

Recent Federal Court Decision Guides Companies Challenging Actions by the Consumer Product Safety Commission

On October 22, 2012, the U.S. District Court for the District of Maryland released an opinion enjoining the Consumer Product Safety Commission (CPSC or the Commission) from publicly publishing a report “implicating” a consumer product. *Company Doe v. Tenenbaum*, No. 8:11-cv-02958-AW, slip op. (D. Md. Oct. 22, 2012). The decision marks the first time a court has prohibited CPSC from posting a report on CPSC’s SaferProducts.gov website, a database mandated by Congress in the Consumer Product Safety Improvement Act of 2008 (CPSIA). The decision not only clarifies the standards that CPSC must satisfy in publishing reports on SaferProducts.gov, but also offers guidance for companies that seek to challenge other unfavorable agency actions by CPSC.

The CPSIA requires CPSC to post on its database “[r]eports of harm relating to the use of consumer products” that CPSC receives from consumers or a broad range of other designated parties. 15 U.S.C. § 2055a(b)(1). The CPSIA allows a manufacturer or private labeler to contest the posting of a report that contains “materially inaccurate” information. *Id.* § 2055(c). The plaintiff-manufacturer in *Company Doe* asserted that a report CPSC intended to publish was “materially inaccurate” because the report did not “relate to” the use of the manufacturer’s consumer product, as required by the CPSIA. After CPSC rejected the company’s argument, the company brought suit arguing, among other things, that CPSC’s decision was arbitrary and capricious and an abuse of discretion under the Administrative Procedure Act (APA).

In a decision on cross motions for summary judgment, the *Company Doe* court concluded that the phrase “relating to” means that the association between the consumer product and the harm addressed in the report cannot hinge on happenstance or chance alone. *Company Doe*, slip op. at 38. In other words, CPSC cannot publish a report when the odds of a connection between a product and the harm are no more likely than that of a “coin flip.” *Id.* at 43. The court explained that, in such a situation, “the Commission’s decision to publish the report bears no rational relationship to the public safety purposes the CPSIA purports to promote.” *Id.* The company presented medical evidence and declarations challenging that the reported incident was related to the product. The court found that, to be “related” to a product, an event must be “connected with” or “associated with” the product. *Id.* at 26. And, the court found unconvincing CPSC’s efforts to “establish the necessary nexus” between the report and the product. *Id.* at 41.

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The court's opinion provides guidance for manufacturers and private labelers seeking to contest the publication of reports as "materially inaccurate," and sheds light on basic questions that companies must face whenever considering a legal challenge to actions by CPSC:

1. *When Does An Action By CPSC Constitute "Final Agency Action" That Can Be Challenged In Court?* CPSC argued that its decision to publish the report did not constitute "final agency action," and therefore was unreviewable by the district court under the APA. However, the court concluded that CPSC's decision to publish the report was a "final agency action" because it "marked the consummation of its decisionmaking process," and represented a decision by which "rights or obligations have been determined." *Id.* at 55-57, 66.

In rejecting the government's arguments, the court clarified that a decision by CPSC need not confer rights or obligations on *the plaintiff* to be reviewable, but need only resolve *the Commission's* statutory and regulatory obligations. *Id.* at 57. Because CPSC made a factual and legal determination that the report contained no materially inaccurate information, the statute and regulations established CPSC's obligation to publish the report. In addition, the court rejected the government's argument that CPSC's decision was not final because the report carried no legal consequence for the manufacturer, and that the report was only a preliminary step that may lead to further fact-finding and administrative action. The court reiterated that CPSC's decision culminated an adversarial process that involved weighing evidence and a finding that the report satisfied the requirements for publication (including the prohibition against publishing materially inaccurate information). *Id.* at 60. Therefore, the court concluded, CPSC's decision completed an adjudicatory process — a "hallmark of final agency action." *Id.* at 60.

2. *When Will A Court Defer to CPSC's Interpretation of its Governing Statutes or Regulations it Promulgates?* The court considered whether CPSC's interpretation of its

own regulations implementing the [SaferProducts.gov](https://www.saferproducts.gov) database (and which address the phrase "relating to" at issue in the challenge) — was entitled to deference. *Id.* at 27. Applying the Supreme Court's framework in *Auer v. Robbins*, 519 U.S. 452 (1997), the court concluded that, because CPSC's regulations merely restated the relevant statutory language, CPSC had "failed to use its expertise and experience to formulate the regulations" and as such it did not "acquire special authority to interpret its own words." *Company Doe*, slip. op. at 28-30. Thus, under this decision, a court will not defer to CPSC's interpretation of a regulatory language that merely parrots statutory language.

The court next considered whether CPSC's interpretation of the statute itself was entitled to deference. For this analysis, the court applied the well-known framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). After reviewing the legislative history and using tools of statutory construction, the court concluded that the phrase "related to" was ambiguous. *Company Doe*, slip. op. at 32-33. The court then ruled that CPSC's interpretation was arbitrary and capricious because it was based on arbitrary factors (i.e., "happenstance") and not tied to the purposes of the statute. *Id.* at 37.

3. *When Will A Court Find That CPSC's Conduct Constitutes an Abuse of Discretion?* In addition to finding that CPSC's decision was "arbitrary and capricious" under the APA, the court also concluded that the decision constituted an "abuse of discretion." CPSC's decision substantially strayed from previous agency interpretations. *Id.* at 44. To illustrate this point, the court looked to five prior examples in which CPSC had approved "material inaccuracy" claims where the evidence in the reports of harm failed to show the products were the sources of the harm. *Id.* at 44. Based on that precedent, the court found that CPSC had violated its own definition of "material inaccuracy," thereby abusing its discretion. *Id.* at 46.

Implications. Companies throughout the distribution chain — manufacturers, importers, retailers and distributors — whose products are subject to CPSC’s jurisdiction should take note of this decision. In addition to creating a roadmap for challenging CPSC’s decisions to publish reports on the SaferProducts.gov website, the decision also could provide important support should a company challenge CPSC’s decisions in other contexts. Companies might point to this decision to support challenges to CPSC’s disclosure of information on grounds that it violates section 6(b) of the Consumer Product Safety Act (CPSA), which requires CPSC to take reasonable steps to ensure that its disclosures — whether initiated by CPSC or in response to an outside inquiry — are “accurate,” “fair in the circumstances,” and “reasonably related to the purposes of [the CPSA].” 15 U.S.C. § 2055(b)(1). Such challenges may arise if, for example, without adequate foundation and following legal requirements, CPSC asserts that it will disclose information indicating that a product is unsafe — e.g., through comments to the media about an ongoing investigation, requests that retailers stop selling a product, or a unilateral press release. In these settings, CPSC must, among other things, establish a meaningful nexus between the product at issue and the harm CPSC is trying to avert. As *Company Doe* demonstrates, if CPSC intends to release information that implicates a product without establishing such a nexus, courts are willing to step in.

If you have any questions about any of the topics discussed in this advisory, please contact your Arnold & Porter attorney or any of the following attorneys:

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