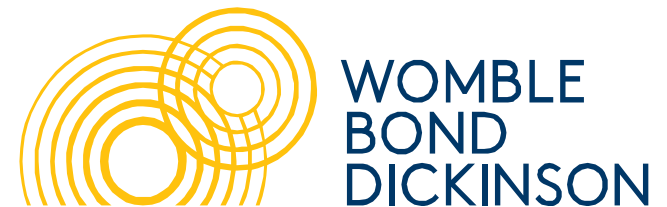




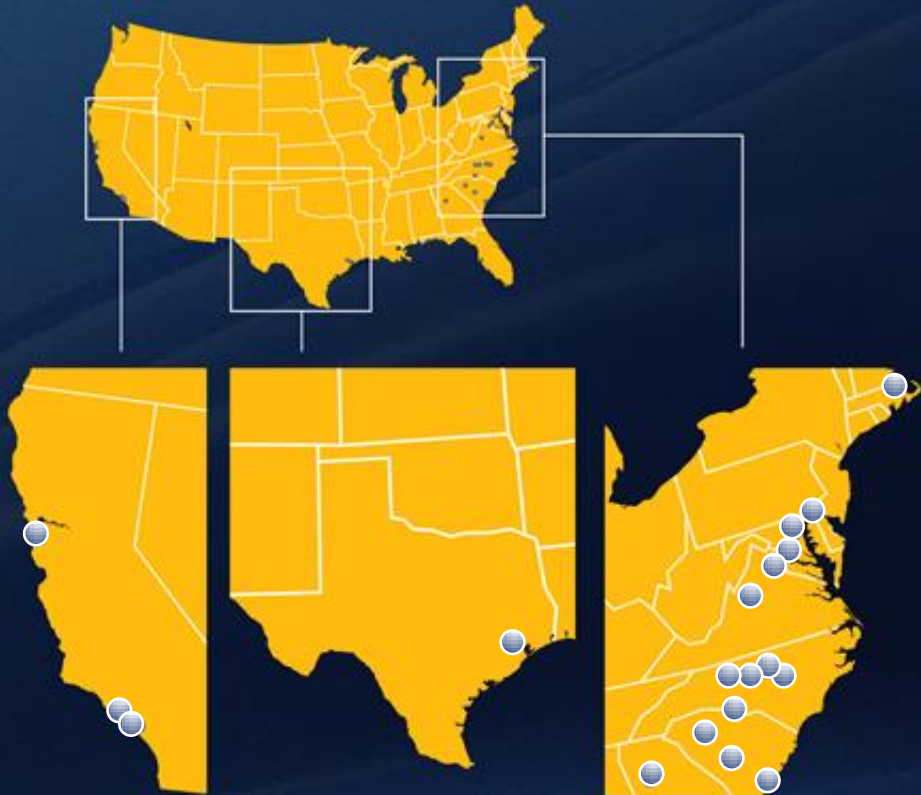
Understanding Foreseeable Misuse

Michael Sullivan & Patrick Spaugh

October 2, 2019



With teams located across the US and the UK we bring an **international perspective** and **extended jurisdictional reach** to a wide range of client needs



US







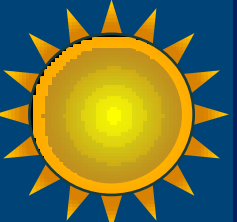
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Greenville
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Houston
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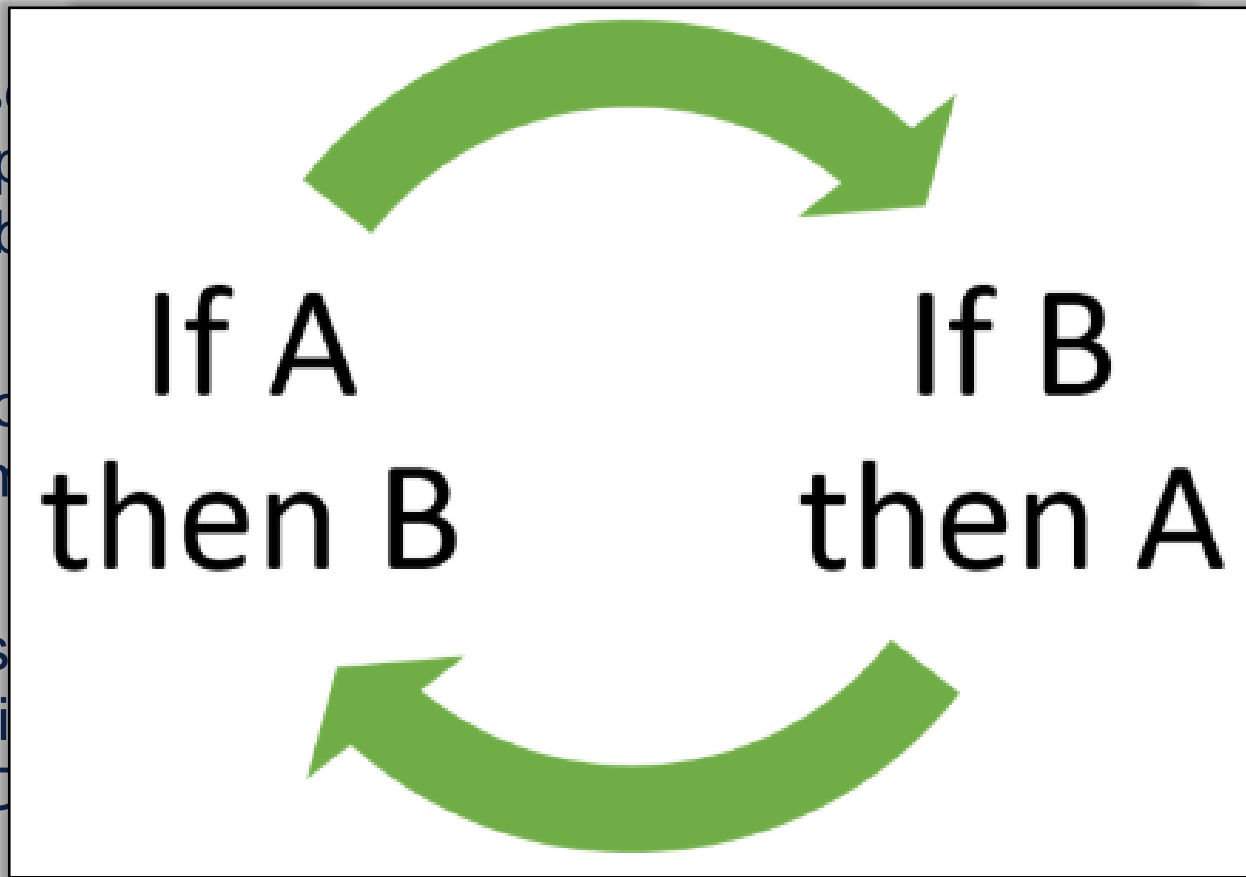


Agenda

SAT	SUN	MON	TUE	WED	THU	FRI
						
What Does Reasonably Foreseeable Misuse Mean?	What about Courts?	How Does the CPSC View It?	Some Examples	Hot Topics in the Industry	Steps To Ensure a Sunny Forecast!	Questions?

What Is Foreseeable Misuse?

- Foresight of anticipated possible misuse
- Reasonable circumstances
- Misuse in an industry *Law D*



sts are

product
Black's

What Is and Isn't Reasonably Foreseeable According to Courts?

Not Foreseeable

- Using “longneck” glass beer bottle as a weapon
- Riding pendulum of an oil pump
- Using ratchet tie-down straps to secure deer stand

Reasonably Foreseeable

- Lifting rear of snowmobile while track is spinning
- Inhaling contents of can of dust remover



What About According to the CPSC?



CPSC Chairman Adler's Law Review Article

The Misuse of Product Misuse: Victim Blaming at Its Worst

Blaming consumers who used a product and were injured or killed

is not just inhumane and reprehensible

designer, **is not just inhumane and reprehensible**. It is truly bad public policy particularly when it is the basis to justify regulatory inaction. **Using foreseeable consumer behavior—victim**

**Using foreseeable consumer behavior—
victim blaming—to undercut regulatory
goals is unacceptable**

create risks and punishes those who are harmed.

Additional Examples



Additional Examples

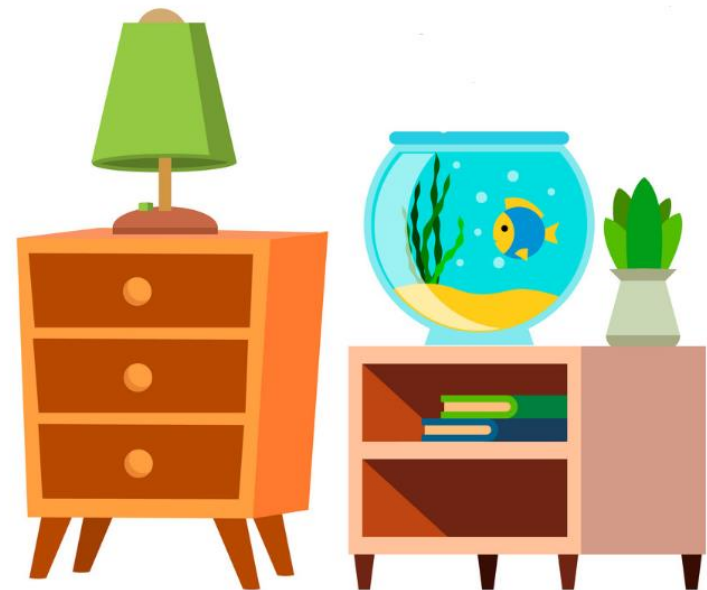


Additional Examples



Additional Examples

- **Nightstands**- “a small furniture item for use beside a bed, intended to hold or store items including but not limited to a lamp, alarm clock, a book, magazines, or reading glasses”
- Marketing descriptions are not a confession booth
- ASTM F2057



How Do You Evaluate?

- **NOT** every conceivable foreseeable use
- Instead:
 - Is the specific misuse widespread?
 - If so, does the manufacturer know about it or **SHOULD** they know about it?

Willful Blindness Won't Work



CPSC Guidance

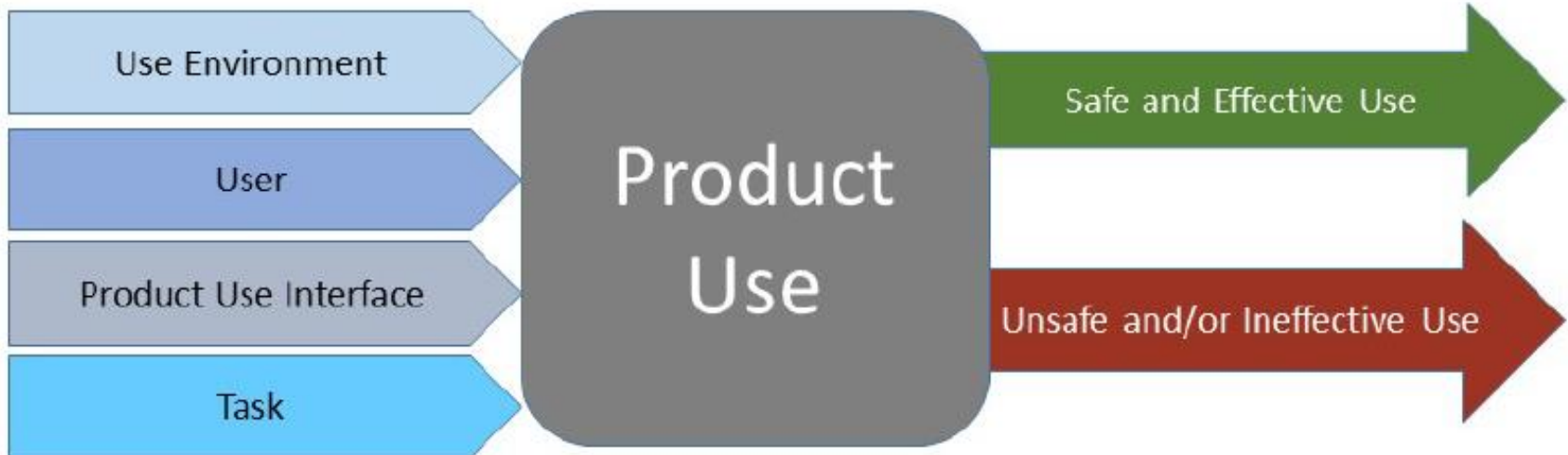
- *Guidance on the Application of Human Factors to Consumer Products*
 - Not a rule and does not establish legally enforceable responsibilities, but failure to use recommendations could be used against you
 - Human factors engineering- application of knowledge about human capabilities and limitations to product design and development to achieve efficient, effective, and safe performance considering cost, skill levels, and training demands. Ensures that the product design, required human tasks, and use environment are compatible with the sensory, perceptual, mental, and physical attributes of the user who will operate and maintain the product



Guidance on the Application of Human Factors to Consumer Products

1. Identify known use-related problems
2. Determine foreseeable uses of the product
3. Identify risks associated with foreseeable use and misuse
4. Evaluate how to mitigate risk

Human Factors Considerations



Additional CPSC Guidance

- Handbook For Manufacturing Safer Consumer Products
 - Consider objective projections of the conditions under which the product is used, including age levels and physical limitations of users, and contingencies that might occur as a result of reasonably foreseeable misuse or abuse of the product.
- Published best practices
 - Consider foreseeable consumer use and misuse of the product.
 - Seek to eliminate, guard against, or warn users of identified risks.
 - Document the work you've done.

Boeing 737 Max



2013

GLOBAL AVIATION SAFETY PLAN



International Civil Aviation Organization

What Should We Be Doing?

- ✓ **Use your common sense:** conduct roundtable sessions when developing new products to determine what misuse is reasonably foreseeable
- ✓ **Look for problems:** what hazards are associated with foreseeable misuse?
- ✓ **Do your homework:** read the CPSC guidance and other applicable literature
- ✓ **Fix the problems:**
 1. Can the hazard be eliminated?
 2. Can the hazard be mitigated?
 3. Create detailed warnings and instructions.
- ✓ **Test the solution:** conduct simulated-use testing regimens
- ✓ **Get certified:** identify and comply with voluntary standards addressing known misuse
- ✓ **Be receptive:** develop system for receiving and tracking accident reports
- ✓ **Formalize and document:** establish official protocol for design safety and keep records
- ✓ **Keep your head on a swivel:** monitor CPSC recalls for similar competitor products and identify whether the same issues may apply to your product
- ✓ **Don't be afraid to ask questions:** we're here to help you with all of the above!

Questions?

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Michael Sullivan



- Clients turn to Michael Sullivan for senior-level strategic guidance in mass tort product liability litigation and other large-scale commercial litigation
- Michael brings nearly three decades of experience in “bet-the-company” cases
 - Mass Tort – National Counsel
 - Multi-District Litigation Strategy
 - Product Design
 - Product Warnings
 - Environmental Contamination
 - Software Licensing
 - Trade Secrets
 - Complex Business Disputes



Patrick Spaugh



- Patrick advises furniture clients about compliance with important state and federal regulations like TSCA, flammability issues.
- He also helps furniture clients overhaul their warranty programs, labels, instructions, and warnings.
- Outside of furniture-specific issues, he represents clients across a variety of industries in (1) employment disputes involving trade secret, non-compete, and discrimination issues; (2) complex business disputes; and (3) products liability actions.