

# Client Alert

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## Consumer Products: The CPSC Files Suit Seeking Civil Penalties Against a Retailer for Failures of Reporting and Material Misrepresentation

By Erin M. Bosman, Ellen Adler, Joanna L. Simon, and Austin Marsh

Last week, the U.S. Department of Justice, on behalf of the United States Consumer Product Safety Commission (CPSC), filed suit against a retailer in the Northern District of Texas. *United States of America v. Michaels Stores, Inc. and Michaels Stores Procurement Co., Inc.*, Case No. 3:15-cv-1203. The CPSC alleges that the retailer did not meet CPSC reporting requirements and made a material misrepresentation to the CPSC concerning one of its products, a glass vase. Allegedly, the glass used to make the vase was as thin as that used in a lightbulb and could easily shatter when handled. The CPSC seeks both civil penalties and injunctive relief. While the retailer may well have defenses to the CPSC's claims, this suit could be intended by the CPSC to serve as a warning to similarly situated companies deciding whether to report products containing potential hazards. It is also potentially instructive for companies deciding in the future whether it may be preferable for them to conclude a CPSC civil penalties investigation with a settlement instead of a lawsuit.

### REPORTING STANDARD

The Consumer Product Safety Act (CPSA) requires that manufacturers, distributors, and retailers "shall immediately inform" the CPSC of any potential substantial product safety hazards or unreasonable risks of serious injury associated with their products. According to the CPSC, "immediately" means "within 24 hours." 16 C.F.R. § 1115.14(e).

### CPSC-BACKED LAWSUIT AGAINST A RETAILER

The complaint alleges that, through an unaffiliated corporation (The Gerson Company), the retailer obtained over 200,000 vases from a Chinese manufacturer in mid-2006. As early as November 2007, the retailer began receiving complaints from customers that the vase would shatter when handled. The retailer received complaints alleging lacerated fingers, nerve and tendon damage, and injuries requiring stitches and surgery through September 2010, when the vases were recalled by The Gerson Company.

On February 22, 2010, the retailer submitted an Initial Report to the CPSC pursuant to 16 C.F.R. § 1115.13(b), a provision which applies to distributors and retailers, and not to manufacturers. However, the CPSA defines "manufacturer" to include any person who imports a product into the United States. 15 U.S.C. § 2052(a)(11). The CPSC alleges that the retailer was listed as the "importer of record" of the vases on U.S. customs forms. Accordingly, the CPSC alleges that the retailer's February 22, 2010, Initial Report was inadequate, as manufacturers are required to provide significantly more information than retailers or distributors. See 16 C.F.R. § 1115.13(c)-(d). The CPSC argues that the retailer's Initial Report "contained misleading assertions, which conveyed the false impression that Gerson had imported the vases and that [the retailer] had acted only as the retailer." The CPSC purports that this alleged misrepresentation allowed the retailer to avoid much of the publicity and legal responsibility related to the 2010 recall.

# Client Alert

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The CPSC's complaint also alleges that "[b]y knowingly failing to report immediately to the Commission, [the retailer] violated the CPSA." The CPSC's position is that the retailer had knowledge of information about the defect and risks associated with the vases "at least as early as September 2008[,]" by virtue of receiving at least nine injury complaints related to the vases. The year-plus delay in reporting to the CPSC was, in the agency's view, a violation of the CPSA.

The complaint specifically seeks civil penalties and injunctive relief requiring the retailer to institute internal recordkeeping and a formal compliance program designed to provide timely reports to the CPSC in the future.

## CPSC OVERSIGHT AND ENFORCEMENT

This lawsuit comes in the wake of increased CPSC enforcement efforts under the Obama Administration's consumer-friendly appointments to the Commission, many of which have been directed at unsafe products and associated reporting violations. Still, prior to this Administration's recent efforts, lawsuits initiated by the CPSC have been relatively rare. Indeed, prior to the current case, the CPSC had only filed three lawsuits and one administrative complaint, all seeking mandatory recall remedies under Section 15 of the CPSA. The three lawsuits were directed at different manufacturers and distributors of rare earth magnets, and the administrative complaint was brought against an inclined sleep product manufacturer. All the actions sought determinations that the respective products posed substantial hazards and asked for mandatory recall remedies for affected consumers. Additionally, as we previously reported, in May 2013, the CPSC sought to hold the former CEO of one of the magnet companies personally responsible for alleged CPSA transgressions of his former company. More recently, the CPSC has significantly ramped up its assessment of civil penalties stemming from companies' failures to report potential product defects, discussed here.

Most civil penalties investigations settle, in part because of the CPSC's power to go after the company in federal court, a much more public avenue than the civil investigation process. However, this new lawsuit may be the beginning of a trend of companies unwilling to settle if, as is likely the case with the retailer, the company believes it has defenses or a sympathetic position and the CPSC nevertheless insists on very high civil penalties and rigorous compliance programs. Depending on the outcome of the new lawsuit, the CPSC may also become more aggressive in referring cases to the Department of Justice. If this occurs and DOJ cooperates, it could increase the pressure on the majority of companies to settle with CPSC, even for high penalties, rather than face the costs, adverse publicity, and uncertainty that could come with litigation. Manufacturers, distributors of products, and retailers (especially those that act as direct importers) are all advised to avoid these situations in the first instance by having a clear and well-understood policy for evaluating potential product hazards. Considering the CPSC's recent efforts to more aggressively undertake strong enforcement action under the CPSA, it is important for companies to confirm that their internal policies are up-to-date and understood and followed by their employees. Unless they consciously decide that they have appropriate and defensible reasons not to, companies will likely want to err on the side of consulting with experienced counsel and proactively reporting to CPSC when a potential substantial product hazard is identified, lest they end up in a civil penalties or, worse yet, civil lawsuit quagmire.

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