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Phone: +1 212 537 6331 | Fax: +1 212 537 6371 | [customerservice@portfoliomedia.com](mailto:customerservice@portfoliomedia.com)

## **The Deputization Of State AGs Under CPSIA**

Law360, New York (December 17, 2008) -- In August 2008, the president signed into law the Consumer Product Safety Improvement Act of 2008 (the "Improvement Act").

This legislation, which in large part was a reaction to an avalanche of recalls of children's products of the last several years (mostly imported from China and the Far East), had an immediate and dramatic effect on the Consumer Product Safety Commission's ("CPSC") regulation of consumer products.

That dramatic effect is guaranteed to continue, as the CPSC rolls out specific rules that implement the Improvement Act.

To date, much of the media attention on the Improvement Act has focused on the effect the Act has on regulation of domestically manufactured and imported children's products.

This is wholly warranted as the Improvement Act institutes sweeping changes which include lowering the requirements for permissible lead content of children's goods, lowering permissible levels of lead permitted in paint and banning the use of certain plastic softeners or phthalates in children's care items and toys.

Receiving less attention, though having no less potentially significant consequences and implications, are provisions of the Improvement Act which impact state regulation of consumer products.

Most significantly, the Improvement Act expands the jurisdiction of state attorneys general ("SAGs") in regulating consumer products and taking action against manufacturers and distributors of products. Manufacturers, private labelers, importers and their insurers would do well to consider this aspect of the Improvement Act.

Under Section 218 of the Improvement Act, SAGs are now specifically authorized to commence suit in federal court alleging violation of any standard or rule promulgated by the Commission which affects a state's residents.

In other words, state prosecutors are now armed with the ability to commence a suit for violation of applicable federal standards, regulations, rules and bans.

By enabling 50 SAGs to enforce standards and rules previously enforced solely by the CPSC, Congress has dramatically increased the resources available for the enforcement of consumer product rules, regulations and standards.

It has also created the potential for differing interpretation of product safety regulations and enforcement, depending on which agency commences an enforcement proceeding against a manufacturer and where.

### *Deputizing Of State Attorneys General*

SAGs have long been active in the regulation of consumer products utilizing state consumer product statutes.

Recent examples include California AG actions to enforce state standards related to flammability of mattresses, and Illinois AG actions, in 2007, against Fisher-Price related to a toy blood pressure cuff. Nevertheless, these actions have been generally based on state laws and generally arose in a state court setting.

Section 218 of the Improvement Act changes things. Section 218 specifically provides that SAGs may commence suit in federal court to:

1. Stop the sale of products that allegedly violate safety standards administered by the CPSC;
2. Stop the sale of banned hazardous substances;
3. Stop the sale of products that have been recalled by CPSC;
4. Stop the sale of children products which have not been certified by third party laboratories as complying with the standards, rules and regulations administered by CPSC (once certification requirements have been implemented) and/or lack tracking labels (once this requirement is implemented in August 2009);
5. Enforce prohibitions against stock piling products in advance of regulation changes; and
6. Stop the sale of products with safety marks if use of such marks is unauthorized.

Before exercising its authority, SAGs must provide the Commission with 30 days notice. The CPSC then has a right to either institute an action itself or intervene in any suit subsequently commenced by the SAG.

In addition to the above categories of possible claims for injunctive relief, and indeed perhaps the most significant aspect of the deputization, the Improvement Act permits SAGs to initiate a civil action alleging that a product poses a “substantial product hazard.”

This enabling provision is a significant expansion of authority for SAGs. Under this mantle, a SAG can forego the 30-day notification requirement and file suit immediately in federal court.

Determination of what constitutes a “substantial product hazard” is, by necessity, a subjective process which requires consideration and balancing of a host of factors.

In the past it has been only the Commission which has made the determination, relying on factors such as: quality control data, test data, field reports of customer complaints and lawsuits.

Also relevant is the nature and severity of injuries that could be caused and the likelihood of encountering the hazard. Now, SAGs are invested with the authority to weigh these factors and make such determinations.

Obviously, the actions of one SAG could have significant ramifications for a product manufacturer well beyond the borders of that SAGs’ state.

The significance of vesting SAGs with discretion to determine that a “substantial product hazard” exists, and to commence an action on that basis cannot be overemphasized.

Certainly, instances have occurred where the Commission has commenced suit based on violation of a specific standard, rule or regulation, but, generally, the primary vehicle through which CPSC has exercised its enforcement authority has been based upon its determination that a product poses a “substantial product hazard”, and most recalls are made on this basis.

SAGs are likely to not be shy in utilizing this newly created authority. It is a matter of record that, at times, SAGs have been extremely critical of the CPSC and the vigorousness of its enforcement activities; examples abound.

For instance, Illinois Attorney General Lisa Madigan recently criticized the CPSC’s policing of resales of recalled “close-sleeper/bedside sleeper” baby bassinets by manufacturer Simplicity, Inc. (See, Michael Bologna, Illinois AG Madigan Blasts CPSC Over Sales of Recalled Products on Craig’s List, 36 BNA Product Safety & Liability Reporter, No. 40 (Oct. 13, 2008)).

In August 2008, CPSC launched a nationwide recall of nearly 900,000 bassinets manufactured by Simplicity under the Graco logo and the “Winnie the Pooh” motif, following strangulation deaths of two infants using the product.

In doing so, CPSC determined that the product posed a substantial product hazard because infants could be trapped in the bassinets’ metal bars and ultimately suffocate.

Thereafter, the Illinois attorney general’s office began to receive reports that notwithstanding the recall, hundreds of recalled bassinets were being sold on Craig’s List and eBay by sellers apparently unaware of the recall and the danger CPSC had identified.

The attorney general launched an investigation and, based on her findings, was sharply critical of CPSC, calling into question the value of federally imposed recalls where secondhand markets continue to trade, apparently unaware, in the recalled product.

The Illinois attorney general called on the CPSC to more aggressively police internet sites selling potentially dangerous recalled items noting “If these recalled items are still for sale on the secondary market, then what good is a recall? It’s nothing more than a piece of paper if it doesn’t effectively communicate with consumers and hold manufacturers accountable.” Id.

While the Illinois attorney general’s investigation and criticism were in turn criticized by CPSC as “grand standing” the lessons for manufacturers and others are clear. An overworked and underfunded CPSC is likely to be supplemented by aggressive SAGs more than willing to aggressively pursue manufacturers of consumer products, and the headlines that such cases will undoubtedly garner.

Indeed, shortly after criticizing the CPSC’s handling of the recall situation with respect to the Simplicity bassinets, on Oct. 28, 2008 the Illinois attorney general filed a lawsuit in state court in Cook County, Ill., against SFCA Inc. (which had acquired the Simplicity brand in March 2008). *People of the State of Illinois v. SFCA Inc.*, 08 CH 40702, Cook County Civ. Ct. (10/28/08).

The complaint maintains actions based on Illinois consumer product statutes and alleges that SFCA continued to supply design-flawed bassinets to Illinois retailers, despite knowing that the design had caused at least one death that led to a design change.

According to the complaint, SFCA refused to participate in the recall, claiming it wasn’t responsible for the design flaws, which occurred prior to its acquisition of Simplicity. The complaint asks the court to

- (1) prohibit SFCA from selling and distributing the bassinets,
- (2) requiring SFCA to hire an independent consultant to develop a product safety protocol and review all of SFCA’s product designs to ensure compliance with safety standards,
- (3) recall all bassinets that used the recalled design,
- (4) provide refunds to retailers who issued refunds or store credits to consumers who returned the bassinets, and
- (5) to notify the public of CPSC recalls by advertising in newspapers throughout Illinois.

Separately, the Illinois attorney general challenged CPSC’s actual recall policy, which allowed manufacturers to issue repair kits as remedies, instead of offering consumers replacement products, refunds or store credits. (Illinois AG, Press Release “Madigan launches three pronged attack against deadly sleep environments for infants” [www.ag.state.il/us/pressroom](http://www.ag.state.il/us/pressroom) (10/29/08).

The Illinois AG called on CPSC to change its policy to require manufacturers and distributors to offer refunds as the sole remedy in situations like this.

The Illinois attorney general further criticized CPSC for issuing complicated and confusing recall notices, which often contain long lists of model numbers and lack model names or retailer information.

True enough, in many instances it is likely that SAGs will continue to pursue remedies for defective consumer products in state court (and, indeed the recent Illinois suit by the attorney general against SFCA was brought in state court), utilizing applicable state statutes.

In fact, the Improvement Act contemplates this and specifically states that it shall not have a preemptive effect on the SAGs, stating that “Nothing in this section ... shall be construed ... to prevent the attorney general of a state ... from exercising the powers conferred on the attorney general . . . by the laws of such state ...” (Improvement Act §218).

In many cases one would expect SAGs to be more likely to pursue suit in a state court forum with which the AG is most familiar, enforcing rules and regulations which, again, the attorney general is most familiar.

But, in states where there are no statutes similar to those enforced by the CPSC, The Improvement Act’s enabling provisions may prove quite attractive to SAGs.

Manufacturers doing business on a national basis confronted with a situation in which a potential “substantial product hazard” exists, or may exist, may be wise to seek to negotiate a settlement with CPSC, to lessen the prospect of having to negotiate a settlement with an SAG whose agenda may be different from CPSC and whose interpretations, particularly of what constitutes a “substantial product hazard,” may be unique or particularly troubling.

--By James W. Weller (pictured) and Christopher D. Thomas, Nixon Peabody LLP

*James Weller is a partner with Nixon Peabody in the firm's Jericho, N.Y., office. Christopher Thomas is a partner with the firm in the Rochester office.*