforce the prohibitions against stockpiling products in advance of regulatory changes
- Stop the sale of products with safety marks if the use of those marks is unauthorized

Any suit by a state attorney general would be filed in federal court. The state must first give the CPSC notice unless the state determines that it must act immediately to protect the residents of its state from a "substantial product hazard" as defined in the Act. Section 218 limits the remedy available to the state to injunctive relief, not monetary damages, and permits states to use their own protocols when interpreting product safety laws. To the extent that this broadened enforcement

authority can be used in tandem with state regulations and consumer protection laws, the combination may increase exposure to manufacturers, distributors, and retailers of consumer products.

In addition, while the state cannot seek damages or penalties under Section 218, the CPSC reserves the right to become a party to any suit filed by the state. The CPSC is not prohibited from imposing fines or seeking penalties in association with enforcement work done on its behalf by the state. Thus, a state enforcement action, while not itself seeking damages or penalties, could nonetheless lead to financial penalties if the CPSC intervenes in the suit. The Act increased the maximum penalty for aggregate violations from \$1.25 million to \$15 million.

The provision allowing private counsel to be retained to assist the state is also potentially troublesome. Involvement by plaintiffs' lawyers in enforcement actions will likely increase the amount of product liability litigation as modeled on past tobacco litigation. What's more, that litigation could be fueled by information obtained by those attorneys pursuant to their collaborative relationships with the state.

Congress attempted to provide some protection against this "bootstrapping" of public and private actions by restricting private counsel's use of information obtained in the public action. If retained private counsel obtains privileged information through discovery or while assisting in a public enforcement action under Section 218, they may not share or use that information in a private action that may arise out of the same set of facts. Arguably, then, a state's internal investigative documents, interviews, or testing results, for example, would not be available for retained counsel's use in a private civil action.

However, nothing prevents private counsel from benefiting from his or her collaboration with the state to separately seek those materials he or she knows exist and that might be obtained by customary discovery mechanisms or Freedom of Information Act-type requests. Likewise, he or she could advise other counsel to do the same. Further, the Act does not prohibit the state from waiving the privilege voluntarily and sharing information with retained private counsel if the latter pursues a private civil action. Therefore, the protection Congress attempted to provide by erecting an information wall between public and private suits may not be practically effective. Thus, although the Act does not contain an attorneys' fee provision for private counsel, they may nonetheless have an incentive to collaborate with state attorneys general because of the information, leads, and insights that can be gained through the public action and used later in private consumer law litigation.

In sum, Section 218 of the Act provides that:

- State attorneys general have the authority to enforce the Act's injunctive provisions.
- Such suit would be brought in federal court, which may offer defendants better procedural and evidentiary protections than state court or administrative proceedings.
- Although state attorneys general cannot seek damages, if the CPSC intervenes the Act's increased fines and penalties provisions may be applicable.
- States can retain private plaintiffs' counsel to assist them in bringing suit.
- The restriction on private counsel then using information obtained in the public suit may be more porous than protective, thus leading to a potential increase in private consumer claims.

