



UNITED STATES
CONSUMER PRODUCT SAFETY COMMISSION
BETHESDA, MD 20814

This document has been electronically
approved and signed.

DATE: November 4, 2016

TO: The Commission
Todd A. Stevenson, Secretary

THROUGH: Mary T. Boyle, General Counsel
Patricia H. Adkins, Executive Director

FROM: Patricia M. Pollitzer, Assistant General Counsel

SUBJECT: *Federal Register* Notice: CPSC Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation

BALLOT VOTE DUE: Friday, November 18, 2016

Commissioner Marietta S. Robinson asks that the Commission consider the attached *Federal Register* notice providing guidance and recommended best practices for protective orders and settlement agreements in private civil litigation.

Please indicate your vote on the following options:

I. Approve publication of the attached document in the *Federal Register*, as drafted.

(Signature)

(Date)

II. Approve publication of the attached document in the *Federal Register*, with changes.
(Please specify.)

(Signature)

(Date)

III. Do not approve publication of the attached document in the *Federal Register*.

(Signature)

(Date)

IV. Take other action. (Please specify.)

(Signature)

(Date)

Attachment: Draft *Federal Register* Notice: CPSC Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation

CONSUMER PRODUCT SAFETY COMMISSION

CPSC Litigation Guidance and Recommended Best Practices for Protective Orders and Settlement Agreements in Private Civil Litigation

[Docket No. CPSC-_____]

AGENCY: U.S. Consumer Product Safety Commission

ACTION: Notice

SUMMARY: The U.S. Consumer Product Safety Commission (CPSC or the Commission) is publishing this Litigation Guidance to provide recommendations for best practices to all parties in relevant litigation related to providing an exemption in protective orders and settlement agreements for reporting information to the CPSC.

FOR FURTHER INFORMATION CONTACT:

Todd A. Stevenson, Secretary, U.S. Consumer Product Safety Commission, Office of the Secretary, 4330 East West Highway, Bethesda, MD 20814 Room 820, 301-504-7923; email tstevenson@cpsc.gov.

SUPPLEMENTAL INFORMATION:

I. Background

The CPSC is a public-health authority with a broad mandate to protect the public against unreasonable risks of injury associated with consumer products. *See* 15 U.S.C. 2051(2014); *See also* Public Health Authority Notification, 79 FR 11769 (March 3, 2014). The Consumer Product Safety Act (CPSA) defines consumer products broadly, making the Commission responsible for ensuring the public's safety from thousands of different ever-evolving product lines. *See* 15 U.S.C. 2052 (2014). The timely collection of information regarding consumer product-related safety hazards is essential for carrying out the Commission's public health and safety mission.

Mandatory self-reporting of potential product hazards by manufacturers (including importers), retailers, and distributors (Industry Stakeholders) is a key element of CPSC's ability to identify potential substantial product hazards and subsequently take corrective action to protect the public. Such Industry Stakeholders are best situated to discover a potential product hazard and, thus, are statutorily required to report immediately to the CPSC when they obtain information that reasonably supports the conclusion that a product fails to comply with an applicable rule or standard, contains a defect which could create a substantial product hazard, or creates an unreasonable risk of serious injury or death. 15 U.S.C. 2064(b) (2014).

Despite the mandatory reporting requirement, the Commission believes Industry Stakeholders do not always meet their reporting obligations. Industry Stakeholders may fail to report potential product hazards altogether, may fail to report them in a timely manner and/or may fail to report new incidents that occur after the initial hazard has been reported.¹

If Industry Stakeholders fail to report, CPSC has limited alternative means of obtaining this critical safety information. It is therefore possible that a product hazard will never come to CPSC's attention. Information in private litigation could, thus, be a key resource for the CPSC when Industry Stakeholders have not satisfied their reporting obligations. However, in some instances, confidentiality provisions imposed or enforced by the courts or agreed upon by private litigants may have prevented parties that are not industry stakeholders from sharing with the CPSC important product safety information they have discovered. *See* S. REP. NO. 110-439, at 6-8 (2008); *see also* Footnote 2 *infra*.

The motions and hearings involved in obtaining protective orders in private litigation for specific documents may result in enormous associated costs both in terms of money and time. This often leads to the use of "blanket" or "umbrella" protective orders covering the entirety of pre-trial discovery. *See Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 879 (E.D. Pa. 1981) (finding that without blanket protective orders, a judge becomes a "veritable hostage" required to spend years on motions for individual documents). Rather than requiring a series of individual rulings for a large number of documents, blanket protective orders may create a presumption against disclosure for all or certain groups of information that then may be

¹ The CPSA recognizes that failures to report and delays in reporting may occur, and authorizes civil penalties up to \$15,150,000 for any related series of violations for stakeholders who violate their reporting obligations. *See* 15 U.S.C. 2068-2069 (2014).

challenged individually for lack of good cause. *See* MANUAL FOR COMPLEX LITIGATION § 11.432 (2004). Such umbrella protective orders have become fairly common. *See Zenith Radio Corp*, 529 F. Supp. 866, 889 (E.D. Pa. 1981) (“We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order... has not been agreed to by the parties); *see also Jepson, Inc. v. Makita Elec. Works, LTD.*, 30 F.3d 854, 858 (7th Cir. 1994) (“stipulated protective orders are relatively common.”). Additionally, if incriminating documents outside the scope of a protective order are discovered before trial, defendants often demand blanket protective orders as a condition of settlement. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785-786 (3rd Cir. 1994). In order to facilitate settlements, courts are often willing to grant these blanket orders without significantly analyzing the public interests involved. *Id.*

The Commission believes that general acceptance of “blanket” or “umbrella” protective orders in private litigation increases the likelihood that such agreements will bar the reporting to the Commission by those who are not Industry Stakeholders of consumer product safety information that the CPSC needs to protect the public. Although a party could pursue a good-cause challenge to allow the reporting of such information, the practicalities involved create a significant disincentive – the party’s attorneys must first recognize the information’s relevance to the CPSC and then pursue a potentially costly series of motions and hearings that are unlikely to benefit their client directly. *See* Nick Saccone, Comment, *Somewhere Between Florida, Texas, and Federal Rule of Civil Procedure 26(c): A Balanced Approach to Protective Orders and Confidentiality Settlements*, 39 U. Tol. L. Rev. 729, 740 (2008) (“Satellite litigation concerning contested discovery requests often has little or no bearing on the ultimate result of the lawsuit, other than increasing the cost of litigation for both injured plaintiffs and defendants.”). Few parties will therefore even attempt to lift protective orders in order to inform the CPSC of relevant product safety information.

According to a report submitted by the United States Senate Committee on the Judiciary on the proposed Sunshine in Litigation Act of 2008, safety information related to dangerous playground equipment, collapsible cribs, and all-terrain vehicle design defects was kept from the CPSC by protective orders in private litigation. S. REP. NO. 110-439, at 6-8 (2008). A cursory review of other civil product liability cases reveals that protective orders are in place in cases

involving additional consumer products that fall under the CPSC's jurisdiction.² These protective orders prohibit parties from reporting to the CPSC information they obtain in the course of litigation that concerns potentially hazardous consumer products, including incident reports.

The Commission believes the best way to protect public health and safety is to preemptively exclude or exempt the reporting of relevant consumer product safety information to the CPSC (and other government public health and safety agencies) from all confidentiality provisions.

II. The Model: NHTSA's Enforcement Guidance Bulletin

The Commission has reviewed the National Highway Transportation Safety Administration's (NHTSA) guidance on this issue. NHTSA is situated similarly to the CPSC with a public health and safety mission to reduce traffic accidents and the deaths and injuries resulting from them. *See* 49 U.S.C. 30101 (2014). NHTSA's "ability to identify and define safety-related motor vehicle defects relies in large part on manufacturers' self-reporting." NHTSA Enforcement Guidance Bulletin 2015-01: Recommended Best Practices for Protective Orders and Settlement Agreements in Civil Litigation, 81 FR 13026, 13026 (March 11, 2016) (hereinafter NHTSA Enforcement Guidance Bulletin). NHTSA found that it does not always receive such information from their industry stakeholders. *Id.* NHTSA recently issued an

² For example, the following is a select (and by no means exhaustive) list of protective orders that have been entered into in ongoing litigation or settlements related to consumer products within the CPSC's jurisdiction. Any relevant information discovered in these cases is covered by the protective orders and plaintiffs would be prohibited from sharing such information with the CPSC. *Hampton v. Crescent Cleaners, Inc., et al.*, USDC Western District of Tennessee, Case 2:08-cv-02696-SHM-cgc, Document 89, Filed 08/17/2009 (infrared liquid propane wall-mounted heater); *Miah v. Ames True Temper, Inc., et al.*, St Ct of DeKalb County, GA, Civ Action File No. 03A05859-7, Protective Order, 7/22/2013 (wheelbarrow); *Tamayo v. Dollar Tree Stores., Inc., et al.*, USDC Eastern District of PA, Case 2:13 cv-02062-GP, Document 41, Stipulated Protective Order, (Document 41), Filed 12/05/13 (markers); *Williams v. Ideal Industries, Inc., et al.*, USDC Northern District of Georgia, Case 1:14-cv-02883-LMM, First Amended Protective Order (Document 46), Filed 02/17/15 (multimeter device); *Broughton v. Paoli, LLC, et al.*, NC Carteret County Sup Ct, 15 CVS 471, Stipulated Protected Order, 12/21/2015 (office chair); and *Gomez v. Harbor Freight Tools USA, Inc.*, Sup Ct of CA Los Angeles County, Case no. BC616712, Stipulation and Protective Order – Confidential Designations, Filed 8/17/2016 (gas cans).

Enforcement Guidance Bulletin in an attempt to address the use of “protective orders, settlement agreements, or other confidentiality provisions” barring reporting to the agency. *Id.*

The NHTSA Enforcement Guidance Bulletin laid out a detailed, comprehensive and compelling legal analysis supporting the disclosure to public health authorities, notwithstanding confidentiality provisions in protective orders, settlements, and similar agreements. CPSC agrees with NHTSA that Rule 26 of the Federal Rules of Civil Procedure and various related state laws, as well as case law on public policy and contract law, all support the conclusion that government agencies with public health and safety missions should be excluded or exempted from the various relevant protective orders that are ubiquitous in private litigation today. NHTSA’s legal analysis of this issue is available at:

<https://www.federalregister.gov/documents/2016/03/11/2016-05522/nhtsa-enforcement-guidance-bulletin-2015-01-recommended-best-practices-for-protective-orders-and>.

CPSC further agrees with NHTSA that nondisclosure provisions may be appropriately used by courts and litigants to “promote full and complete disclosure, to prevent abuses of the discovery process, and to protect legitimate privacy and proprietary interests.” 81 FR 13029. However, when such orders and agreements shield relevant and actionable safety information behind nondisclosure provisions, they violate the good-cause requirement of Rule 26 of the Federal Rules of Civil Procedure, its state corollaries, and the well-established public policy favoring protecting public health and safety.

III. Recommendation for Best Practices

CPSC recommends, following the example set by NHTSA, that “all parties seek to include a provision in any private protective order or settlement agreement that—despite whatever restrictions on confidentiality are imposed, and whether entered into by consent or judicial fiat—specifically allows for disclosure of relevant [consumer product] safety information to [the CPSC] and other applicable authorities.” 81 FR 13029-13030. CPSC’s proposed Litigation Guidance does not impose any new or additional requirements, but sets forth CPSC’s recommendations for best practices when parties are considering confidentiality provisions in litigation related to consumer products within the CPSC’s jurisdiction.

Parties in the process of establishing or already subject to confidentiality provisions may use this Litigation Guidance and CPSC’s standing as a public-health authority to support a reporting exception to these provisions. *See* 79 FR 11769. For example, the exception could explicitly state “nothing herein shall be construed to prohibit any party from disclosing relevant consumer product safety information to the Consumer Product Safety Commission.”

Alternatively, a clause might more generally state that “nothing herein shall be construed to prohibit any party from disclosing relevant safety information to a regulatory agency or government entity that has an interest in the subject matter of the underlying suit.” The CPSC, however, is not endorsing any particular language since the parties themselves are in the best position to determine how that may be accomplished.

IV. Conclusion

The CPSC is publishing this Litigation Guidance to provide recommendations for best practices when drafting protective orders, confidentiality agreements, and settlement agreements. The Litigation Guidance should be reviewed by judges, plaintiffs, and defendants, as well as those parties wishing to submit *amicus* briefs relating to protective orders and confidentiality agreements in ongoing litigation.

The Commission believes this Litigation Guidance is simple. Protective orders, confidentiality agreements and settlements (as well as other similar documents), should include language that allows any party to report consumer product safety information, incidents, injuries and deaths to the CPSC.³

The Commission notes that this Litigation Guidance is not a binding or enforceable rule and would not change any person’s rights, duties or obligations under the CPSIA or any other Act administered by the Commission.

Dated: _____

³ The public is always encouraged to report relevant consumer product safety information to the CPSC via the CPSC’s hotline [(800) 638-CPSC (2772)]; the CPSC’s online reporting tool: www.saferproducts.gov; and by contacting the CPSC’s Office of Compliance and Field Operations directly [(301) 504 7547].

Todd A. Stevenson, Secretary
Consumer Product Safety Commission