



Product risk and liability news

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US

CPSC's new product safety database to go live in March

The US Consumer Product Safety Commission (CPSC) will, from 11 March 2010, implement a publicly accessible and searchable online database of consumer product incident reports, as required by section 212 of the Consumer Product Safety Improvement Act of 2008. In a report to the US Congress, the CPSC confirmed that the website will allow consumers, government agencies, healthcare professionals, childcare providers, 'public safety entities' and others to post detailed reports of product-related safety incidents, including details of harm allegedly caused and photographs of the product in question. Those making reports will have to self-certify that the information provided is true and accurate to the best of their knowledge.

The Act also requires the CPSC to ensure that the manufacturer or private labeller of the product in question has the right to comment on consumer reports and to insist on those comments appearing on the database. Other safeguards include a right for the CPSC to decline to publish reports that it deems to be materially inaccurate and to correct such reports that have already been posted. Nevertheless, concerns have been raised that the system may allow unsubstantiated or unreliable allegations to reach a wide audience. Another fear is that the system will divert consumers from making reports to companies' own customer services hotlines, which may in turn reduce manufacturers' ability to track problems with their products and respond to urgent complaints.

CANADA

Federal government joined as a party in tobacco litigation

In December, a Canadian provincial appeal court ruled that the federal government could be added as a party in two lawsuits involving the tobacco industry. A divided panel of five judges of the British Columbia Court of Appeal overturned part of a lower court's ruling that the third party notices issued against the federal government should be struck out.

The first of the two decisions came in *British Columbia v Imperial Tobacco Canada* [2009 BCCA 540]. It relates to an action brought against the tobacco industry by the British Columbia provincial government to recover healthcare costs, allegedly resulting from smoking, under the province's Tobacco Damages and Healthcare Costs Recovery Act. The second decision (*Knight v Imperial Tobacco Canada* [2009 BCCA 541]) relates to a class action brought by smokers in British Columbia against Imperial Tobacco Canada to recover money they allegedly spent on 'light' and 'mild' cigarettes.

In each case, the defendant tobacco companies had pleaded that the federal government knew of the risks of smoking and in the 1960s pressed the tobacco manufacturers to promote lower-tar cigarettes, arguing that the government's actions, including Agriculture Canada's role in the development of strains of tobacco that to this day are used to make Canadian cigarettes, contributed to any losses the cigarette manufacturers may incur in these actions. In each case, the plaintiffs

had sought to strike out these allegations and the first instance courts had agreed to do so. To succeed in the strike-out application under British Columbia law, the plaintiffs were required to show that it was 'plain and obvious' that the allegations would not succeed at trial.

The Court of Appeal refused to strike out a number of the allegations made by the defendant tobacco companies against the federal government, on the basis that it was not plain and obvious that the federal government did not owe the companies a duty of care in regard to the development of light and mild cigarettes. Further, in the companion class action, the Court of Appeal found that it was not plain and obvious that the federal government did not owe a duty of care in relation to such products to consumers. As a result, the federal government will now be joined as a party in both actions and will have to argue at trial that it did not owe any such duties.

The decisions have broad ramifications for the Canadian federal government in terms of potential exposure to tobacco lawsuits brought by individual smokers. Of more general interest is the possibility that the federal government may ultimately be found to owe a duty of care to companies and consumers when participating in other regulated industries.

EU

Member states co-ordinate a crackdown on mobile phone services misselling

Following an 18-month 'EU sweep' carried out by 27 member states, 70 per cent of websites investigated for misselling mobile phone services (such as ringtones and wallpapers) to consumers have been corrected or closed down. The websites were investigated by national enforcement authorities for serious breaches of EU consumer law, including the Unfair Commercial Practices Directive (2005/29/EC), the Distance Selling Directive (1997/7/EC) and the eCommerce Directive (2000/31/EC).

Member states' principal complaints were unclear pricing, failure to provide complete transfer information and misleading practices that targeted children and young people in particular, contrary to the Unfair Commercial Practices Directive, in particular. EU consumer commissioner Meglena Kuneva stated that

the initiative represented a more integrated European approach to consumer protection policy and was particularly designed to protect children. 'This EU-wide investigation was a direct response to hundreds of complaints coming in from parents and consumers from many different EU countries. Young people should not have to fall victim to scams like misleading advertising that lure them into ringtone subscriptions they thought were free. And parents should not find nasty surprises in their phone bill, when their children by accident have signed up to more than they have bargained for. These results show that EU-wide enforcement co-operation can make a huge difference in cleaning up a market for consumers. This kind of joint enforcement action is where EU consumer policy will focus a lot of efforts in the future,' she said.

Our briefing on the UK implementation of the Unfair Commercial Practices Directive is available at www.freshfields.com/publications/pdfs/2009/apr09/25715.pdf.

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- From 15 July 2010 limits will apply to the use in Europe of p-Phenylenediamine (PPD) and Toluene-2,5-diamine (PTD) in hair dyes. Member states must transpose Directive 2009/130/EC into national law by 15 April 2010. Existing limits must be reduced now as a precautionary measure.
- The non-governmental organisation ChemSec (the International Chemical Secretariat) has suggested adding a further 89 new substances to its 'SIN (Substitute It Now!) List' of chemicals that should be treated as 'substances of very high concern' under REACH, the EU's chemical safety regime.
- In its second implementation report on its nanotechnologies action plan for Europe 2005-09, the European Commission has said that it will continue reviewing all EU legislation relevant to nanotechnology to ensure that products using nanomaterials pose no health, environmental or safety threats.
- In addition, the Commission has begun a consultation on its next nanotechnologies action plan, which would run from 2010 to 2015. It is seeking views from experts and the public on the benefits, concerns, risks, perceptions and the possibility of policy changes in relation to nanotechnologies. Suggestions of new EU policy actions include: establishing an inventory of use and type of nanomaterials, labelling nano-content on consumer products and developing new specifically targeted regulation for nanotechnologies. The consultation will run until 19 February 2010.
- The nominees for positions in the next European Commission, which will run until the end of 2014, are to face questions from the European Parliament shortly before confirmation of their appointment later this month. The nominee for the head of the health and consumer directorate-general is John Dalli, currently

the Maltese minister of social policy. If appointed, Mr Dalli will serve under José Manuel Barroso, who has already been approved by the Parliament to stay on for a second term as president of the Commission.

- The Commission's 2008 proposal for a consumer rights directive, which aims to further improve the functioning of the internal market and would introduce new rules on delivery and the passing of risk in consumer transactions, was discussed by ministers at a meeting of the Competitiveness Council in early December. Ministers appeared to be in broad agreement on the Commission's proposal, although some expressed their concerns about the consequences of fully harmonising the EU's single market. Debate focused on technical development and e-commerce and the need for balance between consumer rights and the obligations imposed on traders. The proposal is still at first reading stage; the Commission has expressed its hope that work on the proposal will progress at a steady pace so that a political agreement can soon be achieved.

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