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Product Liability Law Alert

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Cummins casts light on admissibility of CPSC investigations of products

Opinion provides four key takeaways for product manufacturers who confront evidence of CPSC action or inaction in defense of state law products liability cases.

On Jan. 13, 2014, the U.S. Supreme Court denied a petition for certiorari in case No. 13-574, *Cummins v. BIC USA, Inc.* The plaintiff sought a discretionary appeal from the U. S. Court of Appeals for the Sixth Circuit, which affirmed an adverse jury verdict and subsequent denial of a motion for new trial in the district court. The effect of the denial of certiorari is an implicit endorsement of the Sixth Circuit's interpretation of a federal statute, 15 U.S.C. § 2074(b), governing the admissibility of evidence that the Consumer Product Safety Commission (CPSC) has failed to act in relation to the safety of a product. Because *Cummins* is one of only a few decisions (another is *Morales v. American Honda Motor Co.*, 151 F.3d 500 (6th Cir. 1998)) in the country construing this statute, it is both the law in the Sixth Circuit and persuasive outside the Circuit.

Cummins v. BIC USA, Inc.
In late 2004, a three-year-old Kentucky boy sustained second and third degree burns while he played with a cigarette lighter he found on the floor of his father's truck. BIC manufactured the model J-26 lighter, which was equipped with a two-piece child resistant guard.

The boy's father sued on the son's behalf, alleging violations of Kentucky's Consumer Protection Act and the federal Consumer Product Safety Rule. Part of that Rule, 16 C.F.R. § 1210.3(b)(4), provides that the "mechanism or system of a lighter . . . that makes the product resist successful operation by children must . . . [n]ot be easily overridden or deactivated." The plaintiff contended that the two-piece guard, as opposed to the one-piece guard which been phased out of the lighter's design in 2004, too easily was overridden and deactivated.

BIC responded with evidence that the CPSC never had investigated, expressed concern about, taken any enforcement action in relation to, or found either J-26 model out of compliance with this requirement. That evidence was to be introduced by an expert — a consultant and former employee of the CPSC.

The plaintiff moved *in limine* to exclude this evidence based on 15 U.S.C. § 2074(b), which provides that;

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"[t]he failure of the [CPSC] to take any action or commence a proceeding with respect to the safety of a consumer **product** shall not be admissible in evidence in **litigation at common law or under state statutory law** relating to such consumer product."

The district court denied the plaintiff's motions, construing the phrase "failure . . . to take any action" to mean the CPSC's complete failure to act, rather than the CPSC's activity leading to a decision not to regulate. Thereafter, the expert testified as to the CSPC's activities with respect to the J-26 model. The jury found for BIC. The plaintiff moved for a new trial, renewing his objection to the evidentiary ruling. The trial court denied this motion, and the Sixth Circuit affirmed based on the same reasoning as the district court.

Significance of opinion

The Sixth Circuit's opinion is important for two additional rationales. First, the plaintiff sought to focus the court's attention on the particular alleged defect of the product — the ease with which the two-piece child resistant guard can be deactivated or overridden. The plaintiff contended that this was relevant to the evidentiary issue because the expert's testimony in relation to the two-piece guard amounted only to evidence of the CPSC's inaction, rather than evidence of the CPSC's activity which led to that inaction. The court found that the use of the word "product" in the statute was important. It is evidence of the CPSC's complete failure to engage in activity as to a "product" — rather than, for example, failure to engage in activity as to a particular feature of a product — that was barred.

Second, the plaintiff argued that the expert's testimony was inadmissible because it did not refer to a report or a statement of reasons explaining the CPSC's decision not to take action in relation to the two-piece guard. The court found this argument unpersuasive, as § 2074(b) contains no such precondition to admissibility.

Key takeaways for product manufacturers

Given the frequency with which evidence of CPSC action or inaction is used in products liability cases, there are at least four key takeaways from Cummins to keep in mind.

1. The statute excludes evidence only in relation to **state law claims.**

Interestingly, Section 2074(b), a federal statute, pertains only to "litigation at common law or under state statutory law." If the plaintiff claims a violation of solely federal law, the statute is inapplicable. But if the plaintiff proceeds on both state and federal claims, the statute will apply to the state claims, and the plaintiff will likely be entitled to a limiting instruction advising the jury to this effect.

2. The statute excludes evidence only of the CPSC's **complete failure to act**.

As put in *Morales*, on which the district court and the Sixth Circuit based much of their analysis, § 2074(b) is intended "to exclude those instances where the CPSC had completely failed to act, as opposed to those instances where the CPSC engaged in activity that ultimately led to a decision not to regulate." 151 F.3d at 513. The absence of activity is barred; the activity leading up to a decision not to regulate is admissible.

3. The statute excludes evidence only of the CPSC's complete failure to act as to a **"product."**

The statute regulates the admissibility of evidence as to the allegedly defective product itself, rather than the admissibility of evidence as to the allegedly defective feature of a product.

4. Evidence of the CPSC's activity leading up to a decision not to investigate is admissible **regardless of the lack of explanation as to the CPSC's ultimate decision not to regulate.**

For more information, please contact Terrance Miller, Jason Gerken, or any member of Porter Wright's Product Liability practice group.

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