SMALL BUSINESS LEGISLATIVE COUNCIL

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CONSUMER PRODUCT SAFETY LAW REVISIONS

In 2008, the Consumer Product Safety Improvement Act (CPSIA) was enacted. The law introduced a new regulation regime for children's products and also made some changes, such as the creation of a public complaint database, that are having an effect on the production and sale of many other consumer products. For those business most directly affected by the CPSIA, compliance has been a challenge to say the least. The House majority is attempting to swing the pendulum in the other direction to make the new regulatory regime at least a bit more realistic.

The first step is the approval of a "revision" bill by the Subcommittee on Commerce, Manufacturing, and Trade of the House Committee on Commerce and Energy. The bill addresses some aspects of the children's product definition, the lead content rule, and the structure of the public complaint database, among other items.

The database is the sleeper of the CPSIA. The important thing to note is that the public database, which is up and running, covers a wide range of consumer products, not just children's products. The CPSIA requires that the database include reports of harm relating to the use of consumer products, and other products or substances regulated by the CPSC, that are received by the CPSC from consumers; local, State, or Federal government agencies; health care professionals; child service providers; and public safety entities. While the reports are supposed to be limited to complaints against manufacturers, it is possible a consumer might enter the name of retailer. The complaints are supposed to be monitored but since the database is new, it is too soon to tell whether the database will be accurate. The business community also worries that plaintiffs' lawyers will mine the database for new cases.

The draft bill clarifies eligibility to submit reports of harm to the public database, limiting it to the person who suffered harm or risk of harm, family members, next of kin, or lawyers or other expressly authorized representatives to submit reports. It establishes submission of the location of the product and the contact information for the person harmed as preconditions for posting the report. The draft bill establishes a process for improving product descriptions in the reports of harm where the CPSC agrees the initial description is inadequate. It creates a process for resolving claims of material inaccuracy. Finally it makes misrepresentations relating to the database unlawful (e.g., false reports or false claims of material inaccuracy).

If you want to take a look at the database, go to www.saferproducts.gov.

SMALL BUSINESS INNOVATION RESEARCH PROGRAM

In the March 21st Weekly, I wrote extensively about the efforts to reauthorize the Small Business Innovation Research Program. At the time, there was a bill on the Senate floor to do so. Now, weeks later, the Majority Leader has pulled the bill from the floor because of a dispute over what amendments could be offered. Meanwhile, the House Small Business Committee has approved their version of a reauthorization bill. While the SBIR program is not a high priority for most small businesses, since I mentioned it earlier in the year as active on the Senate floor, I thought I should note its current status – déjà vu all over again.

MEDICAL MALPRACTICE LIABILITY REFORM

The House bill, H.R. 5, to revise the medical malpractice "system" has been approved by the House Energy and Commerce Committee. The House Judiciary Committee approved the bill earlier this year. The bill can now be brought to the House floor. There are some minor differences between the versions and the House Rules Committee will produce a single "clean" version.

As approved by the House Judiciary Committee, the Help Accessible, Efficient, Low-cost, Timely Healthcare (HEALTH) Act would make the following changes:

Non Economic Damages
In any health care lawsuit, the amount of noneconomic damages, if available, may be no more than $250,000, regardless of the number of parties against whom the action is brought or the number of separate claims or actions brought with respect to the same injury. For purposes of applying the limitation, future noneconomic damages shall not be discounted to present value.

Punitive Damages
The amount of punitive damages, if awarded, in a health care lawsuit may be as much as $250,000 or as much as two times the amount of economic damages awarded, whichever is greater.

Punitive damages may, if otherwise permitted by applicable State or Federal law, be awarded against any person in a health care lawsuit only if it is proven by clear and convincing evidence that such person acted with malicious intent to injure the claimant, or that such person deliberately failed to avoid unnecessary injury that such person knew the claimant was substantially certain to suffer.

In determining the amount of punitive damages, if awarded, in a health care lawsuit, the trier of fact shall consider only the following:
(A) the severity of the harm caused by the conduct of such party;
(B) the duration of the conduct or any concealment of it by such party;
(C) the profitability of the conduct to such party;
(D) the number of products sold or medical procedures rendered for compensation, as the case may be, by such party, of the kind causing the harm complained of by the claimant;
(E) any criminal penalties imposed on such party, as a result of the conduct complained of by the claimant; and
(F) the amount of any civil fines assessed against such party as a result of the conduct complained of by the claimant.

Several Liability Only
In any health care lawsuit, each party shall be liable for that party's several share of any damages only and not for the share of any other person. Each party shall be liable only for the amount of damages allocated to such party in direct proportion to such party's percentage of responsibility.

Contingency Fees
In no event shall the total of all contingent fees for representing all claimants in a health care lawsuit exceed the following limits: (1) Forty percent of the first $50,000 recovered by the claimant(s); (2) Thirty-three and one-third percent of the next $50,000 recovered by the claimant(s); (3) Twenty-five percent of the next $500,000 recovered by the claimant(s); and (4) Fifteen percent of any amount by which the recovery by the claimant(s) is in excess of $600,000.

Periodic Payments
In any health care lawsuit, if an award of future damages, without reduction to present value, equaling or exceeding $50,000 is made against a party with sufficient insurance or other assets to fund a periodic payment of such a judgment, the court shall, at the request of any party, enter a judgment ordering that the future damages be paid by periodic payments.

Statute of Limitations
The time for the commencement of a health care lawsuit shall be 3 years after the date of manifestation of injury or 1 year after the claimant discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of a health care lawsuit exceed 3 years after the date of manifestation of injury unless tolled for any of the following (1) upon proof of fraud; (2) intentional concealment; or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person.