

ABA Section of Litigation, Products Liability News & Developments

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CPSC Enforcement: What Will 2013 Bring?

The Consumer Product Safety Commission (CPSC) increased its enforcement efforts in 2012 and appears poised to take even stronger action in 2013. If last year is any indication of what this year will bring, 2013 will be a challenging time for consumer-product businesses regulated by the CPSC.

The commission has signaled that it wants to emphasize its enforcement mission in 2013 through the following:

- Enhanced port surveillance, which has resulted in increased seizures of imports.
- Increased use of administrative complaints for mandatory recalls and other litigation against consumer-product businesses.
- Increased pressure on retailers to “voluntarily” stop selling the “suspect” products of manufacturers/importers who refuse to voluntarily recall such products.
- Higher civil penalties for late self-reporting of violative products—even when a company has recalled a violative product.
- Public statements by majority commissioners arguing for larger civil penalties.

All of these point to the implementation of a stricter CPSC enforcement policy for 2013.

The CPSC spent much of 2009 through 2011 developing regulations that implement the landmark Consumer Product Safety Improvement Act of 2008 (CPSIA). In 2012, the commission’s emphasis began to focus increasingly on enforcement of this new regulatory regime. To that end, the CPSC took various instruments out of its enforcement toolbox, using some for the first time and others for the first time in years.

In 2012, the CPSC increased its enforcement activities at major U.S. ports. CPSC inspectors joined with Customs and Border Protection (CBP) agents to target and seize high-risk imports that violate safety standards. The CPSC and CBP [seized over 2 million units of problematic toys in fiscal 2012](#). The commission believes that stopping unsafe products at the borders before they enter the country is more effective than a recall of a product that has already been distributed in the chain of commerce. Continued and increased CPSC enforcement at the borders can be expected for 2013.

Over the last several years, virtually all CPSC recalls were “voluntary.” Companies jointly recalled products in cooperation with the CPSC. In 2012, however, the commission staff began to file suits seeking mandatory recalls when the CPSC could not reach agreement on the continued distribution of the questioned products. These administrative complaints mainly involved small rare earth magnets linked to accidental ingestion by children. [The CPSC filed three such administrative complaints against companies involved in the sale of high-powered magnets](#). The commission took this unusual action even though the companies had recalled the products and strengthened product warnings in cooperation with the CPSC. The commission recently filed another administrative complaint—this time [against a manufacturer of infant recliners](#) when “... discussions with the company ... failed to result in an adequate voluntary recall plan.”

Just as with the rare earth magnets, the CPSC applied enforcement pressure on the manufacturer of the infant recliners by [persuading major retailers to voluntarily stop selling the infant recliners](#). When the commission took similar action in the case of the sale of rare earth magnets, the resulting economic pressure caused the importers of these magnets to capitulate and discontinue their import of the magnets.

The commission will likely be encouraged by these results and use administrative complaints and pressure on retailers to obtain the kind of recall compliance it desires.

The CPSC is also likely in 2013 to significantly increase civil penalties for late reporting. The 2008 CPSIA dramatically increased the range of civil penalties—up to \$ 15 million for a series of violations. To date, most late-reporting penalties have involved cases where the failure to report occurred prior to the increased CPSIA penalty limits, but these “grandfathered” late-reporting cases are becoming a thing of the past. In 2013, the commission will likely view newer violations as governed by the enhanced CPSIA penalty amounts. [One commissioner](#) has already publically called for increased civil penalties. Further, the [CPSC chairman Inez M. Tenenbaum stated](#) that she expects future enforcement actions will include penalty amounts that maximize deterrence. We can anticipate very large “marquee” penalties in 2013.

Finally, political factors point to enhanced CPSC enforcement. The commission is composed of a Democratic majority. This has been the case during recent years, and with the reelection of Barack Obama, the Democratic majority will remain. Democratic commissioners have historically held a more stringent view of how consumer-product safety laws should be enforced. This will not change in 2013. Instead, businesses should expect a CPSC in 2013 that enforces consumer-product safety rules even more strictly and more stringently.

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