



# Cincinnati Law Library News

A Monthly Newsletter from the Cincinnati Law Library Association

November 2008

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## Beware the Ides of August: CPSC Obtains Nuclear Weapons' for Import Safety

By James T. O'Reilly

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Creatures who are able to escape a certain low-lying swamp along the Potomac during the August doldrums often migrate away; human inhabitants flock to Rehoboth and other beaches or to their Blue Ridge Mountain retreats. Few of the Potomac swamp dwellers stayed around for the unheralded mid-August signing of the Consumer Product Safety Improvement Act (CPSIA), Public Law 110-314. But by the end of 2008, this complex and little-understood "law of unintended consequences" will have struck small business, foreign companies, and tort defense counsel like a summer lightning storm at a picnic.

This article cannot do justice to the entire CPSIA changes, but while researching my new book on the legislation, I came to distill four major themes from the new law, which deserve attention from the business community:

1. Don't fire anyone who is remotely involved with a consumer product.
2. Close your in-house testing lab and outsource to a more independent evaluator of your finished products.

3. Make your best deal in Bethesda, Md. [where the Consumer Product Safety Commission is headquartered], to settle a product problem, because states can be very tricky adversaries.

4. Warn your foreign suppliers that they, too, are under the microscope of quality problems and may soon be facing U.S. liability as much as you are.

Of course these comments are overstated, harshly enough to spill coffee all over the desks of K Street lobbyists. But while the Washington, D.C., elite were sailing and spending quality time with the kids, the "August Surprise" was being shaped, passed and signed.

Americans will be safer as a result of the overall package: The pain is in the details for your clients.

### Whistle Stop

The 2008 amendments have the broadest sweep of any federal law protecting employee whistleblowers that I have ever seen, since I first wrote about such statutes in 1973.

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## Solo Attorneys: Lexis Offer Still Available

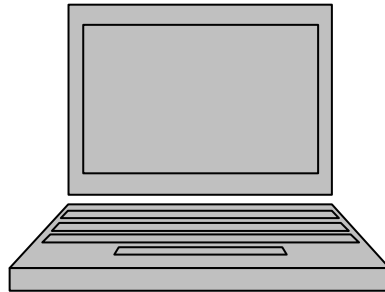
You have 24/7 access to Fastcase through the Law Library and you probably have Casemaker through the OSBA (and here at the Law Library as well). There are times, though, when you want to supplement your legal research with Lexis or Westlaw or authority check using Shepard's or KeyCite. Is that worth \$40 a month to you?

For unlimited access?

Anywhere?

The Law Library offers Lexis (Ohio, Kentucky, & Indiana Enhanced, including federal courts) to CLLA members who are solo attorneys\* for \$40 a month through June 2009. For more information or a list of what's included, contact Mary Jenkins (tel 513.946.5300) or see [http://www.hamilton-co.org/cinlawlib/lexis\\_solos.html](http://www.hamilton-co.org/cinlawlib/lexis_solos.html).

\*Solo attorneys may have a part-time associate, a paralegal, or share space with another attorney – as long as it is a solo practice and as long as the attorney is not a current Lexis subscriber.



## Lexis Web beta

Free for the time being and Google-like in its searchability, Lexis Web offers web-based legal information. It is different than the LexisNexis services you are familiar with, since it also searches the free internet, but the user is encouraged to augment research with [www.lexis.com](http://www.lexis.com) content as needed.

Lots of employer bad choices and lots of bad legal advice will precipitate expensive problems under the new law. Most retailers, whether small or large, are unaware that the employee whom they fire after Aug. 14, 2008, can get their job back temporarily, and then after a hearing, permanently, with back pay, attorney fees, expert witness fees, and some undefined "compensatory" damages. To make a claim successfully, the former employee or union or attorney will convince a Labor Department field investigator that one of the reasons (not the sole justification) for the firing was probably that the worker was "about to" tell the retail store manager that a consumer product was "reasonably" believed by that worker to be either unsafe or in violation of labeling, ingredient or other CPSC rules.

Yes, read that again: This is the broad scope of the statute that now protects 20,000,000 workers, the number cited in a U.S. PIRG press statement of Aug. 14. It will be malpractice for lawyers to continue to advise employers to ignore a product safety concern raised by workers; and because the workers receive both legal fees and expert witness fees, this complaint process will be popular among organizers who seek to induce union membership in retail stores and warehouses in every state.

The cautionary tale for retail store and distributor warehouse managers may be that termination or lesser discipline like suspension or lessened hours need prior legal review, if the employee handles consumer products. The employer has a heavy burden of proof if there is a consumer product on sale at the store and the employee's union or private counsel files a claim for reinstatement, asserting some safety concern that the worker was "about to" assert. Likewise, importers must retain workers who complain about unlabeled toys,

wholesalers cannot dock the pay of workers who told their supervisors of appliance safety concerns, and distributors need to carry their least favorite driver who is "about to" tell the dispatcher that its bicycles might (in the worker's reasonable view) fail a bicycle safety standard.

Prudent management teams in the consumer goods supply chain will have to be trained or retrained about the new protections. For those firms, the only good news is that punitive damages and a 15 percent worker "bounty" on worker reports that lead to CPSC civil penalties were not adopted. The only employee group that is not protected is CPSC's own employees: The White House successfully argued against incentives for the agency staff members to report violations, and forced sponsors to drop provisions allowing a bounty to CPSC employees for reporting potential product hazards that the commission hierarchy had ignored.

Finally, don't cry to CPSC about this remedy. The commission has no role; it was delegated exclusively to the Labor Department, which made no submission to Congress and whose adjudicators were totally uninvolved in shaping the hearings deadlines and the federal court remedies for delays in DOL hearings. If the worker reasonably believed that a CPSC rule was not being followed, the judge of that belief is not the CPSC, for it has been given no seat at the table when the DOL judge or the federal judge decides on damages and reinstatement orders.

### Twisting the Testers

Though badly phrased in the final codified text, the new provision on mandatory tests and certification of products covers at least every children's product and at most, every consumer product. The test is to be done for

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*Beware of the Ides!* continued from page 4

specific compliance required of specific products, such as the lead in toys, the sidewalls of cribs, or (if all products are covered) the structural glass standard for bathroom shower panels. The certification from the accredited testing laboratory must be delivered at the retail level and at the Customs port of entry. “No paperwork, no import” takes on a safety dimension.

For larger companies that had run their own safety test laboratories, this would be a great time to divest that lab to an independent third party. Although CPSC could opt to recognize a company's own lab and accredit it, the wording of the new law appears to strongly favor independent labs. The law sets up the owner of the inhouse lab for penalties or prosecution if management of the company that signs employee paychecks has “undue” influence on its test results. Lab employees have full whistleblower rights. The intricate layers of audits and accreditations are hard to parse and even harder to manage, so a divesting of inhouse laboratories is likely.

### Better Bargain With Bethesda

CPSC compliance staff has been understaffed and under the gun for years, making them wary of industry legal maneuvers on recall and Section 15(b) issues. There are some Washington lawyers who fear overreaching by the commission staff. Some mistrust of one's adversary is inevitable in this setting of hazardous product negotiations. Yet we can comfortably predict a very much warmer embrace of CPSC compliance staff by industry lawyers in 2008 and beyond, as the manufacturers contemplate the alternative. CPSC compliance attorneys will have a “new best friend” in the industry lawyer who looks at the new playing field of enforcement. CPSC staff can prepare to be hugged especially by the lawyers for toy and children's products.

Industry hated the proposals to shift equal power to the states. After the 2008 amendments, the state attorneys general can take all the same enforcement actions that CPSC can take and can win all the penalties that the commission could win. Headlines for future governors; training for future plaintiffs' counsel; cash for state treasuries—what's not to like?

## Member Benefits

All members have access to the following valuable resources and services:

**Circulation privileges** to borrow from over 40,000 print volumes for **up to 6 weeks** at a time

Access to extensive electronic databases from the Law Library, including **LexisNexis**, **Shepards'**, **CCH Omnitax**, **CCH Human Resources Group**, and **CCH Business Group** resources, **Hein Online** Law Journals and Federal Register, and over 70 **Aspen / LOISLaw** treatises in 16 substantive areas

**Wireless network** throughout the Law Library

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5 **meeting rooms** with speaker phones

Professional **reference service** by our law librarians, available via e-mail, telephone, and in person;

Free **document delivery** by fax or e-mail of print and electronic materials

Inexpensive **CLE seminars** throughout the year, on legal research and substantive topics

In addition, solos and members whose firm has a membership have **24 hour remote access** to Fastcase.com case law and Aspen/LOISLaw treatises

The prudent national manufacturer that learns of a potential “substantial product safety” situation will race to embrace a federal agency settlement, to preclude Montpelier, Pierre, Little Rock, and Juneau players from entering their view of that product's safety problem into the federal district courts.

For several decades, a handful of legal specialists inside the Beltway have dealt with CPSC compliance remedies. Their near-monopoly of this quiet legal field will vanish when the National Association of Attorneys General (NAAG) members enter the fray, and mega-firms begin to defend multiple claims in multiple courts on the same consumer product risk situation. Note that the CPSIA appellate case law interpretations are sparse. But now the multiple venues in multiple circuits construing the act as applied will make for some fascinating jurisprudence, and expand the ranks of private attorney “frequent flyers” with a CPSC case load.

### Watch the WTO

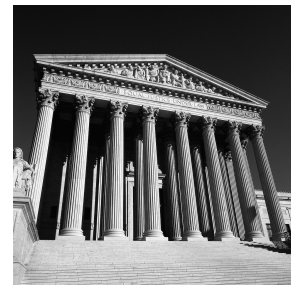
A fourth category to watch is the impact on foreign shippers of consumer goods, whose container loads of computers or cradles can be legally destroyed if they fail testing at the port of entry, or fail to have certifications of compliance, and are then refused re-export permission. Lawyers who can't even spell WTO [World Trade Organization] can observe the ramifications for trade disputes of the Senate's legislative history on this bill's control of new entrants in the all terrain vehicle field, or the direction to the Government Accountability Office to study a provision forcing foreign firms to accept U.S. jurisdiction for CPSC penalties of up to \$15,000,000 against a

violative imported product.

The foreign exporter would be most shocked by the confluence of new criminal penalties (five years in prison, twice the amount of gain or \$500,000, and asset forfeiture) with the large increase in both civil penalties and the availability of civil penalties, and seizure of imports in many more cases. These are like “nuclear weapons” in the administrative agency field. Embassy commercial attaches who dive into the details for their nations will probably be recommending WTO relief against this trade barrier. The sponsors of Public Law 110-314 spent very little of their reports and floor comments on the international rules for product safety limitations, and a great deal of time bashing the quality of the imported goods which CPSC had been tasked to control.

The moral of the story: Congress is an imperfect body and some of the decisions made in midsummer may be even more imperfect than expected. Please pay close attention to Public Law 110-314 before its imperfections drag your clients into the swamp of regulatory pain.

*James T. O'Reilly is a trustee of the Cincinnati Law Library Association and a professor at the University of Cincinnati College of Law. He authored the forthcoming text, Consumer Product Safety & The 2008 Amendments (PLI Press, 2008). He can be reached at [oreilljt@ucmail.uc.edu](mailto:oreilljt@ucmail.uc.edu).*



## Products Liability

By Glenna Herald

As the law of product liability adapts to keep pace with our rapidly changing society, the need for current and credible sources of information increases.

To help our membership keep up to date with this ever evolving topic, the CLLA offers the following publications electronically:

**BNA's Product & Safety Liability Reporter** – Updated weekly, this publication helps users stay current by providing analysis of product liability litigation and product safety issues.

**Aspen's Product Liability Law Library** – Updated annually, this publication offers users the following titles:

Forms & Checklists  
Preparation of Product Liability Cases  
Product Liability Case Digest  
Product Liability Desk Reference  
Product Warnings, Defects and Hazards  
Scientific Evidence and Experts Handbook  
Malingering and Deception in Litigation

**CCH Products Liability Reporter -**  
Updated semi-monthly, this database offers:

Consumer Product Safety Guide Reports  
Products Liability Reports  
The Law of Products Liability  
Case Tables  
Daily Document Updates

Another good source for information regarding consumer safety is the U.S. Consumer Product Safety Commission,

<http://www.cpsc.gov/library/library.html>.

This website gives you access to:

CPSC Publications  
Statistics  
Peer Reviewed Agendas  
Quality Guidelines  
Federal Register Dockets  
National Electronic Injury Surveillance System

If you would like more information on these resources, please contact us.



## Update on Ohio County Law Library Legislation

By Mary Jenkins

SB345, a bill intended to change the management and funding of Ohio's county law libraries, including the Cincinnati Law Library, is currently assigned to the Senate Finance and Financial Institutions Committee.

We expect the bill to be taken up when the state legislature reconvenes in early November. Comments or questions? Contact Mary Jenkins, Law Librarian & Director.

## Holiday Closings

Tuesday, November 11

Veterans Day

Thursday, November 27

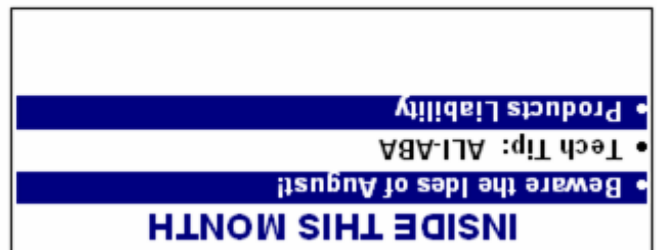
Thanksgiving Day

Friday, November 28

Day after Thanksgiving

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