

Ending Secrecy in Defective Product Litigation: New Federal Reporting Rule for Consumer Products

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As of January 1, 1991, manufacturers of consumer products are required to report to the Consumer Product Safety Commission (CPSC) settlements in cases involving "grievous bodily injury or death" caused by defective products. The new legislation, 15 U.S.C. section 2084, is an important advance for consumers because former regulations were vague and easily avoided. Previous rules required a manufacturer report only when it believed a product was defective or posed a substantial risk of injury. As a result, few manufacturers of consumer products reported and CPSC enforcement was extremely difficult.

The new requirement is part of a growing trend to avoid sealing of court records and concealment of litigation arising from consumer products that caused serious injuries: mutilation, amputation, dismemberment, disfigurement, loss of bodily functions, debilitating internal disorder, severe burns and electric shock and any injury which required extended hospitalization.

Surprisingly, nobody knows how many defective product personal injury cases are actually filed each year in the United States or the number of major injury and death cases that are settled and sealed. Locating court files on such cases is virtually impossible, unless a defendant truthfully answers interrogatories.

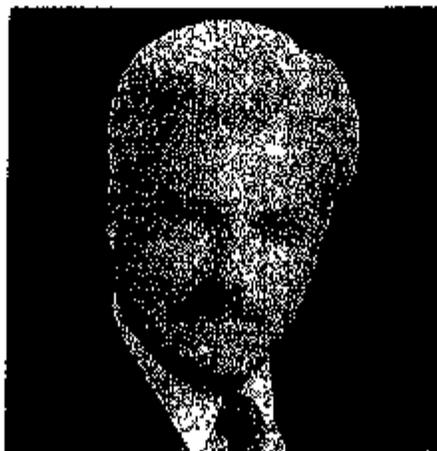
But now, to avoid enforcement action by the CPSC, every manufacturer of a consumer product must monitor personal injury and death claims for the purpose of reporting its product experience to the federal government. Within every consumer product manufacturing company,



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someone must be designated and given the responsibility for collecting claims data and determining whether it is subject to the reporting rules. As a result, "more accurate" answers to product litigation history interrogatories should be forthcoming. Unfortunately, the new statute does not cover products under the auspices of the National Highway Traffic Safety Administration, namely passenger vehicles, and is restricted solely to consumer products under the jurisdiction of the Consumer Product Safety Commission.

The threshold reporting requirement



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occurs whenever, during a two year period, three cases, filed in either state or federal court, result in a judgment in favor of the plaintiff or a final settlement. When a third action is settled or judgment entered, the manufacturer must within thirty days report to the CPSC. Thereafter, every subsequent settlement or judgment in that 24-month period must be reported with thirty days. The 24-month period commences January 1, 1991, and ends December 31, 1992. The next two year reporting period will begin January 1, 1993.

When information is required to be reported to the CPSC regarding a concluded civil action, the manufacturer must provide the following minimum report:

- Name and address of manufacturer;
- The model and model number or designation of the consumer product which was the subject of the civil action;
- A statement as to whether the civil action alleged death or grievous bodily injury, and in the case of an allegation of grievous bodily injury, a statement of the category of such injury;
- A statement as to whether the civil action resulted in a final settlement or a judgment in favor of the plaintiff;
- In the case of a judgment in favor of the plaintiff, the name of the civil action, the number assigned the civil action, and the court in which the civil action was filed.

In addition to this required information, most manufacturers will probably take advantage of the statute's provision to provide "any other information which the manufacturer chooses to provide," especially if it is exculpatory, such as the plaintiff's comparative fault, product misuse, claimed extenuating circumstances, or whether any judgment is under appeal or is expected to be appealed.

If this statute is to be effective, practitioners must be careful to plead that the product caused "death or grievous bodily

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injury" to trigger the reporting requirements. Judicial Council form complaints should be amended in products liability actions to include, on page three under the category of "other damage," the statutory language and a description of the categories of injury described in the statute (mutilation, etc.).

As part of any pre-filing investigation, counsel should contact the Consumer Product Safety Commission to obtain records of all defective product settlements and judgments involving the product and all related products by the same manufacturer. Such cases will invariably also be reported as defective product investigations, independent of the statute and such records are public documents available for purchase from the CPSC.

Because the statute fails to require the identification of plaintiffs, courts, and action number in cases of settlements, initial interrogatories in product liability cases should include an inquiry concerning the defendant's reporting history under the 15 U.S.C. section 2084 to the CPSC for the purpose of identifying further

avenues of discovery and to identify the employee responsible for collecting data and reporting to the CPSC. Once any cases are reported under this new statute, a defendant will not be able to deny specific knowledge or thereafter avoid producing complete identification of the case for plaintiff's counsel.

It is clear that compromises were negotiated by the National Association of Manufacturers in the final statutory language. Under the new statute, the amount of a settlement paid by a manufacturer is not required to be reported and, as expected, the reporting of a civil action "does not constitute an admission of unreasonable risk of injury, a defect in the consumer product which was the subject of such action, a substantial product hazard, an imminent hazard, or any other admission of liability under any statute or under any common law."

For the purpose of this reporting statute, a particular model of a consumer product is one that is distinctive in functional design, construction, warnings or instructions related to safety, function, user population, or other characteristics which could affect the product's safety related performance.

With increased reporting to the CPSC, the Commission will have greater access to the tremendous investigative power of the plaintiffs' bar and increased product safety will result.

But before any of this happens, plaintiffs' counsel must include in every products liability complaint an allegation of "grievous bodily injury or death." Without this effort, the statute will remain largely inoperative and ineffective. ■

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