



**U.S. CONSUMER PRODUCT SAFETY COMMISSION
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**Statement of Commissioner Robert Adler on the
Consumer Product Safety Commission's Provisional Acceptance of a
Settlement Agreement with Williams-Sonoma, Inc.**

May 9, 2013

Background: The Commission recently agreed to accept on a provisional basis a settlement agreement with Williams-Sonoma, Inc. for its alleged failure to notify the CPSC immediately upon obtaining information that reasonably supported the conclusion that its wooden hammock stands contained a defect which could create a substantial product hazard. The defect alleged was the deterioration of the wood in the hammock stands such that when a consumer sat in the hammock, the wooden beams would break, leading to serious injuries when the hammock unexpectedly fell.

According to staff allegations, Williams-Sonoma did not file a report with CPSC until September 11, 2008, almost two years after having received significant information regarding the product's defect. By this time, the company was aware of 45 incidents involving the hammocks, including 12 reports of injuries requiring medical attention for lacerations, neck and back pain, bruising and one incident involving fractured ribs.

In addition to paying a civil penalty of \$987,500, Williams-Sonoma agreed to maintain and enforce a program designed to ensure compliance with the safety statutes and regulations enforced by the Commission. This agreement substantially tracks one recently entered into by the CPSC with another company. In that case, the company agreed to pay a civil penalty and maintain and enforce a compliance agreement in connection with its alleged failure to report a possible substantial product hazard.

Commissioner Nord's Objections: My colleague, Commissioner Nord, although agreeing to provisionally accept the proposed settlement agreement, objected to the inclusion of the compliance provision, complaining that "it smells of regulatory opportunism disguised as enforcement." As willing as I am to tip my hat to her creative use of language, I find her criticism to be without merit.

My colleague's specific complaints are two: (1) the Commission's insistence of a compliance provision in a settlement agreement "inserts" the Commission into the company's operations in a manner that violates the notion that the punishment should fit the crime and (2) the fact that Williams-Sonoma had prior voluntary recalls that did not include findings of defect or regulatory violations somehow means that the Commission could not justify a compliance program based on these prior recalls.

Crime and Punishment: With respect to my colleague's first complaint, I strongly disagree. The compliance provision is neither "punishment" nor is it in any way inappropriate. In this case, the Commission noted that the company had undertaken eighteen voluntary recalls in the past five years¹ and concluded that it would be in the public's – and I would argue, the company's – best interest to lay out a specific set of criteria for the company to follow in its future production and sales. In fact, at its heart, this agreement is nothing more than an affirmation of the company's commitment to follow the law.

Far from viewing this settlement as punishment, I view it as the Commission and the company mutually agreeing to a set of reasonable measures designed to lead to safer products and fewer recalls in the future. Indeed, I suspect that the reason that companies agree to such language is their sense that any conscientious, responsible firm should follow such procedures in their approach to compliance. And to the extent that their past practices might have fallen short of these goals, they are eager to demonstrate that their future approach will be one of strict adherence to such provisions.

Moreover, I would draw my colleague's attention to paragraph 25 of the settlement agreement wherein the company represents that the agreement is "freely and voluntarily entered into, without any degree of duress or compulsion whatsoever." I further note that the company was represented by experienced and sophisticated counsel. So, if my colleague is correct that the Commission somehow overreached, it did so with a willing and well-represented partner.

My colleague's objection would have more force if she had any legal basis or precedent, other than her personal distaste, for rejecting the compliance provision outlined in the agreement. There is, of course, no such basis since this agreement easily falls within the Commission's legal authority – and even more easily within sound public policy. In fact, one might argue that her approach, if followed, would simply constitute a self-imposed tying of the Commission's hands for no good reason. Why the CPSC should unilaterally limit its remedial discretion in the face of a demonstrated need to protect the public escapes me.

Voluntary Recall Agreements: My strongest objection to my colleague's statement revolves around her insistence that the Commission could not take prior voluntary recalls into account in seeking a settlement agreement. She claims that since the recalls did not involve findings of defect or regulatory violations, the Commission must somehow ignore them in crafting any agreement with the company.

¹ I certainly understand that larger companies are likely to have more recalls than smaller companies, and I have considered that in my assessment of the cases before me. Of course, what also matters is the nature of the violations and the level of commitment demonstrated by the companies with respect to their compliance with CPSC regulations.

To the contrary, she argues that such an approach might discourage conscientious companies from engaging in voluntary recalls.²

I am well aware that the voluntary recall agreements that the Commission enters into invariably contain a boilerplate paragraph in which the company asserts that its assent to the agreement does not constitute an admission by the company or a determination by the Commission that the company has violated the law. Transforming this language into a blanket implication that no conclusions about a company's past behavior can be drawn, however, transforms a convenient legal fiction into a broad legal lie.

The reason why firms insist on "non-admission" clauses is their concern that their voluntary recalls might lead to product liability lawsuits or shareholder derivative actions. Because such concerns lie outside the Commission's product safety mandate, I have no strong objection to the clauses. It strains credulity, however, to elevate such language to the conclusion that a history of recalls stands for naught. If anything, such a history should make companies more aware of their duty to report possible hazards and to be prepared to take remedial action where necessary.

In fact, were my colleague's presumption to hold sway, the Commission very likely would be forced to adopt the reasoning of several recent courts regarding SEC settlements in which the courts have insisted on explicit acknowledgement that the companies admit guilt regarding their alleged violations of the law. I find it unnecessary at this point for the Commission to move to such an approach because I reject the notion that past recalls cannot be considered when crafting legal settlements.

Backdoor Rulemaking: Although my colleague stated that she has two reasons for opposing the language in the Williams-Sonoma case, in fact she has a third, which needs to be addressed. Here, she argues that placing compliance clauses in settlement agreements constitutes "backdoor rulemaking." Of course, framing the Commission's action as "backdoor rulemaking" seems to suggest that something improper has occurred – which it has not. As any student of administrative law knows, regulatory agencies have great discretion to decide whether to implement policy through litigation or rulemaking – or both.³ Which tool(s) an agency selects depends on the situation before it. With respect to the recent settlements that the Commission has entered into, I believe the underlying facts strongly support the Commission's actions. The fact that the Commission has sought similar language in the two settlements says little at this point about whether there has been a shift in agency policy in the future. Even if it did, there is nothing improper about implementing the policy in individual case settlements. That said, I do not rule out asking for such clauses in future non-civil penalty settlement agreements nor do I rule out future expansions of the Commission's voluntary recall policies.

² In my experience, the Commission and its staff have always worked closely and effectively with conscientious companies. I see nothing in the provisions at issue that does anything to lessen this cooperation. Moreover, I note that the law requires companies to report potentially hazardous products and to recall them should they present serious risks to the public. I have little doubt that conscientious companies will continue to comply with the law.

³ See, e.g., *National Labor Relations Board v. Bell Aerospace Company*, 416 U.S. 267 (1974) and *Securities and Exchange Commission v. Cheney Corp.*, 332 U.S. 194 (1947).