

CLIENT ALERT

Observations from CPSC's Settlement of *In re Baby Matters* Administrative Action

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On June 14, 2013, the U.S. Consumer Product Safety Commission (CPSC) announced that it settled its administrative action against Baby Matters, LLC, manufacturer of Nap Nanny and Chill infant recliner products, in which it sought a mandatory recall. In July 2010, Baby Matters agreed to a voluntary corrective action with the CPSC, providing in part new product instructions and warnings. Following additional incidents, however, including several infant deaths, the CPSC requested that Baby Matters provide a full refund of the products, which Baby Matters refused. On December 4, 2012, the Commission filed an administrative complaint against Baby Matters, alleging that the products were defective as a result of foreseeable use and because of inadequate warnings and instructions.

The parties signed the consent agreement, available [here](#), on May 20, 2013. In settling the claims, Baby Matters agreed to implement a corrective action plan that includes the issuance of a joint press release with the CPSC, available [here](#); announcement of the corrective action through social media; and payment of \$13,000 that will be used to publicize the recall and maintain a website for five years. Baby Matters also agreed not to manufacture, sell, or distribute the Nap Nanny or Chill products or any of their components in the future. In exchange, the CPSC agreed to dismiss the administrative complaint and release claims against Baby Matters as well as its owner and founder Leslie Gudel-Kemm. The CPSC expressly reserved the right to commence a future action pursuant to Section 15(b) of the Consumer Product Safety Act for failure to timely report.

The *In re Baby Matters* consent agreement is the first of the administrative enforcement actions filed last year seeking mandatory recalls to be resolved. Here are some observations of the settlement:

- CPSC settled for much less than what it was seeking from Baby Matters. The terms of the consent agreement fall well short of what CPSC sought in the administrative complaint. The Commission had requested that Baby Matters be compelled to provide a full refund to consumers, cover consumers' expenses incurred in availing themselves of the remedy, and reimburse retailers for costs expended in connection with the mandatory recall, among other things. Instead, Baby Matters primarily agreed to publicize the recall and stop selling the Nap Nanny, Chill, and their component parts.

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Despite CPSC's announcement that Baby Matters agreed to voluntarily recall the Nap Nanny and Chill products, it has not actually agreed to provide any remedy to consumers, which typically is a standard term for any voluntary recall. Instead, the parties here agreed to what appears to be little more than a public safety campaign, which one may argue the CPSC had already accomplished through its own press releases prior to filing the administrative complaint. Of course, Baby Matters also agreed to stop selling its products, as the CPSC requested, which may be what was driving the Commission's resolution of this matter.

- The Commission released the individual owner of Baby Matters from liability without naming her as a respondent or requiring her to contribute money as a part of the settlement. Leslie Gudel-Kemm was not individually named as a party in the administrative action but is referenced in the text of the consent agreement and signed as the corporate representative of Baby Matters. Along with Baby Matters as the corporate respondent, Ms. Gudel-Kemm, in her individual capacity, has agreed not to manufacture, sell, distribute, or import the products or components and to disclose the settlement to subsequent purchasers of the business. In exchange, the CPSC agreed to release Ms. Gudel-Kemm from liability "in connection with any violations of the CPSA or FHSA arising out of or in any way concerning the manufacturing, importation, distribution, and sale of the Subject Products . . ." The agreement also states that Ms. Gudel-Kemm has no obligation to provide any money to the \$13,000 required to fund publicity efforts.

The CPSC's treatment of Ms. Gudel-Kemm stands in sharp contrast to the Commission's naming of Craig Zucker, founder and CEO of Maxfield and Oberton Holdings, as a party in the ongoing Buckyballs matter despite there being many similarities between the two cases. Ms. Gudel-Kemm and Mr. Zucker both founded small businesses driven by their entrepreneurial vision. Both companies were based on a small number of similar products, which were targeted by the CPSC in the mandatory recall actions. Both companies then went out of business following their involvement with the CPSC.

The Commission has not articulated any reasons why it has dealt with Ms. Gudel-Kemm and Mr. Zucker so differently, despite the similarities between the two cases. While the Buckyballs matter demonstrates that individuals are in the CPSC's cross-hairs for enforcement, the Baby Matters settlement shows that there may be a reprieve for individuals in certain cases.

- Retailers retain primary responsibility for recalling the products. In December 2012, retailers voluntarily assumed responsibility to recall the Nap Nanny and Chill products, agreeing to stop selling and offer full refunds to consumers, after Baby Matters refused CPSC's request to do so. While the Commission attempted to shift that duty to Baby Matters in the administrative complaint and require it to reimburse retailers for costs associated with the mandatory recall, neither of those terms are included in the consent agreement. The retailers – not Baby Matters – continue to offer full refunds for consumers, covering the most significant costs of the recall. In selecting products from small companies like Baby Matters, retailers should evaluate the potential risk of being on the hook for recalls in the event that the manufacturer is not able to cover those costs.

It is uncertain what the CPSC's goals were initiating action against a defunct Baby Matters and settling for considerably less than what it pleaded in the administrative complaint. To the extent that the Commission's goal was to get the Baby Matters products off of the market, it achieved that objective. It remains unclear whether the other requests in the administrative complaint were real priorities for the Commission. While it has been apparent for some time that the CPSC is increasingly aggressive in its enforcement efforts, the *In re Baby Matters* consent agreement appears to reveal at least some practical limits as to what the Commission may realistically accomplish in going after these companies for mandatory recalls at this time.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Cheryl A. Falvey

Partner – Washington, D.C.

Phone: +1 202.624.2675

Email: cfalvey@crowell.com