

WFH And DIY May Spell Uptick In Consumer Product Suits

By **Jennifer Bullard and Dan Bauch** (April 16, 2021, 5:59 PM EDT)

2020 led many people to spend an unprecedented amount of time in their homes. Prior to the pandemic, just 2% of people worked from home full time, according to U.S. Bureau of Labor Statistics data. That number rose to 62% during of the pandemic.[1]

Additionally, 6.2 million Americans are currently unemployed, with unemployment peaking in 2020 at 20.5 million. While restrictions are now being loosened, we can expect that many will continue to spend more time at home.

These changes in our economy have led to changes in consumer behavior that may affect the future of litigation for consumer products companies.

Significantly, as a result of extra time at home, people tackled home improvement projects for which they might otherwise have hired a professional. And with fewer opportunities for leisure travel and destination recreation, Americans entertained themselves more at home, or nearby.

People set up home gyms. People took up new hobbies. And with these activities came a spike in the purchase of products like tools, fitness gear, and lawn and garden equipment. Companies including Amazon.com Inc. reported record sales and profits that nearly tripled, illustrating how the pandemic drove an unparalleled demand for consumer products.[2]

We know from similar historical trends that these upticks in sales are typically followed by an uptick in product liability litigation. After all, more sales mean more potential for accidents with a product once it's in consumers' hands.

In fact, a recent report from the U.S. Consumer Product Safety Commission[3] compares National Electronic Injury Surveillance System data from March 2019 through September 2019 with data from the same time period in 2020. That data showed a 106% increase from 2019 to 2020 in hospitalizations for power home tools, a 68% increase in hospitalizations due to workshop equipment, a 59% increase in hospitalizations due to chain saws, and a 57% increase in hospitalizations for miscellaneous construction materials.

Emergency-room-treated injuries related to consumer recreation products also increased significantly, with the largest increases in ER-treated injuries occurring with fireworks and flares (56%), skateboards, scooters and hoverboards (39%), and all-terrain vehicles, mopeds and minibikes (39%).[4]

Then, at the start of this year, early executive actions by the Biden administration signaled a rollback of the Trump administration's less restrictive regulatory environment. On his first day in office, President Joe Biden revoked six Trump-era executive orders which sought to curtail the federal government's regulatory powers,[5] among them the two-for-one order urging agencies to identify two regulations for repeal for every new regulation promulgated.[6]

Between Jan. 1 and April 7, the CPSC recorded recalls of dozens of products in more than 40 product



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categories — from freestanding clothing storage units to pressure washers, battery packs, medication containers, infant bath seats, snowblowers and essential oils.

While it is impossible to predict at this juncture which product categories will be receiving the most increased scrutiny from government regulators, it seems fairly certain that given the rise in injuries highlighted by the CPSC report, this moment of respite between the rise in sales and the rise in consumer products litigation will be ending soon.

Indeed, the \$7.95 million civil penalty issued last month by the CPSC against Cybex International Inc. would seem to be the first of many actions by regulators that may serve as new launching points for the plaintiffs bar to pursue litigation.

Manufacturers and risk management teams can still be proactive and take steps to limit exposure to what may be to come. Below are some practical tips that can make a meaningful difference if the litigation wave hits.

Review your product literature and consumer communications.

Now is a great time to review your instruction manuals, owner's manuals, warranty language, labels, warnings, marketing materials and any online tutorials or videos for accuracy.

Often a fresh review of these items — especially if they have not been looked at since before the pandemic — may lead to improvements that will pay dividends later.

Review your access points.

Not only should you periodically review the materials provided to consumers, but you should take the time to review how those materials can be accessed by consumers.

Are the materials provided to the consumer with the product? If not, is the consumer provided information on how to obtain copies of those materials or how to review them online? Does your website provide the consumer links to those materials through easy to understand and easy to find access points? Does the consumer have the option to download those materials as PDFs?

You certainly want to avoid a situation where you have spent considerable time and energy to create all the appropriate publications, instructions and other written materials for consumers, but have made it difficult for consumers to find these materials on your website.

Review your complaint handling procedures.

How are you handling complaints about your products? What does the documentation of that process look like? Is it something you would be proud to show a jury deciding whether to hold your company liable? Does it show your company closely monitors the field performance of its products, and cares about its customers' safety?

Often there are aspects of the complaint process that can be improved. These aspects may include the flow of how consumers can make complaints, the information that is obtained and recorded from the consumer, the written communication that goes to a consumer who has lodged a complaint, or the documentation of how a complaint was resolved.

Each aspect of interacting with consumers who are experiencing an issue is an opportunity for your company to shine — or the opposite. Now is a great time to make sure the process is organized, streamlined and working as intended.

Similarly, now is a great time to make sure that complaints and issues are being tracked, to ensure that if trends are developing, they are being identified and dealt with.

Carefully consider design changes and improvements.

Product improvement is the name of the game, and there is certainly nothing wrong with making design changes. But how those changes are documented, and the narrative surrounding the changes,

is often front and center if your company gets sued.

So it's a good time to have a meeting with your engineering and other internal teams to remind them of the importance of written communication, document their processes, and explain to them how bad practices can come back to bite the company down the road.

Review your insurance policies and contracts.

What kinds of claims are covered by your insurance policies? What claims and issues are covered in your contracts with fellow distributors, manufacturers, parts or component suppliers, and employees?

The pandemic has created unique challenges and demands that may not have been contemplated when these contracts and policies were initially drafted. Be proactive about reviewing your policies and contracts, and addressing any gaps or grey areas that may increase your risk of liability.

2020 is receding in the rearview mirror, but the world remains forever changed. Product manufacturers continue to strive to meet the changing needs of consumers. Accordingly, now is the time to for companies to review the manuals, warnings and communications associated with their products.

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[1] <https://enterpriseproject.com/article/2020/12/work-home-after-covid-19-how-make-your-case>.

[2] <https://www.wsj.com/articles/amazon-sales-surge-amid-pandemic-driven-online-shopping-11604003107>.

[3] Jan. 11, 2021, Memorandum, Effect of Novel Coronavirus Pandemic on 2020 Preliminary NEISS Estimates.

[4] Id.

[5] Executive Order on Revocation of Certain Executive Orders Concerning Federal Regulation, Jan. 20, 2021.

[6] <https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs>.