

NOT TO BE PUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION**

THERESA M. ZEIGLER, individually;
and THERESA M. ZEIGLER, as mother
and next friend of MADISEN ZEIGLER,

Plaintiff,

vs.

FISHER-PRICE, INC.,

Defendant.

No. **C01-3089-PAZ**

ORDER

This matter is before the court for further consideration of the motion to compel discovery (Doc. No. 27) filed by the plaintiff Theresa M. Zeigler (“Zeigler”). In a previous order of October 30, 2002 (Doc. No. 19), the court directed the defendant Fisher-Price, Inc. to produce to Zeigler copies of interoffice memoranda, e-mails, and other electronically-produced or paper-recorded documents relating to all electrical problems with Power Wheels toys that have been identified as potentially leading to fires, or are known to have caused fires, that were sent to or from the Engineering Department or the Product Integrity Department at Fisher-Price. From deposition testimony, Zeigler later learned of certain “cage” meetings during which Fisher-Price employees discussed Power Wheels toys that had been returned with fire complaints. Zeigler sought production of records from those cage meetings. In response, Fisher-Price explained that no paper notes or records were maintained, and all existing information from the cage meetings had been entered into computer databases maintained by the Risk Management and Consumer Relations departments at Fisher-Price.

On February 10, 2003, the court directed Fisher-Price to query those databases to locate “all entries that relate in any way to an actual, potential, possible, or alleged electrical problem with a Power Wheels toy where a fire resulted.” (Doc. No. 37) Fisher-Price was directed to produce those documents to Zeigler, or to prepare a privilege log listing documents as to which Fisher-Price claims privilege. In response, Fisher-Price produced no documents to Zeigler, and produced a privilege log listing over 250 documents which Fisher-Price claims are “Materials prepared at the request of legal department exclusively [sic] for use in and in anticipation of property damage litigation.”

Pursuant to the court’s February 10th order, Fisher-Price then provided to the court a copy of each document listed on the privilege log, for *in camera* review. The court then held an *ex parte* hearing with Fisher-Price’s counsel to obtain additional information regarding the materials that were produced. Having completed its review of the documents, considered Fisher-Price’s arguments relating to privilege and Zeigler’s response to the privilege log (Doc. No. 42), and reviewed the applicable law, the court is now prepared to rule on whether the documents listed in the privilege log must be produced to Zeigler.

I. BACKGROUND

Each document listed in the privilege log is entitled “Consumer Return Evaluation Form.” The forms date from October 1997, to February 2003. Each form contains a product number, product name, reference number, consumer name and number, and description of the consumer complaint. The form also indicates whether the product met Fisher-Price’s specifications, and whether the product has had previous corrective action (*i.e.*, has been fixed previously), and states whether the product showed signs of abuse, or extreme or unusual wear. All of the products described in these forms are products that were returned to Fisher-Price, and then were evaluated at the request of the Risk

Management Legal Department. (No such form exists for the Zeigler toy because Fisher-Price does not have possession of the toy.)

All of the forms are addressed to Ronda Strauss, a non-lawyer manager in the Risk Management Legal Department whose function is similar to an adjuster. The forms all are authored by Eric Warner of the Product Integrity Department. Warner is the person who performs the product evaluation, and then writes up the form explaining what he found. Warner also attends the cage meetings. Copies of the forms also may be sent electronically to a secretary or manager in the Product Integrity Department for purposes of scheduling the product evaluations, keeping track of the product's location, and for other administrative purposes. Information on the forms also may be provided to an outside forensics expert when further investigation is requested.

Defense counsel explained that in any case where a consumer complaint involves a fire, the case is handled from the outset by the Risk Management Legal Department because of the inherent potential for a legal claim. These types of cases are not handled the same as other routine types of complaints, such as when a wheel falls off a toy or something fails to work as expected. The latter type of complaint would go through a routine cage meeting, but the fire-related complaints would not. Because the Risk Management Legal Department perceives there is a likelihood of litigation in cases involving fires, the department will request a written evaluation of the product by a Product Integrity design engineer. The evaluation results in a written report, which takes the form of the Consumer Return Evaluation Forms listed in the privilege log. These forms are the only record of what happened at the cage meetings regarding evaluations of products returned by consumers where a fire is involved. The forms are not prepared for every product returned to Fisher-Price, or for every product reviewed at a cage meeting, but only for those products where the Risk Management Legal Department is handling the case and has requested a written evaluation.

Therefore, when Fisher-Price, pursuant to the court's prior order, formulated a computer search for all cage meeting "notes," none were found, because the only record of cage meetings regarding evaluations of product complaints involving fire is the Consumer Return Evaluation Forms.

Fisher-Price argues these documents are privileged because they were prepared at the request of the Risk Management Legal Department "exclusively for use in and in anticipation of property damage litigation." Fisher-Price argues the sole purpose of these product evaluations and the resulting written reports was to help the Risk Management Legal Department in relation to potential claims.

II. DISCUSSION

The court first notes that in the absence of the privilege issue, the information in the Consumer Return Evaluation Forms clearly is relevant to Zeigler's claims, and responsive to Zeigler's discovery requests. The court, in its prior order, attempted to limit Fisher-Price's burden in responding to discovery while still giving Zeigler information relevant to her claims in this case. To the extent the documents in the privilege log were not disclosed, even on a privilege log, in response to the court's prior order, it appears Fisher-Price's interpretation of the order was overly restrictive.

A. Choice of Law

1. Jurisdiction

Before turning to the privilege issue, the court first must address the question of what law applies to Fisher-Price's claim of privilege. Zeigler asserts both diversity jurisdiction pursuant to 28 U.S.C. § 1332, and federal question jurisdiction under the Consumer Product Safety Act, 15 U.S.C. § 2072 ("CPSA"). (See Doc. No. 1, ¶¶ 4, 5) Fisher-Price admits diversity jurisdiction in its Answer (*id.*, ¶ 4), but then denies diversity jurisdiction exists in

its Affirmative Defenses (*id.*, Affirmative Defense ¶ 4). Fisher-Price denies Zeigler has a private right of action under the CPSA on the facts of this case, and therefore denies that this court has jurisdiction under the CPSA. (See Doc. No. 4, ¶ 5 & Affirmative Defense ¶ 5)

If only diversity jurisdiction exists, then the privilege issue must be decided pursuant to the State law supplying the rule of decision. Fed. R. Evid. 501. In this case, the applicable state law is that of Iowa, the state with the most significant relationship to this action. See, e.g., Restatement(Second), Conflict of Laws § 145; *Christie v. Rolscreen Co.*, 448 N.W.2d 447, 450 (Iowa 1989); *Zeman v. Canton State Bank*, 211 N.W.2d 346, 348-49 (Iowa 1973); *Berghammer v. Smith*, 185 N.W.2d 226 (Iowa 1971); *Tice v. Wilmington Chemical Corp.*, 259 Iowa 27, 45, 141 N.W.2d 616, 627 (1966) (quoting Restatement, Conflict of Laws, § 377, “The place of wrong is in the state where the last event necessary to make an actor liable for an alleged tort takes place.”) See also *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 402 (8th Cir. 1987) (“Rule 501 of the Federal Rules of Evidence provides that evidentiary privileges are to be determined in accordance with state law in diversity actions.”); *Dethmers Mfg. Co. v. Automatic Equip. Mfg. Co.*, 23 F. Supp. 2d 974, 1002 (N.D. Iowa 1998) (recognizing the Iowa rule).

If federal question jurisdiction also exists, then the privilege issue is governed by “the principles of the common law, as they may be interpreted by the courts of the United States in the light of reason and experience.” Fed. R. Evid. 501.

2. Zeigler’s claim under the CPSA

To determine whether federal question jurisdiction exists in this case, the court must consider *sua sponte* whether Zeigler can maintain a private action for damages under the CPSA. One court has explained the Act’s purview as follows:

CPSA was enacted by the 92nd Congress on October 27, 1972, along with explicit Congressional findings of fact and statements of purpose. Briefly, the Act is intended for the protection of the public against unreasonable risks of injury associated with ‘consumer products’, a term which is to be liberally construed in accordance with the statute’s patently remedial purpose. *United States v. One Hazardous Product Consisting of a Refuse Bin*, 487 F. Supp. 581 (D.N.J. 1980); *Consumer Product Safety Comm’n v. Chance Mfg. Co.*, 441 F. Supp. 228 (D.D.C. 1977). The Act established a new federal agency, the Consumer Product Safety Commission (“CPSC” or “the Commission”), to conduct studies, tests and investigations relative to the safety or hazards of various consumer products, maintain an Injury Information Clearinghouse for the collection, analysis and dissemination of injury data, and promulgate consumer product safety standards where necessary in order to prevent or reduce unreasonable risks of injury. 15 U.S.C. §§ 2054, 2056. Only “consumer products” may be regulated by the Commission, *Southland Mower Co. v. Consumer Product Safety Comm’n*, 619 F.2d 499 (5th Cir. 1980), the idea being to exclude from the Act’s coverage those articles which are not customarily produced or distributed for sale to, or use by, or enjoyment of members of the consuming public. *Kaiser Aluminum & Chem. Corp. v. Consumer Product Safety Comm’n*, 428 F. Supp. 177 (D. Del. 1977), *rev’d on other grounds*, 574 F.2d 178 (3d Cir.), *cert. denied*, 439 U.S. 881, 99 S. Ct. 218, 58 L. Ed. 2d 193 (1978). See 15 U.S.C. § 2054(a)(1).

Butcher v. Robertshaw Controls Co., 550 F. Supp. 692, 695 (D. Md. 1981).

Section 23(a) of the CPSA, codified at title 15, United States Code, section 2072(a), provides:

Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an

agent, shall recover damages sustained and may, if the court determines it to be in the interest of justice, recover the costs of suit, including reasonable attorneys' fees (determined in accordance with section 2060(f) of this title) and reasonable expert witnesses' fees: Provided, That the matter in controversy exceeds the sum or value of \$10,000, exclusive of interest and costs, unless such action is brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

15 U.S.C. § 2072(a). Despite the apparent clarity of the statutory language, courts have reached opposite conclusions on the issue of whether section 23(a) provides a private cause of action for damages resulting from a violation of the CPSA.

In *Drake v. Honeywell, Inc.*, 797 F.2d 603 (8th Cir. 1986), the Eighth Circuit Court of Appeals became the first United States district court to consider “whether section 23(a) of the Consumer Product Safety Act . . . creates a private cause of action for an injury resulting from noncompliance with the product hazard reporting rules issued by the Consumer Product Safety Commission.” *Id.*, 797 F.3d at 604. The court held as follows:

Section 23(a) by its terms permits a private cause of action for the violation of “a consumer product safety rule, or any other rule or order” issued by the Commission. The Act defines “consumer product safety rule,” 15 U.S.C. § 2052(a)(2), but does not define the scope of the “other rule” provision. Nonetheless, the reporting rules issued by the Commission, whether legislative or interpretive, are patently within the plain meaning of the word “rule.” Therefore, it would appear from the language of section 23(a) that a failure to comply with the reporting rules gives rise to a private cause of action. [FN3]

FN3. The “plain meaning” construction has been used by several district courts to support a private cause of action. *See, e.g., Wilson v. Robertshaw Controls Co.*, 600 F. Supp. 671, 675 (N.D. Ind. 1985); *Payne v. A.O. Smith Corp.*, 578 F. Supp. 733, 738 (S.D. Ohio 1983); *Young v. Robertshaw*

Controls Co., 560 F. Supp. 288, 292-93 (N.D.N.Y. 1983); *Butcher v. Robertshaw Controls Co.*, 550 F. Supp. 692, 698-99 (D. Md. 1981). It also was relied upon by the Minnesota Supreme Court in *Swenson v. Emerson Electric Co.*, 374 N.W.2d 690 (Minn. 1985), *cert. denied*, --- U.S. ----, 106 S. Ct. 1998, 90 L. Ed. 2d 678 (1986), to reach the identical conclusion.

Our investigation, however, only starts with the statutory language. The question whether a statute permits a private right of action is ultimately one of congressional intent. *Universities Research Association, Inc. v. Coutu*, 450 U.S. 754, 770, 101 S. Ct. 1451, 1461, 67 L. Ed. 2d 662 (1981). “[A] thing may be within the letter of the statute and yet not within the statute, because not within its spirit, or within the intention of its makers.” *United Steelworkers of America v. Weber*, 443 U.S. 193, 201, 99 S. Ct. 2721, 2726, 61 L. Ed. 2d 480 (1979) (quoting *Church of the Holy Trinity v. United States*, 143 U.S. 457, 459, 12 S. Ct. 511, 512, 36 L. Ed. 226 (1892)). To discover that intention we must not fix on a single word or sentence, but must examine the law as a whole. *Panama Refining Co. v. Ryan*, 293 U.S. 388, 439, 555 S. Ct. 241, 256, 79 L. Ed. 446 (1935) (Cardozo, J., dissenting). While section 23(a) states that a private action may flow from a violation of a rule, it does not similarly provide for private actions based on a violation of the statute itself. Ordinarily, when a federal statute explicitly creates a private cause of action, it does so for violations of its own provisions, not just for violations of rules that may be issued pursuant to those provisions. This approach was taken, for example, in a similarly comprehensive consumer protection statute enacted just four years earlier, the Consumer Credit Protection Act, 15 U.S.C. §§ 1601-93 (1982 & West Supp. 1986). See 15 U.S.C. § 1640(a) (1982) (permitting private action against any creditor who fails to comply with any part of the statute). From this obvious and unambiguous omission, we must conclude that Congress intentionally withheld from private persons the right to seek

damages based on an injury resulting from a violation of the statute.

Drake, 797 F.2d at 605-06. The court concluded that “despite the plain meaning of ‘rule,’ failure to comply with the Commission’s reporting rules does not give rise to a private cause of action.” *Id.* (distinguishing *Butcher*, *supra*).¹

Drake is precedential in this circuit, and mandates a conclusion that Zeigler cannot maintain a private cause of action for damages against Fisher-Price based on Zeigler’s allegation that Fisher-Price “failed to act and notify the Consumer Product Safety Commission and the users of the product [*i.e.*, the Barbie Sun Jammer]” of defects Zeigler claims exist in the product. (Doc. No. 1, ¶ 25) Accordingly, Count III of Zeigler’s complaint is **dismissed with prejudice**, on the court’s own motion.

3. Law applicable to Fisher-Price’s privilege claim

Dismissal of Zeigler’s federal claim rests this court’s jurisdiction on diversity alone. Therefore, as noted above, Fisher-Price’s privilege claim is governed by Iowa law.

B. Evaluation of the Privilege Claim

¹For other cases holding no private right of action exists under the CPSA, see *Reinheimer v. Honda Motor Co., Ltd. (In re All Terrain Vehicle Litigation)*, 979 F.2d 755, 756 (9th Cir. 1992) (“The [CPSA] does not provide an express private right of action for violation of the provisions of the Act itself, as distinguished from rules or orders issued by the Commission.” Plaintiffs failed to allege violation of a Commission rule.); *Kloepfer v. Honda Motor Co., Ltd.*, 898 F.2d 1452, 1457 (10th Cir. 1990) (agreeing with *Drake* reasoning); *Zepik v. Tidewater Midwest, Inc.*, 856 F.2d 936 (7th Cir. 1988) (reaching same result as *Drake*, but on different grounds, and disagreeing with *Drake* reasoning); *Benitez-Allende V. Alcan Alumínio do Brasil, S.A.*, 857 F.2d 26, 34-35 (1st Cir. 1988) (agreeing with *Drake* reasoning). *But cf. Marek v. Chesny*, 473 U.S. 1, 24, 105 S. Ct. 3012, 3024, 87 L. Ed. 2d 1 (1985) (noting, in *dicta*, that the CPSA is one of two consumer statutes enacted in the same congressional session, and both of the statutes “provide for private rights of action for violations of their requirements, and authorize awards of attorney’s fees.”)

Like Federal Rule of Civil Procedure 26, after which it is modeled, Iowa Rule of Civil Procedure 1.503 provides a broad scope of discovery. Fisher-Price's argument concerns the applicability of subsection (3) of the rule, which limits discovery of trial preparation materials. Subject to certain exceptions relating to expert disclosures set forth in Rule 1.508, subsection (3) allows

discovery of documents and tangible things otherwise discoverable under rule 1.503(1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and that the party seeking discovery is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Ia. R. Civ. P. 1.503(3). Because of the similarities between the Iowa rule and the federal rule, "the history and cases under the federal rule provide guidance in interpreting the Iowa counterpart." *Ashmead v. Harris*, 336 N.W.2d 197, 199 (Iowa 1983).

There are two prongs to the test for disclosure under Rule 1.503(3). First, the party resisting disclosure must make a showing that the materials were prepared in anticipation of litigation, rather than in the ordinary course of business or for other nonlitigation purposes. *See id.*, 336 N.W.2d at 200 (quoting comments of the advisory committee at the time of the 1970 amendments to the Federal Rules of Civil Procedure). If this threshold showing is made, then the party seeking discovery must show a substantial need for the information in the preparation of that party's case, and that the party is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means.

The most thorny question in the present case is whether the Consumer Return Evaluation Forms meet the definition of materials prepared in anticipation of litigation. As explained above, under Fisher-Price's ordinary practice and procedure, the Risk Management and Legal Department assumes the investigation of every single consumer complaint involving a fire, simply because of the risk that litigation could ensue in those circumstances. It would appear, then, that the forms are prepared in the ordinary course of Fisher-Price's business. However, as the *Ashmead* court noted,

It does not matter that the investigation is routine. Even a routine investigation may be made in anticipation of litigation. *See Hamilton v. Canal Barge Co.*, 395 F. Supp. 975, 976 (E.D. La. 1974); *Almaguer v. Chicago, Rock Island & Pacific Railroad*, 55 F.R.D. 147, 149 (D. Neb. 1972). Thus a document prepared in the regular course of business may be prepared in anticipation of litigation **when the party's business is to prepare for litigation**. [Citation omitted.]

Ashmead, 336 N.W.2d at 200 (emphasis added). Thus, the *Ashmead* court held:

[A] routine investigation of an accident by a liability insurer is conducted in anticipation of litigation within the meaning of [the Iowa rule]. Even though litigation may not be imminent, the primary purpose of the investigation is to be prepared to defend a third party claim.

Ashmead, 336 N.W.2d at 201 (citations omitted). The Iowa court declined to follow cases that have held "anticipation of litigation" must mean "a substantial probability of imminent litigation," finding it sufficient "if the primary motivating purpose behind the creation of the document was to aid in possible future litigation." *Id.*

Nevertheless, *Ashmead* is distinguishable from the present case because *Ashmead* involved an insurance company, whose "business is to prepare for litigation." In interpreting the comparable federal rule, courts have held "[t]he documents at issue must have been created based upon a request for legal advice, not just for a regular business purpose. . . . In fact, . . . the threat of litigation [must be] both real and imminent."

Raytheon Aircraft Co. v. United States Army Corps of Engineers, 183 F. Supp. 2d 1280, 1288 (D. Kan. 2001) (citing, *inter alia*, 8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, at 343 (1994 ed.)). As Wright and Miller have explained:

Prudent parties anticipate litigation and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation. But the converse of this is that even though litigation is already in prospect, there is no work product immunity for documents prepared in the regular course of business rather than for purposes of litigation.

8 C. Wright & A. Miller, Federal Practice and Procedure § 2024, at 343 (1994 ed.), quoted in *Ratheon Aircraft Co.*, *supra*, and *Simon v. G.D. Searle & Co.*, 816 F.2d 397, 401 (8th Cir. 1987).

The court finds the Consumer Return Evaluation Forms, by their very nature, are documents prepared in the ordinary course of Fisher-Price's business, and despite the fact that they are prepared at the behest of the Risk Management Legal Department, they do not fall within the exception for materials prepared in anticipation of litigation. Indeed, it is disingenuous for Fisher-Price to assert its investigation into product-related fires is done solely for purposes of litigation. Surely Fisher-Price does not suggest it has no interest in discovering and correcting product defects, and ensuring that its products are safe.

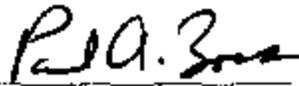
The court also finds Zeigler has made the requisite showing for disclosure of the documents under both the Iowa and federal rules. The information in the Consumer Return Evaluation Forms is clearly relevant to Zeigler's claims, clearly important to the preparation of Zeigler's case, and virtually impossible for Zeigler to obtain by other means.

III. CONCLUSION

The court finds the Consumer Return Evaluation Forms to be discoverable. To expedite the completion of discovery in this case, the court is forwarding copies of the forms to Zeigler.² The discovery deadline is hereby extended to **April 15, 2003**.

IT IS SO ORDERED.

DATED this 13th day of March, 2003.



PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

²The Eighth Circuit Court of Appeals has noted that the “determination of whether . . . documents were prepared in anticipation of litigation is clearly a factual determination[.]” *Foster v. Clausen Miller, P.C.*, 23 Fed. Appx. 606, 2001 WL 1456152 (8th Cir. 2001). “The district courts have broad evidentiary discretion in the handling of privileged documents,” and the court’s decision regarding disclosure of documents will be reviewed only for “‘a gross abuse of discretion affecting the fundamental fairness of the proceedings.’” *Id.* (quoting *Stuart v. General Motors Corp.*, 217 F.3d 621, 630 (8th Cir. 2000)).