



The New CPSC Database as Part of an Adequate Post-sale Information Gathering Program

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Starting on March 11, 2011, the U.S. Consumer Product Safety Commission's new [searchable database](#) of product safety information was up and running. Depending on which side you are on, this new database will either be a boon for consumers or doom for manufacturers. I don't think it will be either. To the extent the submissions are true, it will be one more piece of post-sale information, among many others, that a diligent manufacturer should consider in evaluating post-sale risk and deciding whether any reports to the government need to be made or corrective actions need to be undertaken.

While this database provides some new opportunities for the transmission of inaccurate information, this possibility has existed for years with many other sources of information. I don't believe that this new database will make things much worse for manufacturers, and, in fact, it might provide some additional useful information that can help predict future risk of injury or damage.

Consumers may or may not benefit from this new database. While it will have raw data on supposed incidents involving products, it is questionable whether this information will be useful to consumers. In the beginning, there will be no analysis on the database to help determine whether the product is unreasonably unsafe or defective or whether the consumer was just unlucky or careless. This data, however, might convince the consumer not to buy a product that has no defects even though it is the type of product where accidents can occur if not used carefully, such as ladders.

This database will be used in the future by CPSC staff to analyze incidents and determine whether there are patterns that need to be addressed by the manufacturer. To that extent, this new database isn't helpful to manufacturers; however, manufacturers who have implemented a serious post-sale analytical program should have already analyzed these patterns and taken any appropriate corrective actions.

Of course, the database can be used by plaintiff's attorneys and experts to identify accident modes and patterns which will provide useful information as they develop a case against a manufacturer.

Lastly, reporters will benefit from this database. They can take the raw data and, even if they can't talk to a specific unidentified consumer, they can report on trends and patterns and numbers and types of accidents involving certain products. They can search the database and then pose some embarrassing questions to the manufacturer and retailer who may or may not be prepared to respond at that time.

Manufacturers need to anticipate all of the types of people who may use the database and all of the questions that may be generated by the entries. They need to be prepared to respond in a way that makes them seem diligent in tracking safety issues and dealing with them if necessary.

This article will focus on how a manufacturer should establish an adequate post-sale fact gathering program and how this new database fits into such a program.

Post-sale Duties

The foundation of adequately dealing with post sale issues is the establishment of an information network that will allow a company to determine how its product is performing in the U.S. and world marketplace. This information is necessary for the

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manufacturer to ultimately make decisions about what, if any, post sale actions might be necessary, including reports to various government authorities.

The potential liability of a manufacturer or product seller for common law negligence after sale of their product is well-known. In addition, current U.S. regulatory and common law requirements apply to information that was obtained or should reasonably have been obtained that identify an unsafe condition. Therefore, anything less than a "reasonable" effort at obtaining and analyzing post-sale information may be considered negligent by a U.S. jury or a U.S. government agency in determining whether the manufacturer should have known about the problem before the accident occurred. Therefore, deciding what is reasonable under the circumstances is important to determine and document.

In addition, the potential liability for violations of regulatory laws is growing as more governments implement consumer product safety legislation. Canada's new consumer product safety law will go into effect in early 2011. Australia's law went into effect on January 1, 2011 and South Africa's will go into effect in March 2011. And, while the European Union has had a reporting law for years, each country in the EU is still in the process of implementing the law. All of these laws contain a duty to report to the government if threshold safety events occur. This enhanced focus makes it even more important that a manufacturer gather and analyze safety information received from anywhere in the world.

Current Information Gathering Systems

Today, a manufacturer can receive safety information from a number of readily available sources other than the new searchable database. In addition, the growth of the internet and social networking have made it even easier to find this information if you are looking for it and easier for manufacturers to receive this information from those who want to communicate with them about it.

For many years, well-known consumer publications and websites and consumer reporters have regularly evaluated the quality and safety of products. In addition, for years, consumers have been able to comment on the safety of products and communicate this information to these publications and websites as well as directly to manufacturers, the government and other consumers by the internet, email, fax, and phone. I've read that today there are more than 200 million blogs and that 34% of all bloggers post opinions about products or brands.

Therefore, today, even without the CPSC's new searchable database, there are many ways in which manufacturers can obtain safety information on specific products. Companies need to evaluate where this information comes from and how to capture it. The following sources are a base minimum to consider:

- Notices of lawsuits, claims or accidents or near misses from anywhere in the world will provide information on the types of products that are failing, the mode of failure, and possible misuse of the product.
- Customer complaints and warranty returns from anywhere in the world are fertile sources of information. A pattern of complaints and returns may indicate that a product is failing in a particular mode on a regular basis.
- Notices from the chain of distribution (e.g. distributors, dealers, retailers) and the chain of production (e.g. raw material suppliers, component part suppliers) might put a manufacturer on notice of a potential or actual safety risk or problem.
- Pertinent safety information can also come from competitors or trade associations.
- Accidents, lawsuits, verdicts, settlements or recalls involving a competitor's product that is similar to yours are certainly relevant to consider.
- Websites established by plaintiff's attorneys and safety expert witnesses pinpoint alleged safety issues involving a variety of products.
- Information available from the CPSC on request or received from the CPSC including incident reports, investigatory reports, industry white papers, accident reports and accident estimates under the NEISS system, rulemaking, recall notices and other descriptions of corrective actions. In addition, recall notices and other guidances and rules from foreign governmental product safety agencies.
- Publications and websites established by consumer groups that report on safety issues. For example, see www.clickcheckandprotect.org for a new site established with the help of *Consumer Reports*.
- Investigative reporters have ramped up their reporting as more and more companies have problems and need to recall their products. And daily news stories in the press around the world report on safety incidents involving a product. Of course, all of these articles are available to the public and the government.

It is very important for the manufacturer and others in the chain of production and distribution to establish procedures to review all of the information that might relate to the safety of their products and company and to funnel it to trained personnel to

evaluate so that a decision can be made about any appropriate actions. In addition, this will help the company respond to inquiries concerning safety made by the government, the press, or consumers. Being aware of all information – good and bad, true and untrue, complete and incomplete – can be helpful as long as the important information can be sorted out and adequately evaluated.

One big problem with much of this information is that it is unverified and unverifiable. It can be inaccurate, incomplete, a complete lie, overstated, or even understated. For example, many consumers who contact a company overstate the problem in order to try to get a new, free product and possibly be compensated for some alleged injury or damage. Some dealers and retailers, who usually take the side of their customer, the consumer, also tend to overstate the problem or understate the consumer's fault so as to get some compensation or some damage covered under warranty. And we all know what reporters and plaintiff's attorneys do. It can be very difficult and time consuming to get to the truth involving these various sources of information.

Many manufacturers regularly monitor websites devoted to such opinions. In fact, there are companies that are being hired to find information on the internet and try to determine its truthfulness and remove or counteract negative information that presumably is untrue or misleading or contains confidential information. Companies such as "Reputation Defender" can help with such activities. And companies have been known to buy up website names (usually with the name "sucks" in it) that are used by people to complain about a company's products or services.

The manufacturer who engages in some of these reputation management activities must be careful not to ignore or suppress valid, accurate information concerning a safety issue in the company's products.

CPSC Searchable Database

Information supplied by the consumer or others on the CPSC searchable database probably won't be any more inaccurate, incomplete or worthless than what is currently out there. And, in fact, given that the information being submitted must be certified by the consumer as being accurate, it is hopefully going to be more accurate. Whether it is or isn't accurate, it will have the same potential problems as other information and the manufacturer will have to decide how to follow-up.

Consumers (and almost anyone) will be able to submit incident reports or reports on risk of harm (but not quality complaints) on the CPSC searchable database and manufacturers will have an opportunity to object on two basic grounds – the submission contains confidential information or the submission is materially inaccurate.

There have been numerous articles concerning the new CPSC searchable database, both positive and negative. For the reasons discussed in some of these articles, many of these submissions are going to be difficult to object to and difficult to correct. First, it is unlikely that a submission to the database will have confidential information. Where would the consumer obtain it? Therefore, I doubt whether this objection will be used frequently.

Secondly, in many situations, it will be difficult to object on the basis of material inaccuracy because you either will not know who the submitter is (the manufacturer will not know unless the consumer consents to having their name given out) or you won't have any basis for objecting unless you talk to the submitter and examine their product. Sometimes a short description of an incident or product failure is enough to allow a manufacturer to determine that it is impossible for this type of failure to occur. But will that be enough to successfully object without actually examining the product or talking to the consumer? Time will tell.

So the database will, most likely, contain some inaccurate information on actual incidents and someone's opinion of future risk of harm. However, to look on the positive side, it may provide useful and accurate information that can be followed up that will give the manufacturer an idea about a future risk so that they can take appropriate corrective actions.

Manufacturers want to find out about problems before people are hurt and that is why they have customer service personnel who answer phones, letters, emails and website postings from consumers about safety issues. Why can't this database, if it is properly run and bogus submissions are excluded, be treated as another opportunity to identify future risk?

Conclusion

The CPSC searchable database will, of course, create more information that can be both harmful and helpful for the manufacturer, but also provide additional safety information to consumers, the public, and the government. It remains to be seen whether consumers will actually take the time to post such information or whether consumers will actually consult the CPSC database to determine the safety of products they own or are contemplating buying.

As a consumer, I would much more likely communicate directly to the manufacturer about a safety issue that concerned me and demand a response, something that the CPSC database will not normally provide. In addition, I would more likely consult with some entity like Consumer Reports to check on both the safety and quality of a product I was about to buy.

However, time will tell what effect the new CPSC database will have on consumer sales, product liability issues, and regulatory

issues. In the meantime, manufacturers should register a corporate contact for the database and be prepared to quickly evaluate reports that come in about incidents. Some of them may be bogus or plants, but others may provide valuable information that will allow the manufacturer to take prompt corrective action to minimize the chance of future incidents.

Failing to do this could result in more accidents and injuries and encourage a plaintiff to argue that the manufacturer ignored a clear notice of future risk and that this constitutes a basis for an award of punitive damages.

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