



2022 Focus June Conference  
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Breaking Down Product Liability Faults and Findings

### **The Consumer Product Safety Commission (CPSC)**

The CPSC Recall Workbook is their 'Bible' on recalls. Key elements of the CPSC Recall Book include:

#### **Required Reports**

Reports are required when any organization obtains information which reasonably supports the conclusion that a product distributed in commerce: These include when a product:

1. Fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard upon which the Commission has relied under Section 9 which is the Procedure for Consumer Product Safety Rules.
2. Fails to comply with any other rule, regulation, standard or ban under the CPSA or any other Act enforced by the Commission
3. Contains a defect which could create a substantial product hazard
4. Creates an unreasonable risk of serious injury or death

The Reporting of a product does not automatically mean the Commission will conclude that the product creates a substantial product hazard or that corrective action is necessary. Many of the reports received require no corrective action because the staff concludes that the reported product defect does not create a substantial product hazard.

#### **What, Where and When to Report**

When a report is filed, it should be filed electronically through the CPSC website ([SaferProducts.gov](https://www.saferproducts.gov)).

The report should contain at a minimum:

1. Identification and description of the product
2. Name and address of the manufacturer and/or importer of the product if known. If not known, then the names and addresses of all known distributors and retailers of the product
3. Nature and extent of the possible defect, the failure to comply, or the risk
4. Nature and extent of injury or risk of injury associated with the product
5. Name and address of the person informing the commission

A company must report within **24 hours** of obtaining reportable information.

The CPSE lists that identifying defects can be a result of:

1. Manufacturing or production error
2. Design
3. The materials used in the product

The CPSE mentions that just because a product presents a risk does not mean it's defective. They list the example of a sharp knife. The blade needs to be sharp to do its intended purpose.

Even though via error or misuse, when someone cuts themselves, the product may not be defective.

What are the key questions the Commission uses to determine if an injury with a product makes the product defective:

1. What is the utility of the product? What is it supposed to do?
2. What is the nature of the risk of injury that the product presents?
3. Is the risk obvious to the consumer?
4. What is the need for the product?
5. What is the population exposed to the product and its risk of injury?
6. Are there adequate warnings and instructions that mitigate the risk?
7. What is the Commission's experience with the product?
8. Is the risk of injury the result of consumer misuse, and is that misuse foreseeable?
9. Finally, what other information sheds light on the product and patterns of consumer use?

### Recent Recalls from the CPSE

Over 1M Fit Bit Ionic Smartwatches were recalled due to a potential burning issue from batteries. The battery in the Ionic smatwatch can overheat and this can cause a burn hazard. According the CPSC, there were at least 115 reports in the U.S. and 59 in other countries that involved injuries with second and third-degree burns.<sup>i</sup>

America Honda recalled 32,000 recreational off-highway vehicles (ROVs) due to crash and injury hazards. An intake funnel band screw could loosen and enter the engine. This could cause sudden engine failure resulting in an increased crash or injury.<sup>ii</sup>

### Emerging Issues in Product Liability Claims

## Right to Repair Issues

Many manufacturers void warranties if the user attempts to or hires out a repair not performed by the manufacturer or a certified repairer by the manufacturer. This involves products from cell phones to sophisticated farming equipment. <sup>iii</sup> According to an article in MarketWatch, the 'right to repair' law (if enacted) would change the definition of the ownership of a product.

One of the key questions is do you actually own a product if you do not have the right to repair it if it breaks. Currently, for some products, the broken product had to be replaced or go to the original manufacture to repair it.

Other key questions

- Do adjusters and attorneys need to factor this into product liability claims when determining risk transfer?
- If a product is deemed defective after a repair not performed by the manufacturer, who might be deemed responsible for the defect?
- When does the right to repair conflict with potentially dangerous repairs like the replacement of a phone battery or working on a microwave?
- Who is responsible for injuries when user is injured while attempting repairs, based off a YouTube video?

## Chain of Custody and Spoliation of Products

While the chain of custody is paramount in fire and water losses, it's not often thoroughly documented in product liability cases. This can lead to a product being considered 'spoliated' by the manufacturer. The trail of custody before the injury is just as important as following the incident. Key factors to consider are:

- Who bought the product from where?
- Was it new or used?
- Is the product still under warranty?
- Has the maintenance been performed per the manufacturer?
- Has the product been altered? If so, by who?
- Has the product been used by others or loaned out?
- Where is the product normally stored, is it weatherproof?

## Hot Topics in Product Liability in 2022

According to Reuters News, these are significant product liability product in 2022:

- Opioids
- RoundUp (Bayer) weedkiller
- Gramoxone – Another weedkiller branded by ChemChina's Syngenta
- Johnson & Johnson Talc powder

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<sup>i</sup> From <https://www.self.com/story/fitbit-recall>

<sup>ii</sup> <https://www.cpsc.gov/Recalls/2022/American-Honda-Recalls-Recreational-Off-Highway-Vehicles-Due-to-Crash-and-Injury-Hazards>

<sup>iii</sup> <https://www.marketwatch.com/story/right-to-repair-law-may-run-into-the-changing-definition-of-ownership-11633108731>