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When Does An Industrial Product Become a Consumer Product?

POSTED BY KENNETH ROSS ON JANUARY 31, 2017 IN MANUFACTURING | LEAVE A RESPONSE

And Why Does It Matter?

One of the more perplexing issues I have grappled with over the years is determining when an industrial product becomes a consumer product and therefore subject to the laws concerning consumer products. These include laws involving the U.S. Consumer Product Safety Commission (CPSC) as well as product liability laws concerning sales to consumers. The issue about industrial versus consumer product is not at all clear, especially for some electrical products that are used in areas where consumers might be nearby.

This is an important issue since safety problems involving consumer products might require a report to the CPSC and even foreign government safety agencies. In addition, if an industrial product is arguably a consumer product, maybe it should be designed for a consumer's use, and the warnings and instructions written so that they are understandable by a typical consumer.

As a result, industrial product manufacturers should be aware of the law in this area and the actions that can intentionally, or unintentionally, turn their industrial products into consumer products.

The Law and Practice

The first question in any such analysis is whether the product would be considered a consumer product under the Consumer Product Safety Act (CPSA). The CPSA considers a consumer product to be...

...any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment



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of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—

(A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer,

This is an extremely broad definition, especially because of the use of the terms “a school, in recreation, or otherwise.” And there is an exclusion if the article is not “customarily” produced for use of consumption or enjoyment by a consumer. As applied to electrical products, is a light fixture that is sold for use in schools and municipal parks a consumer product? I think so. Generally speaking, a product is a consumer product if it subjects a consumer to a risk of injury if that consumer is in an area meant for consumers.

Despite that, a light fixture or electrical equipment that is only used in an industrial setting would not be a consumer product even if the occasional consumer (non-employee) might be in that location. So, if an employee's spouse gets hurt in a manufacturing facility from falling electrical equipment, that does not make it a consumer product.

Interestingly, neither the CPSA nor the regulations define the term “consumer.” However, the legislative history provides a little more guidance. It says:

....products which are primarily or exclusively sold to industrial or institutional buyers would be included within the definition of consumer product so long as they were produced or distributed for use of consumers.

It is not intended that true “industrial products” be included within the ambit of the Product Safety Commission's authority. Thus, your committee has specifically excluded products which are not

customarily produced or distributed for sale to or use of consumers. The occasional use of industrial products by consumers would not be sufficient to bring the product under the Commissions, [sic] jurisdiction. The term “customarily” should not be interpreted as intending strict adherence [sic] to a quantum test, however, your committee is aware that some products which were initially produced or sold solely for industrial application have often become broadly used by consumers. If the manufacturer or distributor of an industrial product fosters or facilitates its sale to or use by consumers, the product may lose its claim for exclusion if a significant number of consumers are there by exposed to hazards associated with the product. [H.R. Rep. 92-1153, 92d Cong., 2d Sess 218 (1973)]

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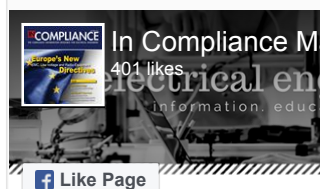
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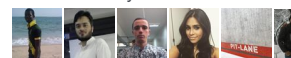
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UPCOMING EVENTS

JANUARY

30 - 1
JAN FEB

DESIGN TROUBLESHOOTING

Subsequent to the passage of the CPSA, the Commission staff answered inquiries coming from the public and industry concerning whether certain products were to be considered consumer products. Most of these answers are contained in Advisory Opinions issued by the CPSC's General Counsel. (The opinions can be found at <http://www.cpsc.gov/en/Regulations-Laws-Standards/Advisory-Opinions/>.)

It should be noted that Advisory Opinions are not approved by the CPSC Commissioners and therefore can be superseded by the General Counsel, the Commission, or by operation of law. As such, these opinions are not enforceable under the law and have been ignored by some individual manufacturers and even entire industries. Despite that, advisory opinions are useful to consider and can be the basis for a company to make a decision on the question of what is a consumer product. For a more definitive answer, a manufacturer could request a new advisory opinion on a particular product, but should be careful doing so as they may not like the answer.

There are very few opinions concerning when an industrial product becomes a consumer product. However, several Advisory Opinions on this question are useful to consider. One opinion (see #231 on the CPSC website) concerning "lift-off aerial baskets" said:

The correspondence submitted to this office does not indicate that Lift-Off aerial baskets are produced or distributed for any consumer use or enjoyment. There is no information to support a finding that this product is customarily sold or leased to or used or enjoyed by consumers; and there is also no information to support a finding that the manufacturer or distributor of the product has fostered or facilitated its sale to or use by consumers. As a result, based on information contained in this correspondence, we do not believe that this product would fall within the jurisdiction of the Commission under the CPSA. Our interpretation on this matter is consistent with an earlier advisory opinion (copy attached) in which we concluded that the Commission would not have jurisdiction over work platforms mounted on motor vehicles.

Another Advisory Opinion concerning farm products (#107) made it clear that the manufacturer was responsible to determine how its product would be distributed and used when it said:

However, the manufacturer of a product has the responsibility to determine the distribution and use patterns of its products and to act accordingly. In our opinion, any doubts should be resolved in favor of considering a product to be a consumer product.

And the CPSC General Counsel said in another opinion (#290):

...if consumer use patterns were to change in the future so that these mowers would be used more than occasionally by

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Donna Kearney

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📍 Boulder City, NV

FEBRUARY

30⁻¹ JAN FEB DESIGN TROUBLESHOOTING, EMC, AND ESD

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5⁻⁹ FEB 2017 IEEE INTERNATIONAL SOLID-STATE CIRCUITS CONFERENCE (ISSCC)

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⌚ (All Day) PST
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7⁻⁸ FEB ETS-UNIVERSITY - TILE! SOFTWARE

⌚ 9:00 am - 5:00 pm (8) Central Time Zone
📍 Cedar Park

27⁻³ FEB MAR EMC WEEK 2017

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MARCH

27⁻³ FEB MAR EMC WEEK 2017

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📍 Boulder Dam Hotel

7⁻⁸ MAR ETS-UNIVERSITY - HEMP/EMI THREAT WORKSHOP

⌚ 8:00 am - 4:00 pm (8) Central
📍 Cedar Park

14 MAR 2017 IEEE MILWAUKEE EMC SYMPOSIUM

⌚ (All Day; Tuesday) Central
📍 Crowne Plaza Milwaukee Airport

19⁻²⁴ MAR EUCAP 2017 - THE 11TH EUROPEAN CONFERENCE ON ANTENNAS AND PROPAGATION

⌚ (All Day)
📍 Le Palais des Congrès de Paris

consumers, they could then be considered subject to the standard.

Last, an Advisory Opinion in the 1980s (#297), provided some factors to be considered for the “current use and distribution patterns.” These factors dealt with:

- Weight and cost of the products
- Are sales made directly to retail dealers?
- Have ads been placed in consumer publications?
- Are products produced in low volume so as not to look like mass produced products?
- Do distributors believe that nearly 100% of the products are sold to commercial users, not consumers?

This General Counsel's opinion also mentioned one of the more interesting questions surrounding these distribution patterns. Most rental yards will presumably rent industrial products to anyone, including consumers. Does that make it a consumer product? In that connection, the General Counsel said that their determination that the products in question were not consumer products could change if “some of the business purchasers mentioned in the survey may have been rental firms that could conceivably rent some of the mowers for consumer use.”

Despite this language, this may not be a real problem for the rental industry. I spoke with representatives of the rental industry who report that they are unaware of any situations where industrial products were considered consumer products because they are occasionally rented to consumers. That doesn't mean that there may not be product liability problems when consumers use industrial products and the warnings and instructions are written for professional users and not occasional ones.

On a more informal basis, I have been told by former CPSC employees that the staff once used a “5%” rule. This means that if at least 5 percent of the sales were to consumers, even if the manufacturer did not intend for consumers to purchase the product, then it would be considered a consumer product. That informal, internal “rule” has not been used recently and the CPSC staff does not use any quantity of sales criteria but instead looks to the factors mentioned above. This is consistent with the Congressional legislative history which stated that there should not be adherence to a “quantum test” in deciding this issue.

Preventive Advice

So, what does this all mean? Clearly, what most easily converts a product into a consumer product is when the manufacturer markets the product in distribution channels that are regularly accessed by consumers. So selling an industrial product to a big box hardware store or to Amazon most likely would make it a consumer product. Advertising a farm tractor in a publication devoted to “hobby farmers” I believe turns it into a consumer

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11 - 13
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⌚ 1:00 pm - 4:00 pm (13) Central
📍 Cedar Park

25 - 27
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⌚ (All Day) Central Time Zone
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MAY

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📍 Granlibakken Conference Center & Resort

8 - 10
MAY
ISPCE 2017 – 2017 IEEE SYMPOSIUM ON PRODUCT COMPLIANCE ENGINEERING
⌚ (All Day)
📍 San Jose Holiday Inn

8 - 9
MAY
MEDICAL SENSORS DESIGN CONFERENCE
⌚ (All Day) Eastern
📍 Newton Marriott

9
MAY
ANNUAL CHICAGO IEEE EMC MINSYMPIUM
⌚ (All Day: Tuesday)
📍 Holiday Inn

product. Promoting a landscaping product in recreational magazines for use in hunting would, I believe, make it a consumer product. And, selling a small amount of a certain farm product to schools to use in 4-H programs probably makes it a consumer product.

These would be my conclusions even if there were few, if any, sales to consumers. And, it would certainly be my conclusion if an accident occurred where a consumer who purchased the product was injured while using it.

The more difficult questions arise when there is no intention for the product to be used by a consumer, but an occasional consumer buys it, borrows it, or rents it. Does that turn it into a consumer product either for CPSC purposes or for product liability purposes? I would argue no.

To better support the argument that it isn't a consumer product, a manufacturer or dealer could sell their product to an industrial equipment retailer or rental yard and tell them not to sell or rent that product to consumers. The manufacturer could also make it clear in a label and in the instructions that this product is not to be purchased by or used by consumers.

To illustrate this point, there is some case law that says that an industrial chemical manufacturer must ask its distributors to not sell industrial chemicals to consumers, and that, if they don't, the industrial chemical is then subject to the Federal Hazardous Substances Act (FHSA), which is under the jurisdiction of the CPSC. So, while these products are not consumer products under the CPSA, the FHSA sets out requirements to label chemicals for consumer use.

The court said in part:

Under the appropriate test, the focus is whether the product, through its normal distribution scheme, is made available to the ordinary consumer. The fact that the defendants' product is labeled "For Professional Use Only," does not determine the issue. The important consideration is whether the product could be purchased by the average consumer for household use.
Canty v. Ever-Last Supply Co., 685 A.2d 1365 (N.J. Super. L. 1996)

If the manufacturer really intends for their product not to be considered a consumer product, it should consider the law and opinions above and do the things necessary for them to be able to argue that it isn't a consumer product under the CPSA, FHSA or product liability laws.

On the other hand, some manufacturers of industrial products are not able to, or don't want to try to, control distribution and instead want their products to be available to be purchased by anyone who wants to use them. In that case, they need to consider consumer use when designing the product and when

9 - 11

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creating warnings and instructions. In fact, it is possible that there would be different sets of warnings and instructions and different packaging depending on the distribution and use patterns.

Finally, if the product could be considered a consumer product for purposes of CPSC jurisdiction, that doesn't necessarily mean that the manufacturer or distributor has to report safety issues to the CPSC. The reporting requirement is triggered by the discovery of a defect in the product that could create a substantial product hazard. Thus, there may be a duty to report even if there have been no accidents.

Sometimes, I have advised companies to report to the CPSC even if it is arguably not a consumer product. If that manufacturer intends to conduct a recall and it is possible that the CPSC will hear about it, it might be better to report to the CPSC that the product in question isn't a consumer product but that you are reporting the defect or risk regardless. Then, the CPSC would not be able to subsequently argue that you failed to report the defect or risk in a timely manner if they were to ultimately determine that the product involved really was a consumer product.

Conclusion

There are many important issues for any product that could arguably subject consumers to some risk of harm. In addition to CPSC issues, there may be problems if someone is hurt and the argument is made that the product was not designed for or contained warnings and instructions meant for consumer use or for consumers that might be in the zone of danger.

Given the importance of this issue, it is advisable to consult with legal experts in safety regulatory compliance to be sure you do not unwittingly assume risks you don't want to accept, or that, if you assume the risks, you are prepared to defend yourself against the CPSC and an injured consumer if an accident occurs.



Kenneth Ross is a Senior Contributor to *InCompliance Magazine*, and a former partner and now Of Counsel in the Minneapolis, Minnesota office of Bowman and Brooke LLP. Ross provides legal and practical advice to manufacturers and other product sellers in all areas of product safety, regulatory compliance and product liability prevention, including safety management, recalls and dealing with the CPSC. He can be reached at [-952-210-2212](tel:952-210-2212) or kenrossesq@gmail.com. Other articles by Ross can be accessed at www.productliabilityprevention.com.

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