



## **Association of Home Appliance Manufacturers**

# **Double Jeopardy? The Role of State Attorneys General**

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## Section 218—New Provisions

- ❑ Amends section 24 of the Consumer Product Safety Act, to provide state attorneys general with right of action to enforce enumerated provisions of section 19 of CPSA
- ❑ Adds section 9 to Poison Prevention Packaging Act to provide state attorneys general with right of action to enforce section 3 of PPPA



## Section 218—Notice to CPSC

- Requires notice to Commission
  - Generally requires 30 day notice to Commission
  - Complaint may be filed earlier if Commission:
    - Consents
    - Immediate action required to protect residents of state from substantial product hazard



## Section 218—CPSC Intervention

- Commission may intervene in case
- No case may be brought if the same violation is the subject of a pending civil or criminal action by the United States



## Section 218—Private Counsel

- Limitations on use of private counsel
  - May not share privileged information obtained while counsel for state for use in separate civil actions
  - May not use privileged information obtained while counsel for state for use in separate civil actions



# Problems with Enforcement by State Attorneys General

- Notice Issues
- Duplication Issues
- Political Issues
- Outsourcing



## Notice Issues

- ❑ “Substantial product hazard” exception to required 30-day notice
- ❑ Most likely AG actions are for failure to comply with standard or ban, or for distribution/sale of recalled product
- ❑ Both by definition involve alleged “substantial product hazards”



## Notice Issues

- Prior notice allows CPSC to initiate own enforcement action or advise AG complaint not well founded
- Immediate filing instead requires CPSC to intervene to express differing view
- Inefficient use of agency and judicial resources



## Duplication Issues

- AG enforcement precluded by CPSC civil or criminal action for same violation
- Exception for claims of failure to comply with standard or ban, and of distribution or sale of recalled product
- These will be most prevalent AG claims
- AG may sue both distributor and retailer if finds recalled product being “offered for sale”



## Duplication Issues

- ❑ Separate CPSC and AG judicial actions may raise threshold issues of transfer and consolidation which delay resolution
- ❑ Conference Committee statement of intent will have little effect
- ❑ Parallel CPSC administrative action and AG lawsuit raise specter of inconsistent outcomes



# Political Issues

- From AG to Governor
- Product safety sells
- Protector of state residents from bad actors
- Power of the press release
- Embarrassing CPSC



# Outsourcing

- ❑ AGs may “outsource” enforcement actions to private law firms
- ❑ Restriction on sharing privileged information with other private litigants not readily enforceable
- ❑ Reported efforts to develop contingency fee arrangements based on value of injunctive relief



## Problems with Enforcement by State Attorneys General

- “50 more safety cops” sounds good
- However, it may result in:
  - waste of CPSC/judicial resources
  - delays in enforcement
  - inconsistent enforcement outcomes
  - politically tinged enforcement action
  - release of privileged information