

CLIENT ALERT

CPSC's Recent \$2.6 Million Penalty Consent Decree Includes Mandatory Injunction Requiring Compliance Program and Liquidated Damages Provision

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The trend toward higher civil penalties for reporting violations at the CPSC continued into the new year with the January 5, 2015 announcement of a \$2.6 million penalty against Gerber Legendary Blades, a division of Fiskars Brands Inc. But the continued trend toward higher penalties is nothing new. The higher penalty amounts in the statute have been effective for more than 5 years, and a steady stream of higher penalties has come out of the Commission in recent months. What is new about the deal announced this month? Aggressive injunctive terms and a liquidated damages provision in a judicially-approved consent decree make this penalty worth noting.



In a complaint filed in the U.S. District Court for the District of Oregon, the CPSC and DOJ alleged that Gerber failed to report to the Commission information which reasonably supported that a knife housed in the handle of the Gator Combo

Axe unexpectedly dislodged when the axe was used, causing serious injuries to consumers. While the case involved only a small number of products – approximately 103,000 axes were sold in well-known retail outlets – the injuries were severe, including permanent nerve damage, surgery to repair tendons, stitches, and related medical treatment. The complaint alleged that the company received notice of the potential for serious risk as early as 2005, with the first serious injury reported in 2009, yet failed to report to the CPSC until 2010. During that delay, several additional serious injuries had amassed both within the company's files and in product reviews on retail sites which were brought to the company's attention by an injured customer.

In addition to the hefty \$2.6 million penalty, the settlement requires the company to adopt a written compliance program, a term similar to others included in recent CPSC penalty settlements not involving DOJ. Those terms include:

- written standards and policies;

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- a mechanism for confidential employee reporting of compliance-related questions or concerns to either a compliance officer or to another senior manager with authority to act as necessary;
- procedures for reviewing claims and reports for safety concerns and for implementing corrective and preventive actions when compliance deficiencies or violations are identified;
- effective communication of company compliance-related policies and procedures to all employees through training programs or otherwise;
- senior manager responsibility for compliance and accountability for violations of the statutes and regulations enforced by the Commission;
- oversight of compliance by Defendant's governing body;
- retention of all records reasonably related to compliance with the safety statutes and regulations enforced by the Commission for at least five (5) years; and
- maintenance and enforcement of internal controls and procedures designed to ensure compliance.

Notably absent from the public record is any discussion of whether the company had an existing compliance plan, though DOJ alleged in the complaint that the company had "not implemented and maintained a reasonable and effective program or system for complying with the reporting requirements of the CPSA" and that there was "a reasonable likelihood" that violations would continue.

The consent decree includes a liquidated damages provision of \$1,000 per day for certain violations of the agreement and enables the government to "seek reasonable costs and attorneys' fees" for future actions to enforce the decree. Most civil penalties are announced by the Commission without prior referral to DOJ and without judicially-approved consent decrees or liquidated damages provisions. However, the Commission itself cannot impose a civil penalty and, when it cannot reach resolution with a company, it must refer the case to DOJ in order to bring an action seeking a penalty. While it is not evident whether the amount of the penalty or terms of the consent decree here differ from what the Commission sought before referring the matter to DOJ, the involvement of DOJ appears to have resulted in more onerous compliance terms and an enforcement stick in the form of liquidated damages. Entry of a consent decree signed by a federal judge raises the stakes of the settlement as well, enabling more efficient enforcement proceedings for any future violations of terms of the agreement.

Image via [The U.S. Consumer Product Safety Commission \(CPSC\) news release, January 5, 2015.](#)

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