

Lawyer Insights

Recall Roundup: October

By Kelly L. Faglioni, Syed S. Ahmad, Geoffrey B. Fehling and Jonathan L. Caulder
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The CPSC took proactive steps in October to address recent concerns with infant sleep products that pose suffocation hazards and could lead to Sudden Infant Death (SID). This month the agency made a rare [proposal](#) for a mandatory consumer product safety standard to address the risks associated with crib mattresses. The safety standard would incorporate by reference the voluntary standard ASTM F2933-19 (Standard Consumer Safety Specification for Crib Mattresses) with modifications to make the standard even more stringent. These modifications include increased product performance testing to cover crib mattress firmness, coil spring issues, and face-in-mattress scenarios. The new rule would also update the product’s warning labels, instructions, and packaging to remove unnecessary wording and emphasize the importance of positioning infants on their backs to sleep. For example, the proposal compares the voluntary standard’s warning label to the proposed mandatory standard’s warning label:

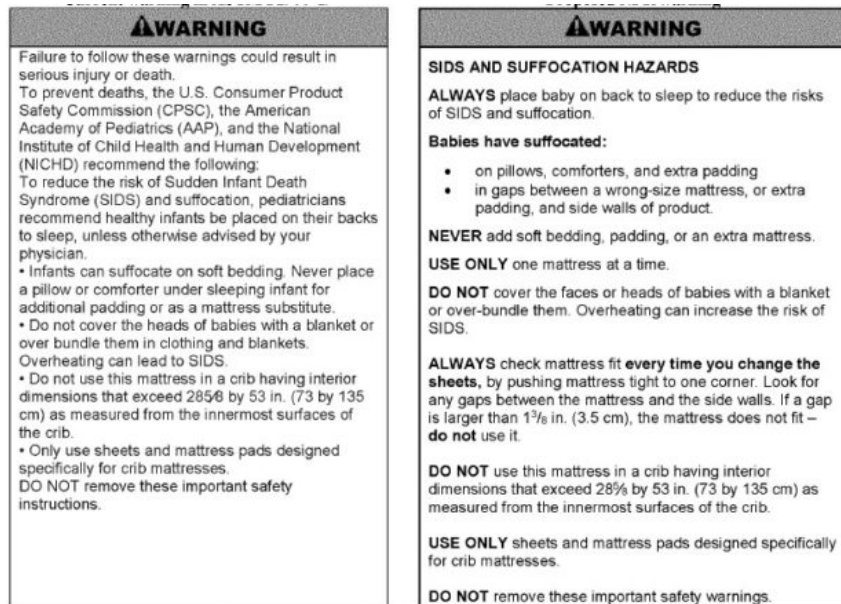


Figure 1. Current (left) and proposed (right) example warning labels for full-size crib mattresses.

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Also this month, the CPSC issued a [warning](#) to consumers that pillow-like infant products, such as nursing pillows and lounging pads, are not safe for infant sleep. Preliminary reports showed that infants left on these products either rolled off or over, leading to suffocation. The agency announced it is launching an investigation to determine the risks associated with these products. No specific branded products were identified in the warning.

Lawyers from Hunton Andrews Kurth LLP's insurance coverage practice provide an update on a recent food contamination-related insurance dispute:

In *Travelers Casualty Insurance Co. of America v. Mediterranean Grill & Kabob, Inc.* (W.D. Tex. Nov. 4, 2020), a federal judge in Texas [granted an insurer's motion](#) seeking to treat 124 separate cases of food poisoning as a single "occurrence" under a commercial general liability policy because all cases arose from the restaurant's allegedly contaminated food. Over a one-month period in 2018, nearly 200 cases of food poisoning from salmonella were reported after customers ate at Pasha's Mediterranean restaurant in San Antonio, Texas. The illnesses led to seven separate lawsuits alleging that the restaurant was negligent in manufacturing and preparing its food, which led to food poisoning. The restaurant sought coverage from its insurer, Travelers, under a policy with a \$1 million "per occurrence" coverage limit and a \$2 million "aggregate" limit.

Travelers accepted the claims and began making payment to resolve the lawsuits, but when its offer to settle the remaining claims for the remainder of the \$1 million per-occurrence limit was rejected, Travelers filed a coverage lawsuit attempting to limit its total exposure to \$1 million for a single "occurrence." In opposition, the restaurant argued that the food poisoning resulted in multiple "occurrences" because the parties did not know precisely which products were contaminated and the salmonella poisoning appears to have more than one cause.

The court disagreed with the restaurant, ruling that a single "cause"—the allegedly contaminated food—gave rise to the restaurant's liability for the lawsuits, which meant that there was only a single occurrence. The court also relied on prior decisions finding that a restaurant's "ongoing preparation of contaminated food" supports a single occurrence, even if the exact source of the contamination is unknown. Because additional discovery to determine how the food was contaminated would not change this analysis, the court denied the restaurant's request to defer resolution of the motion until after further discovery had occurred.

The single "occurrence" issue in *Mediterranean Grill* was significant, as Travelers would have had to pay over \$1.5 million if the food poisoning cases had been counted as 124 separate "occurrences." Similar issues, such as how many deductibles or retentions apply based on the number of "claims," can arise in a variety of contamination or recall-related coverage disputes. Policyholders evaluating possible coverage for those kinds of exposure should carefully review key insurance provisions related to "per occurrence" or "per claim" limits to understand how they may impact total recovery under a policy in the event of a recall or contamination event.

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Total Recalls: 17

Hazards: Violation of Federal Standard (3); Fire/Burn/Shock (3); Laceration (3); Collapse (2); Injury (2); Fall (2); Carbon Monoxide (1); Impact (1)

Product Type	Hazard	Remedy	Injuries/Incidents
Antifreeze	Violation of Federal Standard	Repair	0
Essential Oils	Violation of Federal Standard	Replace	0
Sippy Cups	Violation of Federal Standard	Refund	0
Battery Phone Cases	Burn	Replace	96
Surge Protection Devices	Fire	Replace	1
Extension Cord Splitters	Fire	Refund	0
Ceiling Fans	Laceration	New Instructions	76
Bike Pedals	Laceration	Replace	120
Onion Choppers	Laceration	Replace	266
Tall Bookcases	Collapse	Refund	5
Bookcases	Collapse	Refund or Replace	11
Dining Tables	Injury	Refund	4
Convertible Cribs	Injury	Refund, Replace, or Repair	5
Scooters	Fall	Repair	18
Lounge Chairs	Fall	Refund	19
Oven Liners	Carbon Monoxide	Refund	1
Outdoor Ceiling Fans	Impact	Replace	62

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