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A Practioner's Guide to the Consumer Product Safety Act and Navigating the Consumer Product Safety Commission

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I. Introduction

The Consumer Product Safety Commission (CPSC) is a federal agency having broad powers and abilities, including (a) to fine a retail clothing store $3.9 million for failing to report to that agency within 24 hours that it was selling defective clothing;[1] (b) to hold an executive of a company personally liable for a $57 million recall action;[2] (c) to force settlement with a defunct corporation to pay for the cost of a recall;[3] and (d) to be accused by a federal circuit court of "squashing" a children's art supply company and employing a "sinister exercise of discretion."[4] Accordingly, companies that manufacture and distribute products for use in the United States should endeavor to know more about the CPSC, its regulations, and the enabling act under which it operates.

This article investigates the history and scope of the Consumer Product Safety Act[5] (Act), the Consumer Product Safety Improvement Act of 2008[6] (Act of 2008), and the decisions made by the CPSC, which was established to enforce the Act. In so doing, this article performs an analysis relating to the more substantial sections of the Act, including the following: the CPSC's mandatory online database; consumer safety standards; the hazardous product ban and the CPSC's ability to litigate "imminent hazards"; the CPSC's rulemaking procedures; the CPSC's product certification program; mandatory reporting obligations for "substantial product hazards"; mandatory recordkeeping obligations and the CPSC's inspection privileges; penalties and fines for violations of the Act; and an individual's private right of action under the Act. This analysis will illustrate the CPSC's expansive powers and the level of discretion that federal courts continue to provide the CPSC. Finally, this article will provide practical tips to help Illinois practitioners better understand the manner in which they, and their clients, may utilize the Act to their advantage, particularly when defending against product liability suits.

II. The Consumer Product Safety Act and Commission

In 1970, a national study conducted by the National Commission on Product Safety found that existing federal legislation was disjointed, with enforcement mechanisms focused on post-injury civil penalties rather than prevention.[7] In 1972, in response to these findings, Congress established the CPSC, which focused on a series of educational, regulatory, and punitive measures. Under the Act, five commissioners are appointed by the president (with the advice and consent of the Senate) for staggered seven-year terms, with no more than three commissioners to be affiliated with the same political party.[8]

The Act specifically covers "consumer products," defined as:

> [A]ny article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise.[9]

The Act also applies to imported products,[10] but not exported products, unless such products are intended for use in the United States or present an unreasonable risk of injury to consumers in the United States.[11] The Act also incorporates into the enforcement and interpretive powers of the CPSC certain legislation that existed when the Act was enacted.[12] Although the Act provides the CPSC with jurisdiction over a wide variety of products, not all products are covered. For example, other federal agencies have jurisdiction over child resistant packaging, aircraft, alcohol, ammunition, amusement rides, automobiles, boats, car seats, cosmetics, drugs, firearms, foods, medical devices, motorcycles, pesticides, radioactive materials, tires, and tobacco.[13]

In 2008, after a series of high-profile product recalls during 2007 and 2008—including some involving toys containing lead paint, children swallowing magnets that fell out of toys, and dangerous

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cribs—Congress passed the Act of 2008, which modernized the Act, expanded its regulatory mandate, and doubled its budget. These changes were intended to improve the ability of the CPSC to monitor and react to issues relating to product defects and recalls.[14]

III. The Powers and Limitations of the Act and the Act of 2008

While Congress gave the CPSC tremendous powers to regulate the sales of consumer products by manufacturers, distributors, and retail stores, those powers are still limited and defined by the Act and the Act of 2008. The enumerated powers discussed in this section are but a small percentage of the overall provisions of the Act and the Act of 2008, but do present some of the more onerous regulations placed upon businesses and manufacturers.

A. The Commission's Online Database

One of the more interesting provisions contained within the Act of 2008 is the mandate that the CPSC implement a publicly-available, searchable, online database.[15] The database is required to report harm relating to use of consumer products and other products or substances regulated by the CPSC.[16] Moreover, in collecting that information, the CPSC is permitted to receive that information in a variety of ways, but also is required to provide information to manufacturers and private labelers about the contents of those reports.[17]

Specifically, within five business days of receiving a report, the CPSC is required to notify the manufacturer or private labeler of the report.[18] If a report is submitted to the CPSC that does not include the model or serial number of the product, the CPSC shall seek the model and serial number from the person or entity submitting the report and, if no model or serial number is available, a photograph.[19] Thereafter, the CPSC shall submit such information to the manufacturer of the product and make the report available 15 business days after transmitting the report to the manufacturer.[20]

After receipt of the report, the manufacturer or private labeler may, in turn, request that its own comments or response be included in the private database, request that certain information be designated as confidential, request that the information be redacted as a trade secret, or challenge issuance of the report if the manufacturer or private labeler believes that the report contains inaccurate information.[21] In an instance in which materially inaccurate information is included in the report, the CPSC is required to stay publication no more than five additional days and, if the CPSC determines that information contained in the report is materially inaccurate, must either: (a) decline to add the materially inaccurate information; (b) correct the materially inaccurate information in the report or comment and add the report or comment to the database; or (c) add information to correct inaccuracies in the database.[22]

Moreover, the prohibition on the CPSC against including "materially inaccurate information" is not limited to the reporting stage. Rather, if the CPSC determines after its investigation that information previously made available in the database is materially inaccurate, then within seven business days of learning about such information the CPSC is required to either remove the information, correct such information, or add information to correct inaccuracies in the database.[23]

Preventing the CPSC from publishing "materially inaccurate information" was analyzed recently by the Unites States District Court for the District of Maryland in *Company Doe v. Tenenbaum*.[24] In that case, the plaintiff sought to enjoin the CPSC from publishing what the plaintiff deemed to be "materially inaccurate information," specifically arguing that the report the CPSC sought to publish was "baseless and inflammatory and . . . that its publication, besides being unlawful, would cause irreparable harm to its reputation and financial well-being."[25] The dispute arose after an unidentifed local agency submitted an incident report to the CPSC.[26] Within days, the plaintiff submitted medical evidence to the CPSC supporting the plaintiff's contention that the report was materially inaccurate.[27] A back-and-forth dispute between the CPSC and the plaintiff continued over the course of several weeks. During this time, despite the CPSC's acknowledging three times that the information in the report was "materially inaccurate," the CPSC attempted to "purge" the report of this material inaccuracy rather than electing to simply not publish the report.[28]

Against this backdrop, the *Tenenbaum* court conducted a detailed and lengthy analysis of whether the CPSC's acts against the plaintiff constituted violations under the Administrative Procedure Act[29] (APA). Concluding that the CPSC's acts did violate the APA, the court questioned the methods of the CPSC, finding that the acts were arbitrary and capricious.[30] In two particularly scathing rebukes of the CPSC's decision to publish the report, the court wrote that "the [CPSC's] decision to publish the report bears no sensible relation to the purpose the [Act of 2008] aims to advance: to enhance the [CPSC's] capacity to disseminate information to consumers regarding unsafe products."[31] The court also stated that, "[a]lthough the 'related to' standard requires a showing of connection in lieu of causation, neither the enabling

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statute nor the implementing regulations suggests that rank speculation of this sort suffices to show such an association."[32]

The *Tenenbaum* decision is an important one to businesses, and possibly one causing introspection within the CPSC. Not only was *Tenenbaum* a big win for manufacturers challenging the inclusion of unsupported material on the CPSC's website, but also a very high-profile defeat for the CPSC in one of the signature pieces of the Act of 2008.

Similar to its obligation to publish reports of product defects, the CPSC also has certain Freedom of Information Act[33] (FOIA) obligations as a governmental agency. Those obligations are defined within the Act at 15 U.S.C. § 2055(b)(1)[34] and further explained by the Supreme Court in *Consumer Product Safety Commission v. GTE Sylvania, Inc.*[35] In that case, the CPSC obtained various accident reports, most of which were accompanied with claims of confidentiality, and—despite such confidentiality claims—decided to release such accident reports upon FOIA requests from certain consumer advocacy groups.[36] The companies impacted by such a decision moved for a permanent injunction to prevent the CPSC from releasing such information. In arguing against the injunction, the CPSC took the position that the prohibition on disclosure contained within the Act applied only when the CPSC sought to disclose information to the public, but not when served with a FOIA request.[37] When confronted with this issue, the District Court for the District of Delaware permanently enjoined the CPSC from disclosing the submitted accident reports (as well as data compiled about the accidents on a spreadsheet).[38] The Court of Appeals for the Third Circuit later affirmed, noting that

> the information disclosure requirements of the [Act] were meant to protect manufacturers from the harmful effects of inaccurate or misleading public disclosure by the [CPSC], through any means, of material obtained pursuant to its broad information-gathering power. The policies designed to be served by [this section] would be severely undermined, if not eviscerated, were the [CPSC's] interpretation to prevail.[39]

The Supreme Court affirmed both of the lower courts' finding that the CPSC's interpretation of the Act was inconsistent with the legislative history and the plain languge of the Act. In so doing, it held that

> our interpretation of the language and legislative history of [15 U.S.C. § 2055(b)(1)] reveals that any increased burdens imposed on the [CPSC] as a result of its compliance with [Section 2055(b)(1)] were intended by Congress in striking an appropriate balance bewteen the interests of consumers and the need for fairness and accuracy with respect to information disclosed by the [CPSC].[40]

Not all challenges to the disclosure of information pursuant to a FOIA request are sustained, however. One such example occurred in *Daisy Manufacturing Co., Inc. v. Consumer Products Safety Commission*,[41] in which the Court of Appeals for the Eighth Circuit refused to enjoin disclosure of information relating defects of the plaintiff's air rifle and related injuries. Responding to the FOIA request, the CPSC determined that it was required to release certain records from its prior investigation of the plaintiff: namely, in-depth investigation reports, consumer product complaints, and summaries of incident reports. In finding that the CPSC properly released the documents, the Eighth Circuit held that this action was an "informal adjudication," and, as such, would be reversed only if it was deemed to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[42] Finding the CPSC's actions to not be so, the Eighth Circuit found that the CPSC acted reasonably by conducting independent investigations to corroborate information disclosed in each investigation report; released only those documents it independently verified; planned to release a written explanation that it had not determined the cause of the accidents; and planned to release the plaintiff's comments, if the plaintiff so consented.[43]

B. Consumer Safety Standards

In addition to the power and obligation to publish consumer complaints, the CPSC is also authorized to promulgate consumer safety standards.[44] Such standards shall consist of performance requirements, requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.[45] One caveat to this is that standard-making shall be avoided when (a) compliance with voluntary standards would eliminate or adequately reduce the risk of injury, and (b) is likely to lead to substantial compliance with such voluntary standards.[46]

The CPSC's standard-making authority is broadly discretionary and generally its decision to include particular sectors of an industry and not others is not subject to outside challenges. Such a challenge occurred in *O'Keeffe's, Inc. v.*

Consumer Product Safety Commission.[47] There, a glass manufacturer, subject to the Safety Standard for Architectural Glazing Materials,[48] requested an amendment to the regulations to include transparent ceramic materials and wired glass doors, neither of which were subject to this safety standard. The CPSC denied the plaintiff's request. In challenging the CPSC's decision, the plaintiff argued that the CPSC failed to consider relevant factors necessary to determine whether ceramics and wired glass fire doors posed an unreasonable risk of injury.[49] The plaintiff further assumed that, because transparent ceramic materials manufactured by the plaintiff's competitors were being used for similar architectural purposes as the plaintiff's products and the plaintiff's products were being regulated, then the competitors' products should also be regulated. In further support of its argument, the plaintiff submitted a single incident involving transparent ceramics, though no evidence was submitted by the plaintiff that the incident—a student breaking a transparent ceramic window in a door with his elbow—involved an injury or about the severity of that injury.[50]

Rejecting the plaintiff's argument,[51] the Court of Appeals for the Ninth Circuit found that the CPSC was required to undertake a two-part analysis for determining whether a standard was necessary. First, the CPSC must determine that the class of products pose "an unreasonable risk of injury" looking "specifically at transparent ceramics to determine the nature and the extent of the risk of injury associated with transparent ceramics, the need for transparent ceramics, and the probable effect of the amendment on the utility, cost, and availability of transparent ceramics."[52] Second, the CPSC must make and support findings that an amendment is "reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with the product; that the expected benefits of the amendment bear a reasonable relationship to its costs; and that the amendment imposes the least burdensome requirement that prevents or adequately reduces the risk of injury under consideration."[53] Finding that the CPSC met its obligations in rejecting the request for an amendment to the standard, the Ninth Circuit found that "the [CPSC] is not statutorily required to conduct an exhaustive study or to revise its data-gathering systems in response to a request to rulemaking."[54] Relying on the same rationale, the court also rejected the plaintiff's challenge to the wired glass fire doors.[55]

C. Hazardous Product Ban and Power to Litigate Against "Imminent Hazards"

The CPSC also has the power to ban hazardous products where the product (a) presents an unreasonable risk of injury, and (b) no feasible consumer product safety standard would adequately protect the public from the unreasonable risk of injury associated with such product.[56] Products that have been specifically examined by the CPSC under the Act and considered for banning include certain types of lawn mowers,[57] lawn darts,[58] certain types of automatic garage door openers,[59] and certain classes of bicycle helmets.[60] The CPSC also has established regulations relating to durable nursery products for infants and toddlers,[61] and has enacted mandatory toy safety standards.[62]

The CPSC also has the power to file actions in United States district courts where it believes "imminent hazards" exist, through which the CPSC may seek to seize a product or to enjoin the sale or distribution of a product.[63] Moreover, included amongst the statutory relief available to the CPSC are notification of such risk to purchasers, public notice, recall, repair of the product, replacement of the product, and refund for the product.[64]

One of the main methods by which the CPSC seeks hazardous product bans is through the Federal Hazardous Substances Act[65] (FHSA). Under the FHSA, a "hazardous substance" is defined as:

> Any substance or mixture of substances which (i) is toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable or combustible, or (vi) generates pressure through decomposition, heat, or other means, if such substances or mixture of substances may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use, including reasonably foreseeable ingestion by children.[66]

While seemingly axiomatic, "a product cannot be a 'banned hazardous substance' unless it is first determined to be a hazardous substance."[67]

For example, in an opinion issued by the Court of Appeals for the Second Circuit, the court held that the CPSC properly banned a children's art supply—a shaving cream colored with food coloring—when the CPSC determined that it was flammable because it exhibited flashback when tested according to applicable regulations.[68] In that case, the court found that "the contents of a self-pressurized can [of shaving creams, including Rainbow Foam Paint,] are considered to be flammable if flashback (a flame extending back to the dispenser) is obtained at any degree of valve opening."[69] Finding that the art or educational material

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exemption did not apply, the court noted that "a product that is determined to be hazardous within the meaning of the statute cannot be exempt under the regulations, even if it is an art material, if its intended child user is too young to heed a warning label."[70] In addition to banning the sale of Rainbow Foam Paint, by way of additional examples, the CPSC has also banned the sale of fireworks,[71] firework parts,[72] and children's clothing.[73]

The case involving Rainbow Foam Paint involved a complicated and divisive litigation history.[74] After Linda Weill invented "Rainbow Foam Paint" in 1985, a private consumer organization in 1990 wrote in its magazine that Rainbow Foam Paint was a possible hazard due to flammability. Weill then notified the consumer organization that its allegations were inaccurate and demanded an immediate retraction. Even after the consumer organization agreed to print the retraction, Weill contacted it and stated that she still intended to sue for money damages. The consumer organization decided against printing a retraction and referred the matter to the CPSC. The CPSC subsequently obtained cans of Rainbow Foam Paint. In testing the cans, the CPSC determined that Rainbow Foam Paint was flammable when tested in the upside down position. The CPSC then contacted Weill and explained that, as a result of the testing, the CPSC classified Rainbow Foam Paint as a banned hazardous substance. As the Ninth Circuit explained, "There ensued a rancorous exchange of correspondence between CPSC staff and counsel for Ms. Weill as to whether the substance should be categorized as a 'banned hazardous substance' and enforcement action undertaken. It is apparent that Weill and her counsel became increasingly frustrated over what they perceived to be excessive threats on the part of staff of the [CPSC] in the absence of any action by the [CPSC] officially declaring the product a banned substance under the provisions of the Act."[75] Acting upon the CPSC's threats, the U.S. Attorney's Office in New Haven, Connecticut, filed a seizure complaint in federal court naming as the defendant the Rainbow Foam Paint canisters stored at a preschool toy distribution warehouse in Connecticut. Weill and her company, X-Tra Art, Inc., then filed an action in the U.S. District Court for the Northern District of California seeking to enjoin the Connecticut action. The Ninth Circuit dismissed that action, holding that "where the [CPSC] opts to proceed in court on an allegation that the substance is a banned hazardous substance, the issue should be litigated by the manufacturer in that forum."[76]

Possibly more disturbing than a product ban case like the one involving Rainbow Foam Paint, part of the "substantial product hazard" section of the Act apparently permits the CPSC to place companies in administrative limbo. For example, the Court of Appeals for the D.C. Circuit held in *Reliable Automatic Sprinkler Co., Inc. v. Consumer Product Safety Commission*[77] that the CPSC can issue a statement of its intentions to make a preliminary determination that a product is defective and can request that the company submit to a voluntary corrective action without (a) triggering judicial review or (b) even allowing for a determination of whether the CPSC has jurisdiction over the class of products at issue.[78] There, the plaintiff, Reliable Automatic Sprinkler Co., Inc. (Reliable), was a manufacturer of automatic sprinkler heads that were incorporated into automatic fire sprinkler systems installed in commercial buildings.[79] Consistent with similar investigations and administrative enforcement proceedings that the CPSC brought against other manufacturers of sprinkler heads, the CPSC informed Reliable that it intended to make a preliminary determination that Reliable's sprinkler heads constituted a "substantial product hazard" and requested that Reliable take voluntary corrective action to address the alleged hazards.[80] At the time that the CPSC sent Reliable the letter and up to and including the time that the D.C. Circuit issued a ruling on Reliable's appeal, however, the CPSC had

> not yet made a formal determination that the sprinkler heads present a "substantial product hazard," or even filed an administrative complaint initiating the administrative proceedings that would be required before the agency could make such a determination. Indeed, the [CPSC] has not as yet made a record determination that it has jurisdiction over Reliable's sprinkler heads.[81]

And, in affirming dismissal of Reliable's complaint, the D.C. Circuit acknowledged that the CPSC assumed jurisdiction existed, writing: "Certainly the [CPSC's] investigation *assumes* for now that it has jurisdiction to regulate sprinkler heads. But the [CPSC] has not yet made any determination or issued any order imposing any obligation on Reliable, denying any right of Reliable, or fixing any legal relationship."[82]

D. Commission Rulemaking Procedures

For the CPSC to introduce a rule relating to consumer product safety, certain specific procedures must be followed. The rulemaking must be initiated by an advance notice of proposed rulemaking, through which (a) the product and nature of risk of injury associated with the product

are identified; (b) a summary of each regulatory alternative under consideration is identified; (c) information is identified relating to any existing standard, together with a summary of the reasons why the CPSC believes the proposed standards are not adequate; (d) interested persons or entities are invited to submit comments, regulatory alternatives, or other possible alternatives for addressing the risks; (e) any person or entity is invited to submit an existing standard or portion of a standard as a proposed consumer product safety standard; and (f) any person or entity is invited to submit to the CPSC a statement of intention to modify or develop a voluntary consumer product safety standard to address the risk of injury identified as well as a description of the plan to modify or develop the standard.[83] Each of the various sections of the notice identified above carry with it certain statutorily-prescribed timeframes for response.[84]

If during the notice period, the CPSC receives a proposed standard that is likely to result in the elimination or adequate reduction of the risk of injury identified in the notice and will result in substantial compliance with the proposed standard, the CPSC shall terminate any proceeding to promulgate a new rule and may publish and rely upon the voluntary standard to eliminate or reduce the risk of injury.[85]

It is important to note, however, that the CPSC's rulemaking authority is subject to strict compliance with the procedures outlined in the Act. For example, in *Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Commission*,[86] the Court of Appeals for the Fourth Circuit set aside the CPSC's rule as it related to testing under the Small Parts Rule,[87] finding that the CPSC failed to provide notice and comment required for amendments to rules.[88] In response, the CPSC argued that this "rule" was merely an "interpretation" of a current rule and not a new rule. In rejecting this argument, the court explained that "interpretative rules simply state what the administrative agency thinks the statute means," whereas "a substantive or legislative rule . . . has the force of law, and creates new law or imposes new rights or duties."[89] Based on that definition, the Fourth Circuit held that "the language of the statement and related comments establishes that more is involved than mere 'interpretation,' because the proposed statement has the clear intent of eliminating a former exemption and of providing the [CPSC] with power to enforce violations of a new rule."[90]

And it is also worth noting that the CPSC's decision to terminate or not to start[91] a rulemaking process is not easily overturned. In *Consumer Federation of America v. Consumer Product Safety Commission*,[92] the Court of Appeals for the D.C. Circuit upheld the CPSC's decision—after a consent decree with ATV distributors was entered—to terminate a rulemaking procedure begun against the all-terrain vehicle industry. The matter began when the CPSC published an Advance Notice of Proposed Rulemaking, following 161 deaths and 66,956 ATV-related injuries occurring over a three-year span in the mid-1980s.[93] After further study, the CPSC decided to file a civil action against manufactures of ATVs to gain a judicial determination that ATVs are an "imminently hazardous consumer product" through which the CPSC could effect temporary or permanent relief as necessary to protect the public, which could include certain product bans.[94] During the course of the litigation, the CPSC and ATV manufacturers entered into a 10-year consent decree, which required extensive consumer education, an immediate prohibition on the sale of new three-wheeled ATVs, and a good faith attempt to develop consensus standards.[95]

Challenging the CPSC's decision to end the rulemaking, a number of consumer advocacy groups sued the CPSC, arguing that it acted arbitrarily in failing to ban the sale of adult-sized ATVs for use by children.[96] Holding that the CPSC acted properly, the D.C. Circuit focused on two particular points: (1) that "[u]nder the [Act], a youth ban could not be implemented absent a finding that 'less burdensome' requirements were inadequate to deal with the problem;"[97] and (2) "the Consent Decree regime should be carried out for a reasonable time before further measures are added to the regulatory agenda."[98]

E. Product Certification Program

All manufacturers and private labelers are required to certify—based on a test of each product or upon a reasonable testing program—that their product complies with all rules, bans, standards, or regulations applicable under the Act or any other incorporated acts enforced by the CPSC under the Act, and shall specify the rule, ban, standard, or regulation applicable to the product.[99] Based on the Act of 2008, manufacturers and private labelers are required to submit certain products—specifically, children's products, including those containing or relating to lead paint, cribs, pacifiers, small parts, children's metal jewelry, and baby bouncers, walkers, and jumpers—to third party testing before importation or distribution.[100]

F. Mandatory Reporting for "Substantial Product Hazards"

One of the most troublesome sections for manufacturers of consumer products is found in 15 U.S.C. § 2064,[101] through which Congress created a mandatory reporting requirement for manufacturers

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that fail to comply with a voluntary safety standard, fail to comply with any other rule, regulation, standard, or ban under the Act, whose product contains a defect, or whose product creates an unreasonable risk of serious injury or death.[102] Importantly, where a company so reports, such reporting may not be used as a basis for criminal charges, unless the offense requires a showing of intent to defraud or mislead.[103]

Failing to report a violation can carry with it one of the stiffest penalties that the CPSC will levy under the Act. A prime example of the penalty provisions is shown in *United States v. Mirama Enterprises, Inc.*[104] In that case, the defendant distributed between 30,000 and 40,000 juice extractors in the United States that utilized a rapidly spinning metal grater. The defendant began to receive consumer reports of failed juicers, with such failure manifesting itself in the form of exploding juicers causing pieces of plastic cover and portions of the separator screen being flung as far as eight feet from the juicer.[105] Despite receiving complaints from 23 consumers—including reports of a juicer exploding in a user's face, a report of a flying blade slicing the hand of another, and one report of a woman being taken by ambulance to the hospital—the defendant failed to report any of these malfunctions to the CPSC. After an evidentiary hearing, the defendant was ordered to pay $300,000 plus costs.[106] Affirming the district court's decision, the *Mirama Enterprises* court noted,

> [The defendant] was required to report not merely the twenty-three juicers that shattered, but the 30,000 to 40,000 juicers in the stream of commerce that might well pose an unreasonable risk of serious injury to consumers. When it failed to do so, [the defendant] committed 30,000 to 40,000 reporting offenses. Consequently, the district court could have imposed a penalty of up to $1.5 million. The court did not abuse its discretion in imposing a penalty of one-fifth the maximum amount.[107]

The harshness of the reporting policy does not end at the potential fine imposed, or that that fine is based on all such products in the stream of commerce. Instead, a company may be fined where it fails to report ***even when a product turns out not to be defective.*** Indeed, in *Mirama Enterprises*, the Ninth Circuit explained:

> It makes sense for Congress to have imposed fines for reporting failures even when a product turns out not to be defective. Information about a possible defect triggers the duty to report, which in turn allows the [CPSC] either to conclude that no defect exists or to require appropriate corrective action. Congress's decision to impose penalties for reporting violations without requiring proof of a product defect encourages companies to provide necessary information to the [CPSC].[108]

Moreover, *res judicata* does not apply where the CPSC first institutes an action to prevent distribution of hazardous products and then, later, files another action seeking civil penalties for failing to timely report defects in a defendant's products.[109] In other words, the CPSC may properly sue a company to enjoin distribution of the product and then later sue it again for money damages for failing to report the earlier consumer complaints about the same product line.

Out of this mandatory reporting doctrine, Illinois has developed a duty to warn doctrine based, in part, on public announcements made by the CPSC.[110] Under this doctrine, a party—otherwise not subject to the Act—is considered placed on notice of a potential danger when the CPSC articulates a concern about use of a product used in conjunction with the non-covered party's product.[111] Under the Illinois treatment of this duty to warn, the non-covered party is deemed to have a subsequent duty to warn customers who may encounter a danger based on the corresponding use of the non-covered party's product in conjunction with the covered product of another party.[112] In *Adams v. Northern Illinois Gas Co.*,[113] the Illinois Appellate Court First District and, subsequently, the Illinois Supreme Court held that Northern Illinois Gas Company ("NI-Gas") owed consumers a duty to warn about the dangers of using its gas with a type of flexible brass gas connector that, when used with the company's gas containing a sulfur-component, would become brittle. Holding that the defendant had a "superior knowledge" and "helped to create the dangerous condition," the Illinois Supreme Court held "that NI-Gas owned a common law duty of reasonable care with respect to the brazed connectors."[114]

G. Mandatory Recordkeeping and Inspection Privileges

The Act also requires companies to maintain certain records and permits the CPSC to inspect those records.[115] As explained by the District Court for the Northern District of Illinois,[116] and the Court of Appeals for the Seventh Circuit,[117] a company's recordkeeping obligations under the Act and the CPSC's inspection privileges under the Act are particularly broad. In *In re Establishment*

Inspection of Skil Corp.,[118] the CPSC applied for and received an administrative warrant to inspect and copy the books, records, and papers of the defendant as they related to incidents involving the defendant's circular saw where the lower blade guard might have failed or otherwise did not properly shield the blade.[119] Prior to applying for the warrant, the CPSC conducted inspections of the defendant's facility twice in June 1986 as a follow-up to two incidents involving persons injured by the defendant's circular saw. In September 1986, the CPSC attempted to conduct a follow-up inspection after being notified of 16 additional injuries, including two that resulted in death. At that time, the defendant refused to provide the CPSC access to any records relating to incidents involving circular saws and to files containing engineering information.[120]

Finding that the CPSC had the power to conduct such an inspection—even where it did not adopt recordkeeping rules relating to circular saws or defining what records must be kept—the district court determined that, so long as the documents were relevant and not subject to privilege, the CPSC had the right to inspect them.[121] In its decision, the district court also determined the level of probable cause necessary to obtain an administrative search warrant, holding that such probable cause "may be based either on specific evidence of an existing violation or a general administrative enforcement plan."[122] Moreover,

> the administrative probable cause standard does not require the [CPSC] to present sufficient information to enable the Magistrate to determine whether the consumer product has a defect or presents a substantial product hazard. Rather, the application must provide enough information to enable the Magistrate to decide whether the agency's decision to conduct an inspection to aid its investigation of those questions was itself a reasonable decision. Such a showing provides "specific evidence of an existing violation".[123]

Equally concerning, the Seventh Circuit—despite recognizing that "the search authorized by the district court is extraordinarily broad," that the defendant's "records go back to 1924, and the [CPSC] wants all of them"[124]—held that "all reasonable deference must be shown the [CPSC's] judgment on the necessary scope of the search" and that "[t]he warrant is reasonable in the circumstances."[125]

H. Penalties and Fines

If a manufacturer fails to comply with the Act, such violation can carry with it potentially serious fines and civil penalties,[126] as well as criminal penalties.[127] Criminal penalties include fines or imprisonment for not more than five years, or both, and apply to individual directors, officers, or agents of a corporation who knowingly and willfully authorize, order, or perform any of the acts or practices constituting a violation.[128]

The CPSC is not authorized to seek civil penalties in an administrative proceeding, but rather only before a district court.[129] The discretion of a district court to assess civil penalties, however, is quite broad. As developed by a number of United States courts of appeal, to determine the amount of a penalty, a district court should consider "(1) the good or bad faith of defendants; (2) the injury to the public; (3) the defendants' ability to pay; (4) the desire to eliminate the benefits derived by the violations; and (5) the necessity of vindicating the authority of [the federal agency]."[130]

In further defining these factors, the Court of Appeals for the Eleventh Circuit in *United States v. Danube Carpet Mills, Inc.* found that the "public harm" factor did not require actual injury.[131] Additionally, in determining a defendant's ability to pay a fine, the *Danube* court also found that it is appropriate to gauge the net worth of the defendant, and rejected defendant's arguments that "(1) the relevant gauge of ability to pay is the profit earned from the nonconforming carpet and (2) calculation of net worth should focus on liquid, not illiquid, assets."[132] Moreover, the civil penalties can extend to corporate officers, as well as the corporation.[133] Further, beyond civil penalties being assessed against a defendant, a defendant's employees or officers may be criminally liable for making false statements to a CPSC investigator.[134]

I. Private Right of Action

Under the Act, individuals may sue manufacturers for knowing (including willful) violations of any rule or order for matters in controversy that exceed $10,000, exclusive of interest and costs.[135] Pursuant to the Act, a private cause of action for damages exists for "any person who is injured by virtue of a knowing violation of a 'consumer product safety rule, or any other rule or order' issued by the [CPSC], and provides attorney fees to the prevailing plaintiff."[136] The key phrase is "rule or order," as the private right of action does not extend to violations of the Act itself. Recovery may, in addition to reasonable attorneys' fees, include damages sustained and reasonable expert witness fees.[137] But, it should be noted that where a plaintiffs' recovery is less than $10,000, the court may deny costs to the plaintiff and, in addition,

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may impose costs on the plaintiff.[138] Additionally, the attorney general of an individual state may also bring suit on behalf of the citizens of that state, provided that the state gives written notice to the CPSC prior to initiating the suit.[139] The CPSC may intervene also.[140]

Because of the distinction, "rule or order," set out in the Act, courts have rejected private rights of action for claimed violations of the Act's mandatory reporting provisions[141] where the CPSC did not mandate standards that would have prevented the injury, even where the CPSC could have, and where a component part of the product was covered by the Act.[142] Additionally, courts have rejected private rights of action for claims of punitive damages under the Act.[143] Finally, a private right of action has been rejected where a party sought to hold a defendant manufacturer liable for failing to utilize child-proof packaging for a prescription drug container.[144] But, a private right of action has been found to exist where the CPSC specifically banned the sale of a certain product in certain circumstances, like, for example, the sale of lawn darts.[145]

IV. Using the Act and the Act of 2008 to Your Advantage

While the Act creates a number of disadvantages for businesses, it also presents certain opportunities. Such advantages include: (a) additional defenses to product liability suits in states (like Illinois) in which the risk-utility test is utilized; (b) preemption of certain state law claims; and (c) the very limited ability of private individuals to challenge a company's settlement with the CPSC. Each advantage is discussed below.

A. Evidence of Compliance with the Act

Because the Act serves as a mandatory standard, companies that face private suits can utilize compliance with the Act or cooperation with the CPSC to their benefit. First, in states in which the court has adopted the risk-utility test for examining whether a product is defective or not, including Illinois, compliance with the Act can be introduced to demonstrate that the product was "state of the art"[146] and to defend against "alternative design"[147] attacks.[148] Second, where the CPSC investigates but does not find a product defect, companies can and should offer such non-finding as persuasive evidence that the company's product is not defective.

Illinois is one of a handful of states in which the risk-utility test has been adopted.[149] Under this test, to determine whether a product is unreasonably dangerous, a series of factors is weighed, such factors include:

> (1) The usefulness and desirability of the product—its utility to the user and to the public as a whole.
>
> (2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.
>
> (3) The availability of a substitute product which would meet the same need and not be as unsafe.
>
> (4) The manufacturer's ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.
>
> (5) The user's ability to avoid danger by the exercise of care in the use of the product.
>
> (6) The user's anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or the existence of suitable warnings or instructions.
>
> (7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.[150]

Illinois also separately has adopted a number of other factors, though the list is meant to be suggestive and not inclusive.[151] Those additional factors include:

> (1) the appearance and aesthetic attractiveness of the product; (2) its utility for multiple uses; (3) the convenience and extent of its use, especially in light of the period of time it could be used without harm resulting from the product; and (4) the collateral safety of a feature other than the one that harmed the plaintiff.[152]

The Illinois Supreme Court dealt with the interplay between the risk-utility test and a defendant's compliance with the Act in *Calles v. Scripto-Tokai Corp.* in 2007.[153] There, the plaintiff sought to recover damages in strict liability and negligent design when a three-year-old child died of smoke inhalation in a fire that she allegedly started by using one of the defendant's products.[154] The trial court granted summary judgment to the defendant, finding that the defendant

neither owed a duty to plaintiff nor breached any such duty.[155] The appellate court reversed, finding that the risk-utility test did not apply to a simple device as a lighter.[156] While the Illinois Supreme Court affirmed the appellate court based on questions of material fact, the defendant utilized findings of the CPSC to attack the plaintiff's expert's opinions as they related to a feasible alternative design and whether the alternative design met regulatory standards.[157] To that end, the defendant argued that

> the [CPSC], the regulatory body for these products, required safety devices on cigarette lighters beginning in 1994, but exempted utility lighters. It was not until 1999 that CPSC required safety devices on utility lighters. [Citation omitted.] CPSC exempted utility lighters because it was concerned about "flashbacks" (the build up of gas and resultant sudden flash when a lighter was not ignited properly). Specifically, CPSC feared that if a child-resistant device on a utility lighter needed to be reset between attempts, this could cause a delay in ignition, resulting in the increased risk of flashback. [The defendant] maintains that this concern shows that some of the child-resistant options proffered by [the plaintiff's expert] in his affidavit were not, in fact, feasible. [The defendant] also disputes [the plaintiff's] claim that there would be no impairment to the [lighter] from modification with a child-resistant safety device since she cites no evidence in support of her argument.[158]

Although the court considered the defendant's arguments and accepted its evidence of compliance, it did find a question of fact that precluded summary judgment.[159]

Other Illinois courts likewise have held that evidence of compliance with the Act is proper evidence. In *Hubbard v. McDonough Power Equipment, Inc.*,[160] the Illinois Appellate Court Fifth District reversed the trial court, which had ruled that such evidence was inadmissible. In holding that this evidence was, in fact, admissible, the *Hubbard* court explained that Illinois precedent had established that "a defendant in such a products liability case 'should be allowed to show that a given alternative design is not required by Federal regulations.'"[161] Commenting on this premise further, the *Hubbard* court explained that if

> the product is in compliance with national standards, the finder of fact may well conclude that the product is not defective or that the defect is not unreasonably dangerous. Moreover, such evidence does not improperly remove the focus of the inquiry from the product since it merely indicates that the product, not the manufacturer's conduct, conforms to national standards.[162]

An additional evidentiary advantage exists for a company when the CPSC investigated its product but did not take enforcement action against the product, which serves as proof that the product was not defective.[163] Such a situation arose before the U.S. Court of Appeals for the Sixth Circuit in *Cummins v. BIC USA, Inc.*[164] In that case, a plaintiff sought to recover damages against the defendant, alleging that the defendant's product was defective insomuch as the child-safety guard was easily removed from the lighter. After the jury found BIC not liable, the plaintiff moved for a new trial and eventually appealed, arguing that the trial court erred in allowing the defendant to introduce evidence of the failure of the CPSC to take action concerning the type of lighter that caused the plaintiff's injuries. In determining that the introduction of such evidence was not error, the Sixth Circuit relied on another of its decisions[165] and a decision of the District Court for the District of Maine,[166] where, in each, the courts determined that evidence that the CPSC failed to act was barred only where there was a

> "complete failure by the CPSC to engage in activity on a product; [and] that failure is not to be introduced into evidence as somehow implying that a particular product is not unsafe. [But, w]here the CPSC has engaged in activity, on the other hand, those activities are admissible even if they lead ultimately to a decision not to regulate, just as an ultimate decision to regulate is admissible . . . . They are not 'failure[s] to take any action.'"[167]

B. Preemption of Certain State Law Claims

Courts interpreting the Act also have found that a number of state law tort claims are preempted by the Act. For example, state law failure-to-warn claims are preempted by the FHSA.[168] What this holding means, practically, is that to the extent that a plaintiff or his expert argues that a defendant's label "should have

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included additional or different warnings not required by the FHSA or its regulations, those claims are preempted."[169] This holding additionally means that no liability will attach to a manufacturer in a private right of action suit under the FHSA, provided that the manufacturer complies with the labeling requirements of the FHSA.[170]

C. Very Limited Right to Challenge Settlement with Commission

One particularly important lesson to draw from the above-discussed cases is that the CPSC does not like to have its authority questioned. From recall actions that put companies out of business[171] to multi-million dollar fines,[172] the CPSC can and does come down hard on companies that violate the Act. But, on those occasions when companies voluntarily comply with the Act and enter into settlement agreements, private individuals find little, to no, success in challenging the terms of those settlement agreements. For example, in *Mahoney v. Consumer Products Safety Commission*,[173] the Third Circuit held that the CPSC's decision to enter into and to accept a settlement with the manufacturer of a BB gun was not subject to judicial review.[174] Moreover, as illustrated by the D.C. Circuit's decision in *Consumer Federation of America v. Consumer Product Safety Commission*, where a company enters into a consent decree with the CPSC, a subsequent decision by the CPSC to terminate a rulemaking session against the same company or industry is not likely to be overturned.[175]

V. Conclusion

The Consumer Product Safety Act and the Consumer Product Safety Improvement Act of 2008 present manufactures, distributors, and others in the supply chain with very precise rules that must be followed. Given the scope of the products over which it has jurisdiction and the stiff penalties that may be assessed for violating its rules and regulations, companies should be ever mindful of their responsibilities under the Act, particularly those required under the mandatory reporting requirements. And, while the Act is possibly more problematic for businesses than inherently good, compliance with the Act does present companies opportunities for additional defenses and preemption of state law claims.

(Endnotes)

1 Ron Nixon, *Ross Stores Fined in Sales of Defective Clothing*, The New York Times (June 20, 2013), http://www.nytimes.com/2013/06/21/business/ross-stores-fined-in-connection-with-defective-childrens-clothing.html?_r=0.

2 Andrew Scurria, *CEO Sues to Escape CPSC's $57M Buckyballs Recall Suit*, Law360.com (Nov. 12, 2013, 5:15 PM), http://www.law360.com/articles/487981/print?section=productliability.

3 *CEO Sues to Escape*, *supra* note 2 ("In June, the agency obtained a settlement from **Baby Matters LLC** forcing the defunct company to pay for a recall of a portable baby recliner, signaling that it would not shy away from pursuing companies even after they go out of business.").

4 *United States v. Articles of Banned Hazardous Substances Consisting of an Undetermined Number of Cans of Rainbow Foam Paint*, 34 F.3d 91, 99 (2d Cir. 1994).

5 15 U.S.C. §§ 2051–2089.

6 Pub. L. No. 110-314, 122 Stat. 3016 (2008).

7 *See, e.g.*, Robert A. Faller, *State Implementation of the Consumer Product Safety Act*, 2 Hofstra L. Rev. 693 (1974) (discussing National Commission on Product Safety report).

8 15 U.S.C. § 2053.

9 *Id.* § 2052.

10 *Id.* § 2066.

11 *Id.* § 2067.

12 15 U.S.C. § 2079. The acts that Congress incorporated into the Consumer Product Safety Act (Act), and with which the CPSC is empowered to regulate, are as follows: (a) the Flammable Fabrics Act of 1953, 15 U.S.C. § 2079(b), pertaining to mandatory standards used to manufacture clothing items, interior furnishings, and nonfabric raw materials; (b) the Refrigerator Safety Act of 1956, 15 U.S.C. § 2079(c), which requires all refrigerator manufacturers to equip products with a device to allow the refrigerator to be opened from the inside; (c) the Federal Hazardous Substances Act of 1960, 15 U.S.C. § 2079(a), which governs all toxic, corrosive, flammable, pressure-generating, irritant, or strong sensitizer products, and requiring manufacturers to label products with a warning alerting consumers to the hazard presented (the Federal Hazardous Substances Act also bans any children's product containing a hazardous substance that a child could access as well as allowing for the ban or regulation of products for which a warning would be insufficient to protect a consumer from potential harm, 15 U.S.C. § 1262(e)); (d) the Poison Prevention Packaging Act of 1970, 15 U.S.C. § 2079(a), which requires certain household products be packaged in containers that are difficult for children under the age of five to open within a reasonable amount of time; (e) the Children's Gasoline Burn Prevention Act of 2008, Pub. L. No. 110-278, 122 Stat. 2602 (2008), which mandates certain child-resistant closures for portable gasoline containers; and (f) the Virginia Graeme Baker Pool and Spa Safety Act of 2008, 15 U.S.C. § 8001 *et seq.*, which requires manufacturers to design against hidden drain hazards in pools and spas, as well as design and install additional anti-entrapment systems when there is a single main drain.

13 Consumer Products Safety Commission, *Products Under the Jurisdiction of Other Federal Agencies and Federal Links*, http://www.cpsc.gov/en/Regulations-Laws--Standards/Products-Outside-CPSCs-Jurisdiction/ (last visited Feb. 6, 2014).

14 The changes included: (a) creating a publicly-searchable website, identifying reports of products causing injury, illness, or death, or risks of injury, illness, or death associated with consumer products; (b) requiring that the CPSC issue mandatory federal safety standards for durable infant nursery products; (c) setting new limits on lead-based paint utilized in consumer and children's products; (d) requiring third-party testing and certification of certain children's products; (e) authorizing more direct engagement with foreign agencies tasked with monitoring consumer product safety; (f) enabling the CPSC to order mandatory recalls; (g) prohibiting the sale or resale of recalled products; (h) requiring tracking labels

on children's products; (i) increasing maximum civil and criminal penalties for violations of CPSC laws; and (j) establishing whistleblower protections for employees of manufacturers, retailers, distributors, or private labelers. Consumer Product Safety Commission, 2011–2016 U.S. Consumer Product Safety Commission Strategic Plan 5 (2011), *available at* https://www.cpsc.gov//PageFiles/123374/2011strategic.pdf.

[15] 15 U.S.C. § 2055A(a)(1).

[16] *Id.* § 2055A(b)(1)(A).

[17] *Id.* § 2055A(c).

[18] *Id.* § 2055A(c)(1).

[19] *Id.* § 2055A(c)(5)(A).

[20] 15 U.S.C. § 2055A(c)(5)(A).

[21] *Id.* § 2055A(c)(2)(A)–(C).

[22] *Id.* § 2055A(c)(4).

[23] *Id.* § 2055A(c)(4)(B).

[24] *Company Doe v. Tenenbaum*, 900 F. Supp. 2d 572 (D. Md. 2012). It is worth noting that, in this case, the plaintiff sought to seal the entire case, including filing as "Company Doe." In granting this motion, the court explained that:

> Although the law favors access to judicial records, the facts of this case overcome this presumption. The challenged report is materially inaccurate, injurious to Plaintiff's reputation, and risks harm to Plaintiffs (sic) economic interests. To obviate such harm, Plaintiff sought, and successfully obtained, an injunction evermore enjoining the report's publication. However, were the Court to unqualifiedly unseal the case, Plaintiff would sacrifice the same right it sought to safeguard by filing suit.

Tenenbaum, 900 F. Supp. 2d at 609. The court further granted plaintiff's request to proceed as "Company Doe," finding that "revelation of Plaintiff's identity would yield the very injury that is the cynosure of the underlying litigation." *Id.* at 611.

Despite the district court's holding, which appeared to offer a powerful tool to companies seeking to prevent disclosure of its identity (which would in turn lead to discovery of the product at issue), the disclosure of which would injure a company's reputation and harm its economic interests, the Fourth Circuit reversed the district court's decision in *Company Doe v. Public Citizen*, 12-2209, 2014 U.S. App. LEXIS 7113 (4th Cir. Apr. 16, 2014). Unfortunately for companies seeking to rely on the *Tenenbaum* decision, the Fourth Circuit explained:

> A corporation very well may desire that the allegations lodged against it in the course of litigation be kept from public view to protect its corporate image, but the First Amendment right of access does not yield to such an interest. The interests that courts have found sufficiently compelling to justify closure under the First Amendment include a defendant's right to a fair trial before an impartial jury; protecting the privacy rights of trial participants such as victims or witnesses; and risks to national security. Adjudicating claims that carry the potential for embarrassing or injurious revelations about a corporation's image, by contrast, are part of the day-to-day operations of federal courts. But whether in the context of products liability claims, securities litigation, employment matters, or consumer fraud cases, the public and press enjoy a presumptive right of access to civil proceedings and documents filed therein, notwithstanding the negative publicity those documents may shower upon a company.

Public Citizen, 2014 U.S. App. LEXIS 7113, at *55 (internal citations omitted).

[25] *Id.* at 577.

[26] *Id.* at 576.

[27] *Id.*

[28] *Id.*

[29] *See* 5 U.S.C. § 706(2)(A).

[30] *Tenenbaum*, 900 F. Supp. 2d at 593.

[31] *Id.*

[32] *Id.* at 594–95.

[33] 5 U.S.C. § 552.

[34] Section 2055(b)(1) of the Act states:

> Except as provided by paragraph (4) of this subsection, not less than 15 days prior to its public disclosure of any information obtained under this Act, or to be disclosed to the public in connection therewith (unless the [CPSC] publishes a finding that the public health and safety requires a lesser period of notice), the [CPSC] shall, to the extent practicable, notify and provide a summary of the information to, each manufacturer or private labeler of any consumer product to which such information pertains, if the manner in which such consumer product is to be designated or described in such information will permit the public to ascertain readily the identity of such manufacturer or private labeler, and shall provide such manufacturer or private labeler with a reasonable opportunity to submit comments to the [CPSC] in regard to such information. The [CPSC] shall take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of this Act. In disclosing any information under this subsection, the [CPSC] may, and upon the request of the manufacturer or private labeler shall, include with the disclosure any comments or other information or a summary thereof submitted by such manufacturer or private labeler to the extent permitted by and subject to the requirements of this section.

15 U.S.C. § 2055(b)(1).

[35] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

[36] *GTE Sylvania*, 447 U.S. at 106.

[37] *Id.* at 107.

[38] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 443 F. Supp. 1152, 1162 (D. Del. 1977).

[39] *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 598 F.2d 790, 811–12 (3d Cir. 1979).

[40] *GTE Sylvania*, 447 U.S. at 123–24.

[41] *Daisy Mfg. Co., Inc. v. Consumer Prod. Safety Comm'n*, 133 F.3d 1081 (8th Cir. 1998).

[42] *Daisy Mfg. Co.*, 133 F.3d at 1083 (citing 5 U.S.C. § 706(2)(A) (1994)).

[43] *Id.*

[44] 15 U.S.C. § 2056.

[45] *Id.* § 2056(a)(1)–(2).

[46] *Id.* § 2056(b)(1).

[47] *O'Keeffe's, Inc. v. Consumer Prod. Safety Comm'n*, 92 F.3d 940 (9th Cir. 1996).

[48] 16 C.F.R. §§ 1201.1(c)(1), 1201.2(a)(10).

[49] *O'Keeffe's*, 92 F.3d at 942.

[50] *Id.* at 943.

[51] A particularly strong dissent was lodged to the majority's opinion in *O'Keeffe's*. In one particularly scathing commentary on the majority's

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determination that one incident was insufficient to merit amending the standard, Judge Reed wrote: "As Congress recognized, when your intelligence tells you that something will create an injury and that it seems conceptually clear that an injury will occur, it is primitive to wait until a number of people have lost their lives, or sacrificed their limbs before we attempt to prevent those accidents." *Id.* at 950 (Reed, J., dissenting) (internal quotation marks omitted).

[52] *Id.* at 942 (majority opinion).

[53] *Id.* (internal quotation marks omitted).

[54] *O'Keeffe's*, 92 F.3d at 943 (citing *Consumer Fed'n of Am. v. Consumer Prod. Safety Comm'n*, 883 F.2d 1073, 1078 (D.C. Cir. 1989)).

[55] *Id.* at 944–45.

[56] 15 U.S.C. § 2057.

[57] Lawn Mower Standard, Pub. L. No. 97-35, § 1212, 95 Stat. 357 (1981).

[58] An Act to provide that the Consumer Product Safety Commission Amend its Regulations Regarding Lawn Darts, Pub. L. No. 100-613, 102 Stat. 3183 (1989).

[59] Consumer Product Safety Improvement Act of 1990, Pub. L. No. 101-608, § 203, 104 Stat. 3110 (1990).

[60] Child Safety Protection Act, Pub. L. No. 103-267, § 205, 108 Stat. 722 (1994).

[61] Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, § 104, 122 Stat. 3016 (2008), *amended by*, An Act to provide the Consumer Product Safety Commission with Greater Authority and Discretion in Enforcing the Consumer Product Safety Laws, and for Other Purposes, Pub. L. No. 112-28, 125 Stat. 273 (2011).

[62] *Id.* at § 106.

[63] 15 U.S.C. § 2061.

[64] *Id.*

[65] 15 U.S.C. § 1261.

[66] *Id.* § 1261(f)(1)(A).

[67] *United States v. Articles of Banned Hazardous Substances Consisting of an Undetermined Number of Cans of Rainbow Foam Paint*, 34 F.3d 91, 96 (2d Cir. 1994) [hereinafter *Rainbow Foam Paint*] (internal quotation marks omitted) (quoting 16 C.F.R. § 1500.3(C)(6)(viii) (1993)).

[68] *Rainbow Foam Paint*, 34 F.3d at 91.

[69] *Id.* at 97.

[70] *Id.* at 98 (footnote omitted).

[71] See, *e.g.*, *United States v. Midwest Fireworks Mfg. Co., Inc.*, 248 F.3d 563 (6th Cir. 2001) (upholding permanent injunction banning defendants from selling 79 types of fireworks in violation of the FHSA).

[72] *United States v. Focht*, 882 F.2d 55 (3d Cir. 1989) (imposing injunction upon fireworks parts distributor from selling tubes, plugs, and fuses in interstate commerce); see also *Shelton v. Consumer Prod. Safety Comm'n*, 277 F.3d 998 (8th Cir. 2002) (affirming permanent injunction of importing fireworks in violation of the FHSA and fining the corporate defendant $100,000).

[73] *United States v. Sun & Sand Imports, Ltd., Inc.*, 725 F.2d 184 (2d Cir. 1984) (affirming preliminary injunction during the pendency of the litigation prohibiting clothing company from importing and selling two lines of clothing that the [CPSC] deemed to be sleepwear and that contained flammable materials under the Flammable Fabrics Act, 15 U.S.C. §§ 1191–1204).

[74] The facts in this paragraph are compiled from *Rainbow Foam Paint*, 34 F.3d at 93–94, and *X-Tra Art v. Consumer Prod. Safety Comm'n*, 969 F.2d 793, 795 (9th Cir. 1992).

[75] *X-Tra Art*, 969 F.2d at 795.

[76] *Id.* at 796.

[77] *Reliable Automatic Sprinkler Co., Inc. v. Consumer Prod. Safety Comm'n*, 324 F.3d 726 (D.C. Cir. 2003).

[78] *Reliable Automatic Sprinkler Co.*, 324 F.3d at 731–33.

[79] *Id.* at 730.

[80] *Id.* at 729–30.

[81] *Id.* at 730.

[82] *Id.* at 731–32 (emphasis in original).

[83] 15 U.S.C. § 2058.

[84] See generally *id.*

[85] *Id.* § 2058(b)(2).

[86] *Jerri's Ceramic Arts, Inc. v. Consumer Prod. Safety Comm'n*, 874 F.2d 205 (4th Cir. 1989).

[87] 16 C.F.R. 1501.1–1501.5 (1988).

[88] *Jerri's Ceramic Arts, Inc.*, 874 F.2d at 206.

[89] *Id.* at 207.

[90] *Id.* at 208.

[91] See, *e.g.*, *Consumer Fed'n of Am. v. Consumer Prod. Safety Comm'n*, 883 F.2d 1073, 1079 (D.C. Cir. 1989) (upholding the CPSC's decision to deny the plaintiff's petition to initiate a rulemaking proceeding to ban the use of the solvent methylene chloride in household products, writing that "[w]hile some of the [CPSC's] judgments may be subject to question, Congress has entrusted the responsibility to make them to the [CPSC] and not this court. We cannot conclude that this is that rare and compelling case that would justify our overturning the [CPSC's] refusal to institute a rulemaking.").

[92] *Consumer Fed'n of Am. v. Consumer Prod. Safety Comm'n*, 990 F.2d 1298 (D.C. Cir. 1993).

[93] *Consumer Fed'n of Am.*, 990 F.2d at 1300 & n.2.

[94] *Id.* at 1300.

[95] *Id.* at 1300–01.

[96] *Id.* at 1304.

[97] *Id.* at 1306 (citing 15 U.S.C. § 2058(f)(3)(F)).

[98] *Id.* at 1308.

[99] 15 U.S.C. § 2063(a)(1).

[100] *Id.* § 2063(a)(3)(B).

[101] Section 2064(b) specifically provides:

> Every manufacturer of a consumer product, or other product or substance over which the [CPSC] has jurisdiction under any other Act enforced by the [CPSC] . . . . distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product—
>
> (1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the [CPSC] has relied under section 2058 of this title;
>
> (2) fails to comply with any other rule, regulation, standard, or ban under this chapter or any other Act enforced by the Commission;
>
> (3) contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section; or
>
> (4) creates an unreasonable risk of serious injury or death,

shall immediately inform the [CPSC] of such failure to comply, of such defect, or of such risk, unless such manufacturer, distributor, or retailer has actual knowledge that the [CPSC] has been adequately informed of such defect, failure to comply, or such risk. A report provided under paragraph (2) may not be used as the basis

> for criminal prosecution of the reporting person under section 1264 of this title, except for offenses which require a showing of intent to defraud or mislead.

15 U.S.C. § 2064(b).

[102] *Id.*

[103] *Id.*

[104] *United States v. Mirama Enters., Inc.*, 387 F.3d 983 (9th Cir. 2004).

[105] *Mirama Enters., Inc.*, 387 F.3d at 985.

[106] *Id.*

[107] *Id.* at 988.

[108] *Id.* at 988–89.

[109] *United States v. Athlone Indus., Inc.*, 746 F.2d 977, 982, 985 (3d Cir. 1984) (holding that defendant's "motion for summary judgment was improvidently granted because the prior judgment has no res judicata effect between the parties to the present action" and, later concluding that, "[i]n the imminent hazard case, the wrong for which the [CPSC] sought redress was [the defendant's] *distribution* of baseball pitching machines which presented an imminent hazard to the public, while in this civil penalty suit, the wrong for which it seeks redress is not the distribution of the dangerous machines, but [the defendant's] *failure to report* certain information to the [CPSC] . . . .").

[110] See, *e.g.*, *Adams v. N. Ill. Gas Co.*, 333 Ill. App. 3d 215, 223–24 (1st Dist. 2002), *aff'd*, 211 Ill. 2d 32 (2004).

[111] *Adams*, 333 Ill. App. 3d at 223–24.

[112] *Id.*

[113] *Adams v. N. Ill. Gas Co.*, 211 Ill. 2d 32 (2004), *aff'g* 333 Ill. App. 3d 215 (1st Dist. 2002).

[114] *Adams*, 211 Ill. 2d at 54. The court, however, limited its holding by stating: "This holding is directed exclusively to the element of duty and is limited to the evidence contained in the present record." *Id.*

[115] 15 U.S.C. § 2065(a)–(b).

[116] See, *e.g.*, *In re Establishment Inspection of Skil Corp.*, 119 F.R.D. 658, 665–66 (N.D. Ill. 1987), *aff'd*, 846 F.2d 1127 (7th Cir. 1988).

[117] See, *e.g.*, *In re Establishment Inspection of Skil Corp.*, 846 F.2d 1127, 1134 (7th Cir. 1988).

[118] *In re Establishment Inspection of Skil Corp.*, 119 F.R.D. 658 (N.D. Ill. 1987), *aff'd*, 846 F.2d 1127 (7th Cir. 1988).

[119] *In re Establishment Inspection of Skil Corp*, 119 F.R.D. at 660–61.

[120] *Id.* at 661.

[121] *Id.* at 664.

[122] *Id.* at 666 (citing *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320–321 (1978)).

[123] *Id.* at 668 (quoting *Burkhart Randall Div. of Textron, Inc. v. Marshall*, 625 F.2d 1313, 1320 (7th Cir. 1980)).

[124] *In re Establishment Inspection of Skil Corp.*, 846 F.2d at 1134.

[125] *Id.*

[126] 15 U.S.C. § 2069.

[127] *Id.* § 2070.

[128] *Id.*

[129] *Athlone Indus., Inc. v. Consumer Prod. Safety Comm'n*, 707 F.2d 1485 (D.C. Cir. 1983).

[130] *United States v. Danube Carpet Mills, Inc.*, 737 F.2d 988, 993–94 (11th Cir. 1984) (citing *United States v. Reader's Digest Ass'n*, 662 F.2d 955, 967 & n.18 (3d Cir. 1981)); see also *United States v. J.B. Williams Co.*, 498 F.2d 414, 438–39 (2d Cir. 1974).

[131] *Danube Carpet Mills, Inc.*, 737 F.2d at 994.

[132] *Id.* at 995.

[133] See, *e.g.*, *id.*; see also *Shelton v. Consumer Prod. Safety Comm'n*, 277 F.3d 998 (8th Cir. 2002).

[134] *United States v. Anthony*, 280 F.3d 694, 696 (6th Cir. 2002) (involving the interpretation of sentencing guidelines for an employee sentenced to 24 months of imprisonment, followed by three years of supervised release for altering records during the course of a CPSC investigation to make it appear as though lighters sold by the company were child-proof).

[135] 15 U.S.C. § 2072.

[136] *Drake v. Honeywell, Inc.*, 797 F.2d 603, 604 (8th Cir. 1986).

[137] 15 U.S.C. § 2072(a).

[138] *Id.* § 2072(b).

[139] 15 U.S.C. § 2073(a)(1)–(2).

[140] *Id.* § 2073(a)(3).

[141] *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936, 942 (7th Cir. 1988) ("The causal connection between a defendant's reporting violation and a plaintiff's injury is too attenuated and speculative to satisfy generally applicable standards of causation in fact or proximate causation."). The U.S. Court of Appeals for the Eighth Circuit in *Drake v. Honeywell, Inc.* stated:

> First, the plaintiff would have to show that the defendant "knowingly" violated the reporting rules. Second, the plaintiff would have to show that but for the violation, the injury would have been prevented. In essence, the plaintiff would have to prove that had the defendant reported in accordance with 16 C.F.R. Part 1115, the [CPSC] pursuant to sections 15(c) and (d) would have held a hearing, determined that the product in fact contained a defect which presented a substantial product hazard, and ordered a remedy that would have prevented the plaintiff's injury. The causation problem not only burdens the plaintiff, it also strains the judicial factfinding process. It requires speculation as to whether and how the [CPSC] would have responded to the defendant's report, and whether the [CPSC's] response would have succeeded in preventing the plaintiff's injury. We doubt that Congress intended to set such a tortuous process in motion.

Drake, 797 F.2d at 610 (footnote omitted).

[142] *Carlson v. BIC Corp.*, No. 94-1772, 1996 U.S. App. LEXIS 16643 (6th Cir. 1996) (an unpublished opinion appearing in the Table of Decisions Without Reported Opinions, 89 F.3d 832) (affirming dismissal of a claim under the Act, where the manufacturer owed no duty under the statute to provide protective features on a lighter on the date of the accident).

[143] *DeHaan v. Whink Prod. Co.*, No. 91-CV-00014, 1995 U.S. Dist. LEXIS 750, at *6 (N.D. Ill. Jan. 21, 1995) ("[T]here is no explicit or implicit indication from the text of the Act of any intent to create a private remedy of punitive damages.").

[144] *Deck* ex rel. *Deck v. McBrien*, 759 F. Supp. 454 (C.D. Ill. 1991). The *Deck* court stated:

> In short, we hold that the Consumer Product Safety Commission must by rule designate prescription drugs for regulation before the act can apply.
>
> It hasn't.
>
> We dismiss.

Deck, 759 F. Supp. at 454.

[145] See, *e.g.*, *Aimone v. Walgreen's Co.*, 601 F. Supp. 507 (N.D. Ill. 1985), *rev'd in part on other grounds sub nom. First Nat'l Bank of Dwight v. Regents Sports Corp.*, 803 F.2d 1431 (7th Cir. 1986).

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[146] "State of the art" refers to the "custom and practice at the time of the manufacture" of the allegedly defective product, and conformity with the applicable state of the art can be "taken into account in determining negligence." *Zavala v. Powermatic, Inc.*, 167 Ill. 2d 542, 547 (1995).

[147] Whether a "reasonable alternative design" exists is a question that a plaintiff might attempt to address in product liability litigation to demonstrate that a product is unreasonably dangerous. As the Illinois Supreme Court explained in *Kerns v. Engelke*:

> [A] plaintiff must present pertinent evidence, such as an alternative design which is economical, practical and effective, to the fact finder, who determines whether the complained-of condition was an unreasonably dangerous defect. This, we believe, is what Sutkowski v. Universal Marion Corp. (1972), 5 Ill. App. 3d 313, 319, 281 N.E.2d 749, 753, also stands for:
>
> > "In the development of product's liability principles design alternatives are appropriately considered whether reasonable care is the basis of liability or where liability is predicated upon strict tort liability. (Citation.) In both cases it appears that policy considerations are involved which shift the emphasis from the defendant manufacturer's conduct to the character of the product. Such change in emphasis furnishes additional reasons for permitting evidence of alternative designs in a strict tort liability case.
> >
> > The possible existence of alternative designs introduces the feature of feasibility since a manufacturer's product can hardly be faulted if safer alternatives are not feasible. In this connection feasibility includes not only the elements of economy, effectiveness and practicality but also the technological possibilities viewed in the present state of the art. If the feasibility of alternative designs may be shown by the opinions of experts or by the existence of safety devices on other products or in the design thereof we conclude that evidence of a post occurrence change is equally relevant and material in determining that a design alternative is feasible."

Kerns v. Engelke, 76 Ill. 2d 154, 162–63 (1979).

[148] See, *e.g., Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247, 264–65 (2007) (collecting cases).

[149] *Calles*, 224 Ill. 2d at 264–65 (identifying the risk-utility test and factors that have been adopted in South Carolina, Michigan, Arizona, Colorado, Connecticut, Hawaii, Illinois, Maryland, Mississippi, Missouri, New Jersey, New Mexico, New York, Oregon, Pennsylvania, and Tennessee).

[150] John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 837–38 (1973), quoted in *Calles*, 224 Ill. 2d at 264–65.

[151] *Id.* at 265–66.

[152] Am. L. Prods. Liab. 3d § 28:19, at 28-30 to -31 (1997), quoted in *Calles*, 224 Ill. 2d at 265–66.

[153] *Calles v. Scripto-Tokai Corp.*, 224 Ill. 2d 247 (2007).

[154] *Calles*, 224 Ill. 2d at 250–51.

[155] *Id.* at 253.

[156] *Id.*

[157] *Id.* at 267.

[158] *Id.* at 267–68.

[159] *Id.* at 269.

[160] *Hubbard v. McDonough Power Equip., Inc.*, 83 Ill. App. 3d 272 (5th Dist. 1980).

[161] *Hubbard*, 83 Ill. App. 3d at 278 (quoting *Rucker v. Norfolk & W. Ry.*, 77 Ill. 2d 434, 438 (1979)).

[162] *Id.* (citing *Rucker*, 77 Ill. 2d at 439).

[163] Businesses, conversely, may seek to exclude correspondence with the CPSC where the letters do not definitively indicate that the CPSC is finding a product defective, even in situations where the CPSC has made a preliminary determination that a product presents a substantial risk of injury and where the defendant is taking voluntary corrective action. See *Tober v. Graco Children's Prod., Inc.*, 431 F.3d 572, 576 (7th Cir. 2005) (interpreting the Indiana Product Liability Act, Ind. Code 34-20-1, *et seq.*).

[164] *Cummins v. BIC USA, Inc.*, 727 F.3d 506 (6th Cir. 2013).

[165] *Cummins*, 727 F.3d at 512–14 (citing *Morales v. Am. Honda Motor Co.*, 151 F.3d 500, 512–13 (6th Cir. 1998)).

[166] *Id.* (citing *Johnston v. Deere & Co.*, 967 F. Supp. 578, 580 (D. Me. 1997)).

[167] *Id.* at 513 (quoting *Johnston*, 967 F. Supp. at 580, and omitting footnotes).

[168] *Kirstein v. W.M. Barr & Co.*, 983 F. Supp. 753, 760–61 (N.D. Ill. 1997).

[169] *Kirstein*, 983 F. Supp. at 762 (citing *Moss v. Parks Corp.*, 985 F.2d 736, 740 (4th Cir. 1993)).

[170] See *Moss*, 985 F.2d at 740. The court in *Moss v. Parks Corp.* stated that

> a common law tort action based upon failure to warn may only be brought for noncompliance with existing federal labeling requirements. In actions such as the present one, if the plaintiff requests a label that is "more elaborate or different" than the one required by the FHSA and its regulations, the claim is preempted.

Id.; see also *Terrazas v. Ashland Chem. Co.*, No. 98-CV-07491, 1999 U.S. Dist. LEXIS 17935, at *4 (N.D. Ill. Nov. 10, 1999) (awarding summary judgment to a kerosene manufacturer in a wrongful death suit for exposure to kerosene manufactured by the defendant, which allegedly caused the decedent's fatal breast cancer; the court found that common law claims were preempted and that no question existed that the labeling of the kerosene complied with the FHSA); *Miles v. S.C. Johnson & Son, Inc.*, No. 00-CV03278, 2002 U.S. Dist. LEXIS 22695, at *23, *26–27 (N.D. Ill. Nov. 25, 2002) (holding that warning and design defect claims were preempted by the FHSA and PPPA). But cf. *Leipart v. Guardian Indus., Inc.*, 234 F.3d 1063, 1067–68 (9th Cir. 2000) (stating, "[W]e believe that the [Act] expressly pre-empts only requirements imposed by state standards or regulations, not requirements imposed by state common law.").

[171] See, *e.g., United States v. Articles of Banned Hazardous Substances Consisting of an Undetermined Number of Cans of Rainbow Foam Paint*, 34 F.3d 91, 99 (2d Cir. 1994); *see also* Scurria, *CEO Sues to Escape*, *supra* note 2 ("Maxfield [& Oberton LLC] shut down late last year after the CPSC publicly branded Buckyballs as dangerous and urged six major retailers to yank them from store shelves over longstanding worries that the rare-earth magnets can cause severe injury if accidentally swallowed.").

[172] Nixon, *Ross Stores Fined*, *supra* note 1 ($3.9 million fine levied upon a company for failing to report that it continued to sell defective children's clothing after the agency warned that the clothes could cause injuries or death).

[173] *Mahoney v. Consumer Prod. Safety Comm'n*, 146 Fed. Appx. 587 (3d Cir. 2005).

[174] *Mahoney*, 146 Fed. Appx. at 589.

[175] *Consumer Fed'n of Am. v. Consumer Prod. Safety Comm'n*, 990 F.2d 1298, 1305–08 (D.C. Cir. 1993).