



# Legal Issues for Chemicals

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# Topics

- Product liability and workplace safety
- GHS compliance
- Industrial vs. consumer
- Dual use labels

# Product Liability vs. OSHA

- Product Liability

- | Burden on manufacturer
- | Employer not liable
- | What evidence re OSHA is admissible?

- OSHA

- | Burden on employer
- | Manufacturer not liable for OSHA non-compliance except for HCS, especially where OEM sells chemicals with its name on them.

# Laws and Regulations

- A product is defective if it does not comply with an applicable product safety statute or administrative regulation -- if there is causation
- Compliance is admissible but may not be determinative (i.e., may not be a defense)

# Voluntary Standards

- Compliance with standards is *generally* not required; however,
  - Certain laws may require compliance
  - Failure to comply may have to be explained away in court
  - Could be proof of state of the art
  - May need to exceed standards

# Content of adequate warnings (law and standards)

- Description of hazard
- Probability of hazard occurring
- Severity if occurs
- How to avoid hazard

# What is an adequate warning in the U.S.

- Warning does not have to be followed in order for it to be adequate
- It must be comprehensible
- Studies tend to show that many warnings are not noticed or noticed and not followed
- Best defense is that injured would not have complied with a better warning (lack of causation)

# Product Liability

- OEM may be liable if chemical has inadequate labeling, even if they didn't make it.
- Evidence of non-compliance with laws, regulations, and standards can be discovered and may be admissible.
- Compliance with HCS not a defense.
- OEM can blame chemical supplier but may not get out of case.
- OEM generally can't blame employer.



# Consumer vs. Industrial:

## Why is this important?

- Industrial products are designed for users who are usually trained and supervised.
- Consumer products are designed for non-professionals who may not know how to use the product safely and may not read the warnings and instructions.
- SDS is not meant for consumers and therefore is not really an adequate warning and instruction for consumer use.

# Why important?

- Industrial products subject to OSHA requirements but mostly imposed on employer not manufacturer.
- Employer and manufacturer do not have a legal responsibility to report to OSHA if the industrial product is defective.
- Manufacturer may have to report new hazards to EPA and update SDS/label (OSHA).

# Why important?

- Consumer products are subject to CPSC requirements including various laws, standards, and regulations
- Must report to the CPSC safety problems that arise after sale, including non-compliance with FHSA.
- Also there are reporting requirements in Canada, EU, Australia, etc.

# Why important?

- Industrial products and consumer products both subject to product liability laws and litigation. But laws are different depending on what type of product it is.
- May be impossible to defend industrial product used unsafely by consumer.

# What is a consumer product?

Congress said:

....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.

# Congress also said:

- The occasional use of industrial products by consumers would not be sufficient to bring the product under the CPSC's jurisdiction.
- 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 thereby exposed to hazards associated with the product.

# What has CPSC said:

“...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.”

# CPSC also has...

- Provided some factors to be considered for the “current use and distribution patterns.” They are:
  - 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?



# Industrial chemicals

- When does FHSA apply? Court said:
  - | “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.”

# Industrial chemicals

- Manufacturers should
  - | Have labels for both OSHA and CPSC requirements, or
  - | Should request or require its distributors to not sell to consumers.
  - | Manufacturer does not have to monitor compliance but if they know distributor is not complying, they need to do something.

# Dual Labels

- OSHA HCS vs. FHSA?
- CPSC has not accepted HCS labels as compliant with FHSA.
- Therefore, selling products for industrial use and consumer use would technically need two labels.
- What are chances of enforcement?

# QUESTIONS?

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### When does an Industrial Product become a Consumer Product?

by Kenneth Ross



One of the more perplexing questions I have grappled with over the years is when does an industrial product become a consumer product and therefore subject to the laws concerning consumer products. These include laws involving the U.S. Consumer Product Safety Commission ("CPSC") and also product liability laws concerning sales to consumers.

This is an important question 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, it should be designed for a consumer's use and the warnings and instructions should be written so that they are understandable by a typical consumer.

As a result, industrial product manufacturers should be aware of actions that they can take to 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 defines "consumer product" as follows:

The term "consumer product" means 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 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,

Interestingly, neither the Act 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



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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)]

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 were 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, the manufacturer could request a new advisory opinion on a particular product. But, be careful doing that as you may not like the answer.

A review of these opinions reveals very few 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 consumers, they could then be considered subject to the standard.

Last, an Advisory Opinion in the 1980's (#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



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have been rental firms that could conceivably rent some of the mowers for consumer use."

Despite this language, in reality, this may not be a problem. 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.

There have been several court decisions dealing with jurisdiction. However, none of them have provided any more guidance concerning industrial products than what is stated above.

On a more informal basis, I have been told by former CPSC staff that the staff once used a "5%" rule. If at least 5% 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 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 would, I believe, make it a consumer product. Advertising a farm tractor in a publication devoted to "hobby farmers" turns it into a consumer product. Promoting a landscaping product in recreational magazines for use in hunting I believe makes 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, the manufacturer or dealer could sell to an industrial equipment retailer or rental yard and tell them not to sell or rent 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. So, for example, I am a professional logger and I purchase a professional size chain saw. The warnings should say that this is for professional use only and the instructions should make it clear that it should not be loaned to or sold to a consumer.

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, if they don't, then the industrial chemical is 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)

Therefore, if the manufacturer really intends for the product to not 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 under 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 able 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 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.

Manufacturers can help with the safety and defensibility of their products by considering who their reasonably foreseeable users will be and provide a product that is safe for that use.

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