INTRODUCTION
On August 14, 2008, President Bush signed the Consumer Product Safety Improvements Act of 2008 (the “Act”), which substantially increases the resources of the Consumer Product Safety Commission (the “CPSC”). The Act authorized enhanced laboratory and computer equipment, higher staffing levels, and budgetary uptrending through 2014.

Several provisions of the Act will be of particular interest to the subrogation community. For example, the Act requires the CPSC to create an online, publicly available database for consumer products, which will provide greater and easier access to product defect information. Identifying the manufacturer of a product and its failure mode are essential first steps in pursuing subrogation based on a malfunctioning product. The new law promises to support that effort by making available a database of complaints and problems reported by consumers. The Act also requires manufacturers and distributors to promptly disclose product defects or face serious penalties.

BACKGROUND
Since its inception in 1972, the CPSC has collected a wealth of information on product malfunctions. However, it has been difficult to gain complete and timely access to that information. Each year, the CPSC receives approximately 500,000 product reports, through letters from consumers, complaints to the CPSC hotline and information from the National Electronic Injury Surveillance System.

The CPSC pursues an in-depth investigation when a report pertains to a serious injury, and then prepares an Epidemiological Investigative Report (“EIR”). The EIR then is forwarded to the product manufacturer for voluntary comments. None of this information is available on the internet or through a searchable, consumer-friendly database. While the CPSC’s website provides a database of recalls and notices, it does not include specific details about failure mechanisms or injuries.

The CPSC also maintains an Injury Information Clearinghouse accessible through the Freedom of Information Act. Under the current structure, a member of the public who is interested in learning about complaints for a particular product, or details of incidents involving the product, must submit to the CPSC a written request authorized by the Freedom of Information Act (commonly referred to as a “FOIA Request”). The CPSC researches its files and provides the requester with any non-confidential information on the product. This is a very time-consuming process, often taking months, if not years.

NEW PROCEDURES
1. The Act Mandates a Consumer-Friendly, Searchable Database
The Act requires the CPSC to open its files and share its information with the public by creating a searchable database of product information submitted by consumers as well as manufacturers. The database will be searchable by date, product name, model and manufacturer. Importantly, it will also provide access to a category of company-generated reports mandated by the Act.

The previous Consumer Product Safety Act, 15 U.S.C. §§ 2051, required all manufacturers, distributors and retailers of consumer products to report “immediately” to the CPSC any information which reasonably supported the conclusion that a product contains a defect that “could” create a substantial product hazard. Such reports are commonly referred to as “Section 15(b) reports.” The new database will include searchable information from Section 15(b) reports not currently available to the public.

2. The Act Mandates Stiffer Penalties for Companies
Prior to August 14, 2008, the maximum civil penalty that could be imposed on a company for failing to comply with the CPSC’s Section 15(b) requirements was $1,825,000, and the
maximum criminal penalty was imprisonment for one year. Under the Act, civil penalties have been increased to $15,000,000 (almost an eight-fold increase), and maximum criminal penalties have increased 500%, to five years.

THE VALUE OF CPSC INFORMATION

The CPSC has collected thirty-five years worth of information on product performance and failures. The information identifies a specific hazard (e.g., fire, property damage, personal injury) and the number of reports received for each hazard. The information is specific to manufacturer, product type, model and year of manufacture.

Earlier this year, for example, the CPSC reported that a major manufacturer of toasters had cooperated in the recall of seventeen toaster models manufactured in China. The toasters posed a hazard of igniting nearby flammable items, including kitchen cabinets, because the toasters remained “on” or energized, after toasting bread.

In another 2008 action, the CPSC issued a nationwide recall of horizontal toasters that allowed food to catch fire. When the toaster door automatically opened and the food rack extended beyond the door, flames from the food could escape the unit, exposing kitchen cabinets and their contents to the fire. The manufacturer had received over 1,000 fire complaints, causing property damage and personal injuries.

The CPSC’s oversight extends beyond small kitchen appliances, to include component products such as gas control valves. In a recent recall, the CPSC identified a fire hazard associated with a series of control valves installed in residential space heaters, wall heaters, boilers, fireplaces, pool heaters, infrared heaters and furnaces, as well as commercial cooking appliances, fryers, commercial water heaters and poultry brooders. The CPSC received reports of flash fires that occurred when a pilot light extinguished and the gas valve stuck in the open position. Gas continued to flow until it met a heat source, causing an explosion and fire.

Acquiring background information about previous malfunctions of a specific product is extremely valuable to the team investigating subrogation for a specific claim. Working with consultants with technical and scientific expertise, the subrogation professional is able to define and articulate a failure mode, the essential factor in establishing a product defect under the law. At trial, many courts will allow the admission of evidence of prior incidents if they involve identical products and circumstances.

CONCLUSION

Cozen O’Connor maintains its own product liability database on an array of defective products, gathered from CPSC recalls as well as from years of experience in analyzing and pursuing products liability subrogation claims. If you would like assistance in the investigation of product failure, product recalls, or technology designed to correct earlier failure modes, contact the attorneys listed below, or any member of the subrogation department of Cozen O’Connor. We will be happy to discuss a particular product or general access to information regarding product failures.