

R | L | C | RETAIL
LITIGATION
CENTER

 **RILA**
RETAIL INDUSTRY LEADERS ASSOCIATION
Educate. Innovate. Advocate.

RETAIL LAW CONFERENCE 2013



Title Sponsor

**HUNTON &
WILLIAMS**

Navigating the New Consumer Product Regulatory Landscape: Developments in Consumer Protection at the Agencies and in the Courts

CHERYL A. FALVEY
JENNIFER S. ROMANO
Crowell & Moring LLP

Agenda

- **Regulatory Developments Impacting Retailers**
- **Jurisdictional Implications of New Product Designs**
- **Retailer's Unique Relationship with the CPSC**
- **Class Action Litigation Trends to Watch**

What to Expect Post Shutdown

- **Personnel Changes at the CPSC**
- **Key Areas of Continued CPSC Focus:**
 - Negotiations/Settlements of Higher Civil Penalties
 - New Use of Administrative Litigation
 - Public Database Driving Action
 - Role of Staff on Voluntary Standards
 - Action at the Ports/ 1110 Rule

Trends in CPSC Activity

- **Class wide product defect investigations**
- **Class wide injury profiling**
- **Early release of investigative information**
- **Aggressive approach to section 6(b)**
- **Increased use of social media**

Regulatory Developments

- **Conflict Minerals Management**
- **Green Chemistry Initiatives and TSCA Reform**
- **Green Advertising Guidance and Enforcement**
- **The “Internet of Things”**
- **Supply Chain Management**
 - **CPSIA Testing and Certification**
 - **FSMA Regulations**

Phthalate-Free

- The FTC Green Guides state that a free of claim can be appropriate for trace amounts where:
 - The level is a trace amount which depends on the substance and requires a case-by-case analysis
 - The substance’s presence at a trace level “does not cause material harm that consumers typically associate with that substance”
 - The substance has not been added intentionally to the product

Jurisdictional Creep



FDA



EPA

Retailer Relationship with CPSC

- **Reporting obligations**
- **Role in recalls**
- **Store level warning campaigns**
- **Indemnification in penalty cases**

Is this good enough?

- Manufacturer warrants that Products will comply with all applicable state and federal laws and regulations as well as voluntary industry standards and shall indemnify retailer . . .
- Manufacturer shall submit Products for independent third-party testing laboratory for compliance with all applicable regulations and legal requirements . . .

Mass. Supreme Court

Toys R Us maintains that the evidence was insufficient to establish negligence because there also was evidence that the vendor warranted to Toys R Us that the slide would be free from defects and would conform with all laws, and because Toys R Us engaged Bureau Veritas to confirm that the slide met all applicable regulatory requirements. Essentially, Toys R Us argues that such evidence negates the other evidence of negligence by demonstrating that Toys R Us exercised reasonable care in importing the slide. ***The jury, however, were not required to credit the evidence of reasonable care by Toys R Us.***

Daiso Consent Decree

- Retain a “Product Safety Coordinator”
- Conduct a “Product Audit”
- Establish a testing program
- Create guidance manuals
- Determine labeling requirements
- Establish recall procedures
- Develop reporting procedures

Consent Decree Compliance Programs

- Written standards and policies
- Mechanism for employees to report confidentially regarding compliance concerns
- Employee training program
- Senior management responsibility
- Board oversight
- Recordkeeping for five years

What to Expect in Product Safety

- Continued Pressure on Ingredient/Constituent Disclosure
- Need to Track and Test Product Chemical Constituents
- Increased Federal Enforcement and Congressional Oversight
- Focus on Safety and Compliance in Communications to Investors
- Continued Shift in Products Litigation from Causation Claims to Misrepresentation Claims

Litigation and Regulatory Action

- Primary Jurisdiction
- Indemnification
- Class Certification/Ascertainability
- Class Settlement

Primary Jurisdiction

- Stay of proceedings or dismissal without prejudice
 - Issue within the special competence of an administrative agency
 - Agency expertise, uniformity and consistency in policy questions
 - Policy vs. legal issues
- Examples: Food and product labeling

Indemnification

- Timing
 - Indemnification claim
 - Indemnification complaint
- Tolling agreement
- Joint defense agreement
- Examples: Privacy incidents, consumer products

Class Certification/Ascertainability

- Objective, reliable, and administratively feasible method to determine the class
 - party records
 - third party records
 - affidavits
- Example: consumer products investigation/recall, TCPA

Class Settlement

Cy Pres Contributions

- Direct distributions to the class are preferred
- *Cy pres* distributions no more than a small percentage of total settlement funds
- Beneficiaries of *cy pres* funds serve the interests of silent class members
- The parties designate recipients of *cy pres* funds

Class Settlement

Attorneys' fees – points of scrutiny

- Clear sailing provision
- Disproportionate to the benefit to the class
- Not cross-checked by the lodestar method or percentage of the benefit to the class (~25%)
- Not scrutinized by District Court
- Low-risk litigation, signaled by numerous firms
- Fees of non-lead counsel incurred after appointment of lead counsel
- Coupon settlement

Questions

Cheryl A. Falvey

cfalvey@crowell.com

Jennifer S. Romano

jromano@crowell.com