

VERMONT ATTORNEY GENERAL USES STATE CONSUMER FRAUD STATUTE TO IMPLEMENT CONSUMER PRODUCT PENALTIES

By Hal Stratton*

The provisions of Section 218 of the Consumer Product Safety Improvement Act of 2008 (“CPSIA”) give the attorneys general of each of the fifty states the authority to enforce certain provisions of federal product safety statutes administered by the Consumer Product Safety Commission (“CPSC”).² To date, this authority has not been used by the state attorneys general. However, a recent enforcement action by the Vermont Attorney General provides insight as to what product safety stakeholders and those in the consumer product supply chain may expect in the future as to enforcement of product safety laws by the states and their attorneys general.

State Attorney General Product Safety Powers Granted by the CPSIA

In enacting the CPSIA, Congress gave state attorneys general broad power to enforce certain federal product safety statutes. These powers include, among others, the right to proceed in U.S. district court to enjoin product safety stakeholders from a number of activities, including selling products that violate a CPSC safety regulation, selling products that have been recalled, selling banned hazardous substances and selling products that do not meet the certification provisions provided in the CPSIA.³ In addition, state attorneys general now also have the authority to proceed in U.S. district court, on their own and without the CPSC, to enjoin the sale of products that exhibit a “substantial product hazard” under federal law, a power which previously has been reserved to and within the province and discretion of the CPSC.⁴

However, the CPSIA does not give the state attorneys general authority to impose or seek monetary penalties against parties who violate federal product safety laws. Such provisions were included in various drafts of CPSIA legislation as it worked its way through Congress. While this language was the source of much behind-the-scenes debate and negotiation, the final version of the CPSIA did not include authority for state attorneys general to impose penalties under federal statutes which they may otherwise enforce. The lack of authority to recover monetary damages and penalties under the CPSIA will likely have a significant effect upon whether any of the state attorneys general will routinely use powers granted in the CPSIA under the federal statutes alone in consumer product enforcement efforts in the future. With budget cuts virtually across the board in the states, any action that does not allow the state to collect monetary damages or penalties will likely not take priority.

Vermont Attorney General Action

This does not mean, however, that state attorneys general will not become more involved in the enforcement of consumer product safety laws in the future. The enactment of the CPSIA and the publicity surrounding certain high-profile recalls over the past few years beginning in 2007, have served to raise the profile of product safety nationwide, including among the state attorneys general. A recent action by the Vermont Attorney General against Dollar Tree Stores, Inc. (“Dollar Tree”) illustrates the inherent power, aside from federal law, the state attorneys general possess under state law to enforce product safety laws and perhaps portends what will likely be the most widely-used procedure by the states to ensure consumer product safety in their jurisdictions.⁵

In March 2006⁶ and October 2007,⁷ Dollar Tree, in cooperation with the CPSC, recalled children’s jewelry that contained lead. In addition, as grounds for the action, the Vermont Attorney General noted reports that Dollar Tree sold bracelets containing cadmium in November 2007. After the announcement of these recalls, the Vermont Attorney General’s office purchased four products similar to those that were subject to the recall from Dollar Tree and had them tested. The results of the tests indicated high levels of cadmium in some of the products and high levels of lead in others. Prior to learning of the Vermont Attorney General’s actions, Dollar Tree adopted procedures to ensure that it would not sell any further products containing lead or cadmium. The CPSC did not seek (or as yet has not sought) a penalty from Dollar Tree under the federal law in connection with the recalls, and, as discussed above, the Vermont Attorney General did not have authority under the CPSIA to seek such penalties. So, it would seem the case was closed at that point.

However, the Vermont Attorney General’s office wasn’t finished with legal action against Dollar Tree. It proceeded not under powers granted by the CPSIA, but rather under Vermont state law, specifically the Vermont Consumer Fraud Act.⁸ The Vermont Attorney General’s office used the following provision of this act to seek relief under Vermont state law against Dollar Tree: “(a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.”⁹ The contention of the Vermont Attorney General under this language was that the selling of children’s jewelry containing high levels of toxic substances such as cadmium and lead constitutes an unfair or deceptive trade practice under the Vermont statute.

In addition, however, unlike the attorney generals’ power under the CPSIA, the Vermont Attorney General, once an unfair or deceptive act such as selling an unsafe product has been determined, has the authority to seek a civil penalty under the provisions of 9 V.S.A. § 2458(a)(1), which provides for penalties of \$10,000 per violation. Under this provision,

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Dollar Tree agreed to pay the state of Vermont a civil penalty for all violations of \$100,000.

State Consumer Protection Laws

Each state has a consumer protection or fraud statute similar to Vermont's which can be enforced by the state attorney general.¹⁰ Although these statutes differ from one another in various ways, each provides their state attorney general with wide latitude to enforce unfair or deceptive trade practices. Each of these statutes also provides for the recovery of monetary damages and penalties for their violation. As product safety laws and issues evolve, state attorneys general and their staffs will likely be turning to their state consumer protection statutes more and more to address the violation of federal consumer product safety laws and the sale of unsafe products alleging that such sales constitute unfair or deceptive trade practices under the state statute.

CPSIA and Federal Preemption

The Consumer Product Safety Act ("CPSA")¹¹ and the Federal Hazardous Substances Act ("FHSA")¹² provide that any state or local regulation that is not identical to a regulation addressing the same risk promulgated under the CPSA or FHSA by the CPSC is ineffectual and thus preempted. Additionally, prior to the CPSIA, states had no authority to enforce federally-imposed recalls or other federal enforcement actions under federal law. This statutory scheme clearly indicated a preference for preemption of local and state product safety law by federal law.

These preemption provisions as they pertain to regulations are maintained by the CPSIA. However, in granting enforcement powers to the state attorneys general under the CPSIA, Congress has effectively put the state attorneys general virtually on par with the CPSC regarding the injunction of the sale of consumer products exhibiting a substantial product hazard and further allows them to enforce federally promulgated regulations and federally-administrated recalls. The issue of preemption in the field of consumer product safety will undoubtedly be the subject of additional litigation in the future.

Potential Future Enforcement Actions

The involvement of state attorneys general in consumer product safety enforcement is just beginning, although a number of the larger states, such as California and Illinois, have been involved in product safety issues even before the enactment of the CPSIA. Previously, most states have relied on the federal government to enforce consumer product safety law and sought to enforce only state statutes which specifically address product safety. However, the recent actions of the Vermont Attorney General may portend a new era in state product safety enforcement, where specific state product safety laws do not exist. All consumer product stakeholders in the supply chain, including manufacturers, distributors, importers, and retailers are subject to these state actions and authority. In looking toward the future, consumer product stakeholders should expect the following:

1. More and more states, through their attorneys general, will become involved in consumer product safety enforcement,

primarily through their state consumer protection statutes, even where specific state consumer product safety statutes do not exist.

2. States will seek monetary damages from stakeholders and those involved in the consumer product supply chain for violations of consumer product safety law through their state consumer protection statutes even where the CPSC does not.

3. Depending on the circumstances of the situation, states may engage in multistate action as to consumer product enforcement, joining together to collectively assert claims stemming from each state's consumer protection statute. The state attorneys general have a long history of multistate action in various consumer areas, including among others, tobacco, pharmaceuticals, consumer finance, and, more recently, the Toyota recalls.

4. The enforcement powers of the CPSC and the states are not mutually exclusive. States may take enforcement action under their respective consumer protection statutes in certain circumstances regardless of any action or inaction by the CPSC.

Consumer stakeholders should monitor and consider the actions and the powers of the state attorneys general and the states as well as the CPSC and the federal government in their product safety planning, assurance, and remediation programs.

Endnotes

1 15 U.S.C. § 2073(b).

2 These statutes include the Consumer Product Safety Act, 15 U.S.C. §§ 2051-2089; the federal Hazardous Substances Act, 15 U.S.C. §§ 1261-1278; the Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204; the Poison Prevention Packaging Act, 15 U.S.C. §§ 1471-1477; the Virginia Graeme Baker Pool and Spa Safety Act, 15 U.S.C. §§ 8001-8008; the Children's Gasoline Burn Prevention Act, Pub. L. No. 110-278, 122 Stat. 2602 (codified at 15 U.S.C.A. § 2056 note); and the Refrigerator Safety Act, 15 U.S.C. §§ 1211-1214.

3 15 U.S.C. § 2073(b)(1).

4 15 U.S.C. § 2073(b)(2)(C).

5 Assurance of Discontinuance, *In re Dollar Tree Stores, Inc.*, State of Vermont, Washington County, available at <http://www.atg.state.vt.us/assets/files/Dollar%20Tree%20AOD%20-%202010-2-5.pdf>.

6 Press Release, Consumer Prod. Safety Comm'n, Dollar Tree Stores Inc. Toy Jewelry Recalled for Lead Poisoning Hazard to Children (Mar. 23, 2006), available at <http://www.cpsc.gov/CPSC/PUB/PREREL/prhtml06/06118.html>.

7 *Id.*

8 9 V.S.A. §§ 2451-2480n.

9 9 V.S.A. § 2453(a).

10 See State Attorneys General Powers and Responsibilities (L. Ross & E. Myers eds., 2d ed. 2008).

11 15 U.S.C. §§ 2051-2089.

12 15 U.S.C. §§ 1261-1278.

