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Product Liability & Mass Tort Litigation

Virginia Alert



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Potential Liability for Virginia Retailers of Children's Products

BY JOHN ERBACH

Earlier this year, the Virginia General Assembly amended the Virginia Consumer Protection Act to prohibit the sale or manufacture of any children's products that the U.S. Consumer Product Safety Commission has recalled. The statute creates a rebuttable presumption that the retailer knew about the recall if the Consumer Product Safety Commission has continuously posted a notice for thirty or more days. To avoid liability under this rule, retailers must therefore take a proactive approach to ensure compliance.

According to the new requirements — found at Va. Code §§ 59.1-198 and 59.1-200 — a “children's product” means a consumer product designed or intended primarily for children 12 years of age or younger. To determine whether a product falls within this definition, the General Assembly has adopted four factors to consider:

1. A statement by a manufacturer about the intended use of such product, including a label on such product if such statement is reasonable;
2. Whether the product is represented in its packaging, display, promotion, or advertising as appropriate for use by children 12 years of age or younger;

3. Whether the product is commonly recognized by consumers as being intended for use by a child 12 years of age or younger; and
4. The Age Determination Guidelines issued by the staff of the Consumer Product Safety Commission in September 2002, and any successor to such guidelines.

The Virginia Consumer Protection Act creates a private cause of action, allowing individuals to bring claims seeking penalties of up to \$500 or actual damages, whichever is greater. If the violation is willful, damages may be three-fold actual damages or \$1,000, whichever is greater. In addition, the statute allows plaintiffs to recover reasonable attorneys' fees. Under the new “children's products” category, the penalties remain unchanged.

Given the potentially high-cost of penalties and attorneys' fees, retailers dealing in children's products should develop company policies to ensure timely compliance with children's product recalls. Retailers should seek counsel to assess potential liability and fashion best practices for maintaining compliance with the Virginia Consumer Protection Act.

For more information pertaining to this matter, please contact John Erbach at 804.783.6914 or jerbach@williamsmullen.com.

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