The Consumer Product Safety Act-Placebo or Panacea

Michael T. Fox

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THE CONSUMER PRODUCT SAFETY ACT—
PLACEBO OR PANACEA?

“A child has to experience some minor injuries, some minor experiences of trauma in order to learn.” Richard J. Manuell, Child Safety Consultant, National Safety Council.¹

An infant squirms between the slats of his crib. His body easily slides through, but his skull does not. He strangles to death.² A man is suddenly shocked from his power saw, and tries to insulate himself by standing on a stack of wood. Nonetheless, another shock grips him. As his wife cuts the power, he drops the saw and the blade slashes his thigh.³ A little girl gets up in the middle of the night, trips over the cord of the “spill-proof” steam vaporizer,


2. NCPS at 23.

One model of crib was the cause of two infant strangulations within a three week period in 1965. In 1968, the same model crib was still being marketed without change in design, and without warning of the particular hazard. Ironically, the manufacturer, Trimble Products Inc., has as its motto: “Since 1912, your baby's health and comfort, our only business.” Id.

If the reader is unaware of the enormity of the problem of consumer safety, and of the vital need for some sort of affirmative action in this area, he would read chapter 2 of NCPS. It should be noted that the Final Report is not universally accepted. One critic, who read all the hearing testimony, reached a totally opposite conclusion than did the National Commission on Product Safety. His criticisms, briefly, are (1) that the testimony revealed no “solid” evidence to support the conclusionary results painted in the Final Report because of the non-meaningfulness of the statistics; (2) that the Commissioners premised their conclusions on the sentimental, but economically unsound proposition that “even one injury is too many”; (3) that the inevitable result of federally imposed requirements that products be made safe will be “gray products” which consumers will not buy, thus dampening the economy; (4) that the Commissioners assumed that the public was too ignorant to make the “cost-benefit” trade-offs regarding consumer products, i.e., he is incompetent to make his own safety decisions; (5) that new monopolistic-related abuses will result because only a few lucky producers would be able to operate within the system; and (6) that the make-up of the National Commission on Product Safety was so loaded with consumer product safety advocates as to destroy any chance of objectivity in its findings. See Henderson, Book Review, 51 Bosron U.L. Rsv. 704 (1971).

3. The shock was produced by a short circuit between brush retainers pressed into contact with the commutator, the consequences of a faulty design. Id. at 26.
and is drenched by scalding water from the reservoir of the vaporizer. She is burned over 30% of her body, requires hospitalization of some six months and faces the prospect of six to twelve operations. These are not examples of isolated incidents. Some twenty million injuries—110,000 permanent—and thirty thousand deaths are annually attributed to incidents involving consumer products. Of course, unreasonably hazardous products do not cause all of these injuries, but the sheer weight of these statistics, coupled with an estimated five and a half billion dollar annual cost to the nation from product related injuries, convinced Congress that action at the federal level was necessary to reduce the risk to the consumer. The solution offered is the Consumer Product Safety Act (the Act).

PART I—THE ACT IN CONTEXT

A. Synopsis of the Act

The Act purports to protect the public against unreasonable risks of injury associated with consumer products, to assist consumers in evaluating the comparative safety of consumer products, to minimize conflicting state and local regulations, and to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries. To achieve these ends,

4. McCormack v. Hankscraft Co., 278 Minn. 332, 154 N.W.2d 488 (1967). The outside of the reservoir registered 182° after six hours of operation—water of 145° will burn, water of 180° will cause third degree burns on a five-year old.
5. NCPS at 1.
6. Id.
8. Sec. 2(b). The purposes of the Act are intended to ameliorate the problem, which Congress found to be that:

(1) an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce;
(2) complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately;
(3) the public should be protected against unreasonable risks of injury associated with consumer products;
(4) control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers;
(5) existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate; and
(6) regulation of consumer products, the distribution or use of
the Act establishes an independent five-member Consumer Product Safety Commission⁹ (the Commission) together with a 15-member Product Safety Advisory Council.¹⁰ Also established is the Injury Information Clearinghouse,¹¹ intended to serve as a collating headquarters for information relating to injuries associated with consumer products. The clearinghouse is to disburse this information to the Commission for standard setting purposes, or to the manufacturer¹² so that he may take corrective measures without Commission intervention.

Within the parameters of the definition of consumer product,¹³ set forth at Appendix I, infra, the Commission is empowered to promulgate safety standards which will be mainly relative to the performance, design, or construction of the product, or to warnings accompanying the product.¹⁴ A proceeding to establish a consumer product safety standard will be commenced upon the Commission's own motion,¹⁵ or upon receiving a proposal from the Advisory Council,¹⁶ or upon the granting, voluntarily¹⁷ or by court order¹⁸ of a private petition. The petition may be that of a consumer or manufacturer.

The proceedings for establishing the standard begin with the publication of a notice in the Federal Register identifying the product and the associated risk, and inviting any person to submit a standard or an offer to develop a standard within 30 days of the publication of the notice.¹⁹ The Commission may accept one or

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⁹. See Sec. 2(a).
¹⁰. See text accompanying notes 30-32 infra.
¹¹. See text accompanying notes 30-32 infra.
¹₂. Unless otherwise noted, “manufacturer” will serve as a shorthand notation for “manufacturer, distributor, retailer, or private labeler” since people in all of these categories can be held liable criminally, civilly, or privately, under the Act.
¹³. “Consumer product” includes imported products, but not products intended solely for export. See Sec. 17, 18.
¹⁴. See Sec. 7(a).
¹⁵. See Sec. 7(a).
¹⁶. See Sec. 28.
¹⁷. See Sec. 19(d).
¹⁸. See text accompanying notes 30-32 infra.
¹⁹. See text accompanying notes 30-32 infra.
more of these offers\textsuperscript{20} and may contribute to the costs of developing the standard.\textsuperscript{21} If the Commission receives no offers, or declines to accept any offers or if the only offer which is accepted is by the manufacturer of the product to be regulated, or if an existing standard is sufficient, the Commission may independently develop a standard.\textsuperscript{22} In any case, except where good cause is shown, the Commission must either withdraw the notice of its standard setting procedure or publish the safety rule or the declaration that a product is a banned hazardous product not more than 210 days after the first notice was published.\textsuperscript{23} If the Commission finds that no feasible safety standard exists which would adequately protect the public, then it may promulgate a rule declaring the product a “banned hazardous product.”\textsuperscript{24}

Before a safety rule based on such a standard can be created, or an unreasonably hazardous and unremedial product banned, the Commission must first find one of the following: (1) that the rule is reasonably necessary to eliminate or reduce an unreasonable risk of injury associated with such a product, (2) that the establishment of the rule is in the public interest or, (3) in the case of a banned product, that no feasible safety standard exists.\textsuperscript{25} The effective date of each rule shall be at least 30 days but not more than 180 days from the date the rule is enacted, unless it is in the public interest to shorten or lengthen the allowed time.\textsuperscript{26} The effective date must relate to the particular hazard, that is, the Commission must find that a given effective date is reasonably necessary to eliminate or reduce the risk of injury.\textsuperscript{27} The production of goods at a significantly greater rate between the date of enactment and the effective date of a rule with a view toward circumvent-


\textsuperscript{21} Sec. 7(d)(1).

\textsuperscript{22} Sec. 7(d)(2).

\textsuperscript{23} Sec. 7(e)(1), (2), Sec. 7(c).

\textsuperscript{24} Sec. 7(f).

\textsuperscript{25} Sec. 8.

\textsuperscript{26} Sec. 9(c)(2).

\textsuperscript{27} Regarding Sec. 8, banning hazardous goods for which there is no feasible safety standard, Congress has declared that the Commission need not attempt to develop a standard under Sec. 7, but may directly proceed to ban the hazardous product. H.R. Rep. No. 92-1153, 92d Cong., 2d Sess. 36 (1972) (House Report).

\textsuperscript{26} Sec. 9(d)(1).

\textsuperscript{27} Sec. 9(c)(2).
ing the rule, called stockpiling, is prohibited.\textsuperscript{28}

As previously mentioned, any interested person may petition the Commission to initiate proceedings to issue, amend or revoke a safety rule. This petition must be granted or denied within 120 days of filing.\textsuperscript{29} If the petition is granted, a proceeding to develop a standard, or to declare a product banned, is commenced; there is no automatic drafting of a standard. If the petition be denied, or if the Commission does not answer within 120 days, the petitioner may bring an action in the District Court to compel the Commission to take the requested action.\textsuperscript{30} To prevail, the petitioner must show by a preponderance of evidence that the product presents an unreasonable risk of injury and that failure to initiate the rule-making proceeding exposes consumers to a risk of injury.\textsuperscript{31} If the consumer meets this burden, the remedy is an order by the court that the Commission should commence a standard setting proceeding, not a requirement that a rule should be formulated.\textsuperscript{32}

Once a rule is established, a person adversely affected may appeal such a ruling in a District Court by filing not later than 60 days after the promulgation of the rule.\textsuperscript{33} The rule will be overturned

\textsuperscript{28} Sec. 9(d) (2).
\textsuperscript{29} Sec. 10(a), (d).
\textsuperscript{30} Sec. 10(e) (1). The predicted efficacy of this federal injunctive relief is discussed at p. 30-31 infra.
\textsuperscript{31} Sec. 10(e) (2).
\textsuperscript{32} Obviously this section is the Act's designed access point for consumer input, although a three-year period is interposed during which time no consumer petitions will be allowed in order to provide time for the organization of the new agency.

The burden of proof section (Sec. 10(e) (2)) refers to the requirements of establishing a standard, although Sec. 10(a) provides for a petition to withdraw a standard, a provision which probably would be brought by a manufacturer, not a consumer. Conceivably, then, a court will be called on to decide exactly when a risk of injury becomes reasonable. No definition is included in the Act, but the Senate Bill (S. 3419, 92d Cong., 2d Sess., § 102(g), (h), (i) (1972) printed at 118 CONG. REC. S9532 (daily ed. June 21, 1972) ) employed a balancing test which appears rational. When the degree and frequency of anticipated injury could be reduced without affecting the performance or availability of the class of product under consideration, then almost any risk of injury is unreasonable. If performance or availability is affected, then those interests must be balanced against the degree and frequency of foreseeable injury. The Senate's balancing test emphasized that health and safety should take precedence over other factors.

It was also noted in the Senate consideration of the Act that the phrase "unreasonable risks of injury associated with consumer products" was used to state the purpose of the Act. Sec. 2(b) (1) (emphasis added). "Associated" was used because it meant that the injury did not have to result from "normal use", but could also result from foreseeable or reasonable misuse of the product. See 118 CONG. REC. S18198-99 (daily ed. Oct. 14, 1972) (remarks of Sen. Moss).

\textsuperscript{33} Sec. 11(a).
unless each of the findings that the Commission is required to make under Section 9(c) is supported by "substantial evidence" on the record taken as a whole. 34

Thus, although the Commission's rule making proceeding is permitted to follow the informal procedures of section 553 of Title 5 of the U.S. Code . . . its determinations are subjected to the stricter standard of review that is normally reserved for formal agency proceedings . . . 35

Imminently hazardous products need not be subjected to the standard setting proceedings under the Act. 36 The Commission may proceed by libel for the seizure and condemnation of such a product, and may obtain such relief as an order requiring the manufacturer to notify known purchasers of the product of the risk and recall, repair, replace or allow refund for the product. 37 In appropriate cases the Commission is required to initiate a standard setting proceeding as soon as practicable to apply to the seized product. 38

The Act imposes several affirmative duties on the manufacturer. He must furnish notice and a description of any new consumer product to the Commission before distributing it in commerce. 39 If his product be regulated by a safety standard, he must certify that the product conforms to all applicable safety standards and must specify any standard which is applicable. 40 The manufacturer must allow inspection of warehouses and factories and the like. 41

34. Sec. 11(c).
36. Sec. 12(a). Imminently dangerous is defined as presenting imminent and unreasonable risk of death, serious illness, or severe personal injury.
37. Sec. 12(b).
38. Sec. 12(c).
39. Sec. 13(a). This requirement is contingent upon the Commission's prescribing procedures for such notification.
40. Sec. 14(a)(1). The Commission shall require the certificate to be based on reasonable testing programs. Also, certain products will have certifying labels permanently attached to them, where practicable.
41. Sec. 16.
If the manufacturer acquires knowledge that the product does not comply with an applicable safety rule, or that the product contains a defect which would create a substantial product hazard\(^42\) he must immediately inform the Commission.\(^43\)

The Commission has several alternative methods for reducing or eliminating the risks to the public presented by defective consumer products. In addition to banning the marketing of hazardous products for which no feasible safety standard can be developed,\(^44\) seizing imminently dangerous products\(^45\) and setting standards with which goods must comply, the Commission may require the manufacturer to give notice of the defect to the public, to others in the marketing chain, or to persons known to have purchased and taken delivery of the product.\(^46\)

The Commission may require the manufacturer to elect one of the following remedial devices:

1. To bring such product into conformity with the requirements of the applicable consumer product safety rule or to repair the defect in such product.
2. To replace such product with a like or equivalent product which complies with the applicable consumer product safety rule or which does not contain the defect.
3. To refund the purchase price of such product.\(^47\)

In the event such remedial actions are required, no charge shall be imposed on any person who avails himself of such a remedy. Further, the manufacturer shall reimburse such a person for his reasonable and foreseeable expenses.\(^48\) The Commission has broad authority in this area to place the burden of making such reimbursement on that member of the marketing chain who was either most at fault, or who is most able to bear the cost.\(^49\)

After defining the duties of the Commission and the manufacturer, the Act continues to explicate exactly what is prohibited. No person shall market any consumer product which is not in conformity with an applicable consumer product safety standard, or which has been declared a banned hazardous product.\(^50\) Also de-

\(^{42}\) Defined as: a product defect which because of the pattern of the defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public. Sec. 15(a) (2).

\(^{43}\) Sec. 15(b).

\(^{44}\) Sec. 8.

\(^{45}\) See text accompanying notes 36–38 supra.

\(^{46}\) Sec. 15(c).

\(^{47}\) Sec. 15(d) (1), (2), (3).

\(^{48}\) Sec. 15(e) (1).

\(^{49}\) See House Report at 42–43.

\(^{50}\) Sec. 19(a) (1), (2).
declared unlawful are the following: the failure to allow inspection, the failure to furnish the Commission with information relating to product defects, the failure to comply with an order requiring notification, repair, replacement, or refund, the failure to furnish a certificate or the issuance of a false certificate, or the failure to comply with the stockpiling restrictions.

A knowing violation of a prohibited act subjects the violator to civil penalties not exceeding $2,000 per violation and up to $500,000 for a related series of violations. The violation is "knowing" if the violator had actual knowledge, or should have had the knowledge as a reasonable man under the circumstances, including knowledge obtainable by the exercise of due care to ascertain the truth of representations. Among other things, the degree of the knowledge of the violator bears on whether and to what extent the compromise provision will be employed.

The criminal penalty provision is simple: any person who knowingly and willfully commits a prohibited act after receiving notice of non-compliance may be fined not more than $50,000 or imprisoned for not more than one year, or both. Individual representatives of a corporation may be subject to the criminal penalties for knowing and willful violations notwithstanding any penalties which may have been imposed on the corporation.

The Act provides for the issuance of injunctions to prevent an individual from marketing a product which does not comply with an applicable standard, and for the seizure by libel procedure and condemnation of products which do not conform. The Act extends the power to enforce these provisions by permitting "any interested person" to bring an action in a District Court to enforce a consumer product safety rule, or repair, replacement, or refund order, or to obtain appropriate injunctive relief. Such an action shall be preceded by notice to the Commission, the Attorney Gen-

51. Sec. 19(a) (3).
52. Sec. 19(a) (4).
53. Sec. 19(a) (5).
54. Sec. 19(a) (6).
55. Sec. 19(a) (7).
56. Sec. 20(a).
57. Sec. 20(c).
58. Sec. 20(b).
59. Sec. 21(a).
60. Sec. 21(b).
61. Sec. 22.
eral, and the alleged violator, stating the nature of the alleged violation, the relief requested, and the court in which the action will be brought.  

Explicitly created is a federal cause of action for damages (and reasonable attorney's fees) for anyone who sustains an injury due to a knowing violation of a safety rule or order—a cause of action which "shall be in addition to and not in lieu of any other remedies provided by common law or under Federal or State law." Compliance with an applicable safety standard will not relieve a person from liability under state law or under the common law, nor will the failure of the Commission to take any action with respect to a consumer product be admissible in evidence in any litigation under state statutory or common law.

Any state standard which relates to the same consumer product safety standard as established under the Act must be identical to the federal standard, but the federal government or the government of any state or political subdivision may establish more stringent standards for consumer products procured for its own use.

To round out its coverage of consumer products, the Act transfers certain functions of other governmental agencies under other legislation to the Commission. All functions of the Secretary of Health, Education and Welfare under the Federal Hazardous Substances Act and the Poison Prevention Packaging Act of 1970.

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62. See text accompanying notes 46-47 supra.
63. Sec. 24. Note here that the prevailing party will be allowed to recover reasonable attorney's fees. This provision makes it likely that a "plaintiff's bar" of private attorney's general will quickly evolve. With this financial inducement, private persons or consumer groups will have an added incentive to carefully scrutinize all those in the marketing chain to insure that products measure up to safety standards. In the context of the Securities Acts, this "plaintiff's bar" has been the primary watchdog for violations of Rule 16(b) (15 U.S.C. § 78(p) (1970) ) and has generated such a great deal of enforcement litigation that a violation of Rule 16(b) will almost invariably result in liability. (Of course, a private attorney general generates a much higher fee in 16(b) litigation than will result in Sec. 24 violations, due to the nature of that which is regulated. It seem reasonable, however, to think that consumer organizations will not find the fee disparity sufficiently great to dissuade their participation in the "plaintiff's bar".)
65. Sec. 25.
and all functions of the Secretary of Health, Education and Welfare, the Secretary of Commerce, and the Federal Trade Commission under the Flammable Fabrics Act\textsuperscript{69} are transferred to the Commission, along with certain functions of the Secretary of Health, Education and Welfare under section 7 of the Poison Prevention Packaging Act of 1970.\textsuperscript{70} If a hazard which is associated with a consumer product could be eliminated or reduced by action taken under the Federal Hazardous Substances Act, the Poison Prevention Packaging Act of 1970, or the Flammable Fabrics Act, then the hazardous product may be regulated only in accordance with those acts.\textsuperscript{71} Implicit in this statement is the idea that if the hazard cannot be reduced under the procedures of the other acts, then the provisions of this Act may be employed to reduce the hazard.

Specifically deleted from the scope of the Act are hazards associated with consumer products which could be prevented or reduced to a sufficient extent by actions taken under the Occupational Safety and Health Act of 1970,\textsuperscript{72} the Atomic Energy Act of 1954,\textsuperscript{73} or the Clean Air Act.\textsuperscript{74}

B. Relation of the Act to Presently Existing Federal Regulations

Section 3 of the Act defines consumer product to be

any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise ....

A wide variety of products are specifically excluded from the definition, products which logically should be included in order to fully achieve the purposes of the Act.\textsuperscript{75} These product categories are (1) those which are not customarily produced or distributed to the consumer, (2) tobacco and tobacco products, (3) motor vehicles and equipment, (4) economic poisons, (5) firearms and ammunition, (6) aircraft and associated equipment, (7) boats and

\begin{itemize}
  \item \textsuperscript{70} Sec. 30(a), (b).
  \item \textsuperscript{71} Sec. 30(d). See Appendix II infra.
  \item \textsuperscript{72} 29 U.S.C. § 651 et seq. (1970).
  \item \textsuperscript{73} 42 U.S.C. § 2011 et seq. (1970).
  \item \textsuperscript{74} 42 U.S.C. § 1857 et seq. (1970).
  \item \textsuperscript{75} See note 8 supra.
\end{itemize}
equipment, (8) drugs, devices and cosmetics, and (9) food. With two exceptions, these products were excluded because it was felt that they were adequately regulated by regulations already in existence. The two categories of products which were not excluded from the definition of consumer product using this rationale are tobacco and firearms. Appendix I shows the types of regulatory measures employed by the Act and compares them to the provisions of the regulations governing those products not contained in the definition of consumer product.

For the most part, federal safety legislation consists of piecemeal responses to specific safety crises and too often fails to include closely associated product hazards. Also, these federal regulatory procedures are often inadequate. For example, the Federal Insecticide, Fungicide, and Rodenticide Act regulates mainly through the requirement of labeling of hazards and does not confer general authority to promulgate performance standards. This is a typical example of the inflexibility of regulations and serves to accentuate what is perhaps the most significant difference between this Act and the regulations governing the excluded products. Depending on the hazard to be eliminated, the Commission can elect any of several methods including formulating standards, requiring the labeling of hazards, requiring the recall of products, banning products, and imposing civil and criminal penalties.

C. Relation of the Act to Previously Existing Remedies

Before the Act, federal legislation in the areas of product safety was virtually non-existent, consisting in the main of isolated regulations enacted to deal with specific hazards. Moreover, no government agency was empowered to ban products which posed unreasonable risks of injury, or to require compliance with minimum safety standards. Neither were there any procedures by which manufacturers could be enjoined from marketing unreasonably hazardous products. No meaningful criminal penalties existed for manufacturers who knowingly marketed unreasonably dangerous goods.

76. Sec. 3(a) (1) (A-I).
78. The consequences of and rationale for the congressional failure to consolidate all consumer protection functions in a single agency is discussed at p. 837 infra.
79. NCPS at 89.
81. NCPS at 92.
82. Id. at 2.
83. Id.
Equally inadequate as a protection for the consumer is industry self-regulation. The legal unenforceability of any standards or regulations is the most obvious drawback to consumer protection. Furthermore, competition between manufacturers tends to result in a subordination of safety factors to cost considerations, styling and other marketing considerations.\textsuperscript{84} One authority describes the inadequacy of industry self-regulation thusly:

As now constituted, industry codes have a built-in weakness, for they are prepared and controlled on a voluntary basis by the very people to whom they are to be applied; the analogy would be if the judge and judged were the same. All of man's experience shows that self policing does not give the public adequate protection.\textsuperscript{85}

State and local laws were also examined and found inadequate in the study by the National Commission on Product Safety. Their study revealed a "hodgepodge of tragedy-inspired responses to challenges that cannot be met by restricted geographical entities."\textsuperscript{86} It was also found that the laws were doubly burdensome in that they were ineffective from a safety aspect while at the same time being unduly restrictive on manufacturing. The National Commission on Product Safety summarized that

[w]ithout central leadership, States and municipalities are unable to chart broad spectrum product safety programs. Balkanized jurisdiction plagues some manufacturers with diverse manufacturing specifications that interfere with distribution of their product.\textsuperscript{87}

Before the Act, then, the consumer was left to forage for remedies among the common law of products liability, particularly in the areas of warranty, negligence (and intentional tort) and strict liability. Regardless of the theory, there are certain issues present in every products liability case. In order to recover from the manufacturer or seller of a product alleged to have caused injury, it should be remembered that the consumer must show that

(1) the product in question . . . has been defective or harmful in some way, that is, to have had an element capable of causing injury; (2) the party sought to be held liable for the injury is identified with the product (that is, is shown to have actually been or to have had the status of, its manufacturer or seller); and (3) the defendant manufacturer's or seller's act or omission with respect to his product must be shown to be causally related to the harm for

\textsuperscript{84} Id.
\textsuperscript{85} Vice Admiral Hyman G. Rickover (Ret.), NCPS at introduction to Part III.
\textsuperscript{86} Id. at 2.
\textsuperscript{87} Id. at 3.
which it is sought to hold him liable.\textsuperscript{88}

1. Warranty

The Uniform Commercial Code (U.C.C.) imputes two implied warranties onto the vendor of goods that goods shall be merchantable\textsuperscript{89} and that they shall be fit for a particular purpose.\textsuperscript{90} Also recognized is the creation of express warranties when the seller makes any affirmation of fact or when there is any description of the goods which becomes a basis for the bargain.\textsuperscript{91}

Two serious drawbacks exist in the use of this remedy by the consumer; that of lack of privity of contract between the consumer and manufacturer, and that of the opportunity of a manufacturer to disclaim any of the warranties. Though the relaxed rigidity of these principles has made them chiefly of historical interest, the unwary consumer could still fall prey to these defenses.

The question of privity was based on the idea that since the contract was made between X and Y, X alone could sue only Y if there were a breach of an implied or express warranty. This doctrine was believed to be unduly restrictive and was finally exploded in the famous case of \textit{Henningsem v. Bloomfield Motors, Inc.},\textsuperscript{92} which held both the manufacturer of an auto and the dealer who sold it liable to the wife of the purchaser who was driving the car on a theory of an implied warranty of safety.

Problems still exist in this area. Since the cause of action sounds in contract, many courts and attorneys still apply contract rules which simply cannot be complied with because in most cases no contract exists between the parties.\textsuperscript{93}

The requirement that the consumer give timely notice to the manufacturer after discovery of the breach\textsuperscript{94} and the availability of warranty disclaimers\textsuperscript{95} are further albatrosses around the neck of the consumer. As to the U.C.C.'s requirement of timely notice, the courts were aware of the inequity of holding a consumer to the

\textsuperscript{88} 1 R. Kursh, \textit{American Law of Products Liability} 3, § 1:1 (1961).
\textsuperscript{89} \textit{Uniform Commercial Code} § 2-314.
\textsuperscript{90} \textit{Uniform Commercial Code} § 2-315.
\textsuperscript{91} \textit{Uniform Commercial Code} § 2-313(1).
\textsuperscript{92} 32 N.J. 359, 161 A.2d 691 (1960). This decision was the logical terminus of the line of cases which used various fictions such as the agency of the dealer to sell for the manufacturer, or the consumer's being the third party beneficiary of a contract between the manufacturer and the retailer. See W. Prosser, \textit{Handbook of the Law of Torts} 654 n.27 (4th ed. 1971) (Prosser), citing an article which lists 29 such methods by which various courts have achieved this result.
\textsuperscript{93} Prosser at 655.
\textsuperscript{94} \textit{Uniform Commercial Code} § 2-607.
\textsuperscript{95} \textit{Uniform Commercial Code} § 2-316.
same level of knowledge as a dealer in goods and deftly avoided this problem by holding that a long delay was reasonable, or that the provision was not intended to apply in personal injury cases, or by holding that the requirement was inapplicable where the parties had not dealt with each other. 96

Courts and legislatures also frown on disclaimers of liability and have effectively relegated them to a role of relatively secondary significance in products liability cases. 97 Courts have been imposing liability in the face of these disclaimers on various rationales since as far back as 1907. 98 In California tight restrictions on the efficacy of disclaimers have been imposed by statute, restrictions so tight that it is likely that most consumers would be irate if the disclosure required to make the disclaimer efficacious were actually made known to them. 99

Thus the consumer is left to prove the following elements in a cause of action under a warranty theory: he must prove that there was a breach of the express or implied warranty, a causal connection between the breach and the injury, and damages. Once these elements are proved, the seller or manufacturer is strictly liable even though he was not negligent in manufacturing or marketing the defective good. Although there is good authority to the contrary, 100 it is felt that in a given fact situation, a consumer could recover under this theory. Furthermore, it is good practice to plead this theory along with other common law causes of action because of the inapplicability of the usual tort defenses of con-

96. Prosser at 655-56.
97. Although few manufacturers would strenuously pursue a disclaimer defense where the disclaimer is, for want of a better phrase, "against public policy", it is postulated that the mere existence of these provisions in the contract could induce an injured consumer who has not sought legal advice to never bring suit.
99. See Song-Beverly Consumer Warranty Act, Cal. Civ. Code §§ 1790 et seq. (West 1973), particularly § 1792.4. But see Delta Airlines Inc. v. Douglas Aircraft, 238 Cal. App. 2d 95, 47 Cal. Rptr. 518 (1965) where waiver of all conditions or liabilities by seller was held valid when the case involved no element of personal injury, privity of contract issue, or elements of inequality of bargaining position, or adhesion contract. There is no thwarting of public policy through recognition of disclaimers in the commercial world where the buyer may be able to absorb and administer the inevitable risk of seller's operation. See Comment, Federal Motor Vehicle Safety Legislation, 29 Ohio St. L.J. 177, 206 n.190 (1968).
100. See, e.g., Prosser at 656.
tributory negligence and assumption of risk in a contract action.

2. Negligence or Intentional Misconduct

A manufacturer who knows or has reason to know that his product is defective or dangerous and nonetheless injects it into the stream of commerce without warning may be liable for the intentional tort of battery if injury were substantially certain to result from the use of the product.101

Negligence differs from intentional tort in products liability in that there is a lower degree of knowledge evident on the part of the defendant in the negligence case. In the landmark case of MacPherson v. Buick Motor Company,102 Justice Cardozo found that the manufacturer assumed a duty to the consumer regarding products which would be dangerous if negligently made; merely by placing the vehicle on the market. The rule has been extended beyond inherently dangerous articles and has finally emerged to hold the seller liable for negligence for marketing any product which could foreseeably be expected to inflict substantial harm if it is defective.103 This liability runs to anyone in the marketing chain including component part manufacturers and assemblers,104 and injuries to the benefit of any foreseeable plaintiff.105

The failure of the manufacturer to exercise the care of a reasonably prudent man under the circumstances shows his negligence, and this care is required in every aspect of his marketing activity, ranging from a failure to inspect or test to failure to disclose defects and dangers. While the negligence cause of action is still of importance when the liability is based on a design defect, or failure to give an adequate warning,106 the existence of the usual defenses to negligence, i.e., contributory negligence and assumption of risk, have relegated this cause of action to the status of "a second string

101. See Roginsky v. Richardson–Merrill Inc., 378 F.2d 832 (2d Cir. 1967). This was the first of the famous MER/29 cases. MER/29, an anti-cholesterol drug, was known by the defendants to be substantially certain to cause cataracts. The defendants marketed the drug nonetheless, and even went so far as to falsify their report to the government. Though the opinion is phrased in terms of negligence, it appears that the requisite degree of knowledge was before the court such that the tort of battery could have been established.

Even if a cause of action for intentional tort probably cannot be established because of the difficulty of proving the requisite degree of knowledge, it should still be asserted since it might affect the issue of punitive damages.


103. Prosser at 643 (citing cases).

104. Id. at 664.

105. Id. at 662.

106. Id. at 644–46.
3. Strict Liability in Tort

The concept of strict liability in tort stems from a 1963 California decision, Greenman v. Yuba Power Products, and was re-emphasized in another recent California case, Cronin v. J.B.E. Olson Corp. In Cronin the California Supreme Court discussed the split of authority in the definition of defect, some courts following the standard expressed in Greenman, but the majority following the standard as expressed in Section 402A of the Restatement (Second) of Torts. The Greenman rule, followed in California, is as follows:

A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being. . . . [T]he liability is not governed by the law of contract warranties but by the law of strict liability in tort.

The majority rule in this country according to the Cronin court is the rule of Section 402A, which requires for recovery that the plaintiff show not merely a defective product as in Greenman, but a product in a "defective condition unreasonably dangerous." The significance of the different rules goes to the proof requirement on the part of the plaintiff. Under Section 402A the added burden is that the defective condition, i.e., a condition not contemplated by the ultimate consumer, must be unreasonably dangerous. Unreasonably dangerous was defined as being "danger-
ous to an extent beyond that which would be contemplated by
the ordinary consumer who purchases it, with the ordinary know-
ledge common to the community as to its characteristics."\textsuperscript{114}

The result of this added burden is to require the plaintiff to
prove "an element which rings of negligence."\textsuperscript{115} This result is
antithetical to the purpose of the doctrine of strict liability, viz., to
relieve the plaintiff from the problems of proof inherent in negli-
gence or warranty actions, and thereby to insure that the costs of
injuries from defective products are borne by the manufactur-
ers.\textsuperscript{116}

Whatever burden is imposed on the plaintiff as to proving the
product defective and/or unreasonably dangerous,\textsuperscript{117} he must also
prove that the defect proximately caused the alleged harm. He need
not prove that he was unaware of the defect,\textsuperscript{118} since this is an af-
firmative defense (awareness of the defect implies an assumption
of risk) which must be pleaded and proved by the defendant.

Compared to the common law remedies, the standard employed
in the Act for assertion of a private cause of action most nearly ap-
proaches negligence or intentional tort in its scope. Section 23 of
the Act restricts suit to those consumers who sustain injury by rea-
son of a "knowing" or willful violation of a consumer product safety
rule. As previously mentioned, "knowing" is further defined by

\begin{footnotesize}
\begin{enumerate}
\item The product must be one that is unreasonably dangerous,
\item It involves unexpected danger,
\item It bears inadequate warning concerning dangers from proper
  use,
\item It has a defect that is not natural to the product,
\item It produces a reaction which is not an isolated occurrence,
\item The product creates an ultra-hazardous condition.
\end{enumerate}
\end{footnotesize}

\textsuperscript{114} RESTATEMENT (SECOND) OF TORTS § 402A (1965) comment i at 352-53.
\textsuperscript{115} 8 Cal. 3d at 132, 104 Cal. Rptr. at 442, 501 P.2d at 1162.
\textsuperscript{116} Id.
\textsuperscript{117} Whatever the burden on the plaintiff as to what he must prove in
order to establish the defect, it has been postulated that recoverable prod-
uct defects can be grouped into six categories:
\begin{enumerate}
\item The product must be one that is unreasonably dangerous,
\item It involves unexpected danger,
\item It bears inadequate warning concerning dangers from proper
  use,
\item It has a defect that is not natural to the product,
\item It produces a reaction which is not an isolated occurrence,
\item The product creates an ultra-hazardous condition.
\end{enumerate}

Freedman, "Defect in the Product: The Necessary Basis for Products

\textsuperscript{118} Luque v. McLean, 8 Cal. 3d 136, 104 Cal. Rptr. 443, 501 P.2d 1163
(1972).

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Section 20(c) as meaning

(1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.

Since a knowing violation of a safety rule will subject a manufacturer or seller to criminal liability, a discussion of the relation of penal statute violations and negligence is appropriate.

Briefly, statutory violation in a negligence case is usually shown as either negligence per se, or as merely "some evidence" of negligence. Negligence per se proceeds under the theory that the legislature, as representatives of the community, can promulgate statutes which substitute a minimum standard of care for the jury's determination of the standard, the violation of which is negligence. The opposite view is that since penal statutes are to be strictly construed, and that no penal statute if so construed contains any implications that it is to be applicable in private litigation, then violation of a statute should have no bearing on civil liability for negligence. The fact that there is a statutory violation should only be "some evidence" for a jury to consider in deciding whether the violator was negligent.

The legislative preemption of the jury's function in the negligence per se theory stems from a determination that in certain fact

\begin{itemize}
  \item \textbf{119.} Sec. 21.
  \item \textbf{120.} See Comment, Products Liability Based Upon Violation of Statutory Standards, 64 Mich. L. Rev. 1388, 1390-93 (1966).
  \item \textbf{121.} Id. at 1390.
  \item \textbf{122.} Id. at 1392, citing Lowndes, Civil Liability Created by Criminal Legislation, 16 Minn. L. Rev. 361, 369-70 (1932).
  \item \textbf{123.} Comment, supra note 119, at 1392; Lowndes at 369-70. See also Satterlee v. Orange Glenn School District, 29 Cal. 2d 581, 177 P.2d 279 (1947) (violation of statute raising a rebuttable presumption of negligence); New Amsterdam Casualty Co. v. Novick Transfer Co., 274 F.2d 916 (4th Cir. 1960) (violation of statute only "some evidence" of negligence, applying Maryland law).
\end{itemize}

An alternative to these theories is that proof of a statutory violation is prima facie evidence of negligence, with the jury to decide whether the manufacturer, retailer, or distributor is to bear the primary responsibility for the particular product defect.

It was noted that this theory is used only where the statute did not require a showing of a violator's mens rea. Furthermore, it is indicated that since this theory's main purpose is to avoid subjecting a violator to liability via the negligence per se route when someone else in the marketing chain was more "at fault", the concept is made unnecessary by the tendency of most courts to broadly interpret their jurisdiction's indemnifi-
situations, a given standard of care is necessary to achieve some purpose that the legislature had in mind when it promulgated the statute. To insure that the negligence per se findings comport with the legislative purpose, the plaintiff must fall within four restrictions:

(1) He must belong to the class of persons whose interests were sought to be protected by the legislation upon which he relies; (2) the particular interest invaded by a defendant's alleged misconduct was of the type which the legislature sought to safeguard; (3) the enactment was intended to protect this interest from the particular hazard which caused the injury giving rise to the litigation; and (4) the statute was designed to guard against the kind of harm exemplified by this injury.

As previously noted, the key to consumer recovery is showing a knowledgeable violation of a consumer safety rule. If a consumer can allege this knowledge, then he has raised a federal question, and can bring suit in federal courts. While the Act serves to establish "statutory" negligence, or negligence per se, the consumer need not jettison the more easily proven cause of action of strict liability in tort, because under the doctrine of pendent jurisdiction, the consumer can assert any state causes of action (i.e., the common law causes of action) as long as these claims have arisen from a common nucleus of operative facts. Since previous experience under the common law has indicated a willingness on the part of courts to widely apply these causes of action, the signi-
Significance of the Act with respect to private actions for injury is that the consumer now has an additional forum in which to bring suit.

PART II—CRITIQUE OF THE ACT

The fashion of the times is to look askance at any semi-paternalistic governmental activities which are intended to protect the consumer from "big businessmen". Whether or not such skepticism is warranted, it appears to be unfounded in looking at this Act. On balance the favorable aspects outweigh the deficiencies—while the Act does not completely subordinate the manufacturer's interests to those of the consumer, it does impose certain burdens on him, and given the need for some sort of legislation in this area, the Act should prove helpful. Moreover, it arms the consumer with certain alternatives not found at the common law.

Several valid arguments against the establishment of the new agency exist. First, the establishment of another agency will probably be unjustifiable in that the gains to the consumer will be insignificant when compared to the costs to the government. Considering the poor track records of certain agencies, the Interstate Commerce Commission and the Food and Drug Administration in particular, this generalization is not completely irrational. Moreover,

118 Cong. Rec. H8567 (daily ed. Sept. 20, 1972) (remarks of Rep. Springer). The fact situation discussed by Representative Springer would obviously yield a good defense to the "knowing" requirement of Sec. 23. But this same fact situation would nonetheless produce liability in a strict liability in tort cause of action, which may be adjudicated in the federal courts under pendent jurisdiction.

128. There is no product, no matter how inherently safe it is, that cannot be turned into an engine of destruction in the hands of an imaginative, but clumsy, consumer. Only a complete conversion to full governmental paternalism can produce the millenium, which was perhaps the goal of Congress, because only when there is legislation eliminating all products which could harm a consumer due to even unforeseeable misuse will user stupidity exit as a cause of injury. Obviously this complete governmental control is not forthcoming. Since this and other consumer legislation only extends to products which would be dangerous if defective, or which are inherently dangerous, or which would be dangerous when "foreseeably misused", it can only be termed "semi-paternalistic".

129. See notes 2, 8 supra.

since the functions of the new Agency are for the most part already being performed by other agencies, another agency is unnecessary. A redirection of policy or re-ordering of priorities among already existing governmental bodies would adequately protect the consumer, using legislation already in existence.

It cannot be disputed that creating a new agency instead of utilizing presently existing bodies will be costly. But it is also beyond dispute that the system for protection prior to the Act was insufficient. A new, independent agency is desirable for two reasons. First, the National Commission on Product Safety and Congress concluded that the new Commission should be kept as insulated as possible from the influence of politics—a conclusion which precluded placing the agency within the Department of Health, Education and Welfare as desired by President Nixon and then Secretary of H.E.W. Richardson. Moreover, the existing legislation which assertedly could be used instead of the Act was designed to meet other problems not directly related to consumer product safety. For example, the Federal Trade Commission was intended at least in part to prohibit deceptive advertising, not to prohibit the marketing of unsafe products.

A second argument directs itself to the rationale behind allowing public participation in Commission activities. The Act established a Commission which decides whether standards and rules are necessary for consumer protection. The Commission determines the public interest in safety and weighs it against the interest of the


131. For a brief discussion of the duplication of consumer protection functions under various agencies, see S. REP. No. 92-835, 92d Cong., 2d Sess. (1972) reprinted in UNITED STATES CODE CONGRESSIONAL AND ADMINISTRATIVE NEWS 4575-78, 4589-93 (1972).

132. It is conceivable that the Federal Trade Commission Act, 15 U.S.C. § 41 et seq. (1970), could be extended to apply to unreasonably dangerous consumer products. This act prohibits deceptive trade practices; it might be argued that marketing an unreasonably dangerous product and leading the consumer to believe that the product is not dangerous (when the consumer would not have purchased the product had its defect been known to him) is a deceptive trade practice. It should be remembered that the F.T.C. is basically concerned with maintaining fair and free competition, and not with product safety per se.

133. See text accompanying notes 79-81 supra.


manufacturer in profit-making. Why, then, allow yet another private interest, that of a consumer in airing a pet peeve against a product, to enter the picture at all? Allowing judicially backed petitions for agency action implies that the Commission determination of the public interest exists in name only. Granting the consumer access to the court will mean that much of the Commission's efforts will be spent in justifying its actions, instead of eliminating product safety hazards.

However, the Act's greatest strong point is its accessibility to both the consumer and manufacturer alike. Notwithstanding the Commission's own standard-making and enforcement powers, the consumer has the opportunity to petition the Commission to begin the proceedings for the issuance of a safety rule, to bring a court action to enforce a consumer product safety rule or recall order, or to bring a court action to recover damages. Unlike other federal agencies, then, consumer input is encouraged by the provisions of the Act, input to which the Commission must respond. Conversely, the manufacturer can petition the Commission to bring proceedings to terminate a standard. Moreover, all parties may obtain judicial review of Commission actions adverse to their interests. Given the intense need for adequate con-

136. The second argument, discussed at p. 834, decries consumer input in the establishment or enforcement of standards and rules as an usurpation of the authority duly delegated to the Commission. Why raise this brouhaha? If the object of the Act is to achieve the goals set by Congress, see note 8 and accompanying text supra, what difference does it make who initiates or forces the action if the goal is reached?

If the goal is not achieved, that is, if the consumer action is held to be unfounded or spiteful, then of course the Commission has wasted resources in defending the action. However, given the enormity of the problem created by hazardous products, see note 2 supra, this feature of the Act seems justified when balanced against costs. For the role of private attorneys general in other areas see note 62 supra.

137. Sec. 10(a).
138. Sec. 24.
139. Sec. 23.
140. Sec. 10. The House Report at 38 points out that the right to petition agency action is a part of the Administrative Procedure Act, 5 U.S.C. § 553(e) (1970), which governs these proceedings. Also, Sec. 10 adds the requirement that the Commission must explain its reasons for denying a petition. While this is standard administrative law practice, it still provides the consumer his first actual voice as a consumer.
141. Section 10.
142. Sections 10 and 11 provide for judicial review of action taken by the
sumer protection, the opportunity for manufacturers to protest Commission rulings exemplifies the Congressional attempt to maintain fairness to the manufacturers. The procedures for manufacturer protest appear to be adequate to maintain the particular interests of the production sector.

As previously mentioned it was deemed desirable to keep the new Agency as free as possible from the influences of politicians. The class of people known as politicians would corrupt the administrators of the Act in an attempt to protect special interests. It should be noted that this argument for the creation of an independent agency is somewhat weak. Since Senators and Representatives are popularly elected, by definition they represent the will of the people, and therefore any influence they exert will be that of the people. Whether the influence is manifested by surreptitious back-room deals, by budget cutbacks, or some other method, the result is still the same—a representative of the people doing the will of the people. Furthermore, agency independence really has little bearing on whether the Commission will be overly susceptible to suggestions made by congressmen, because any pressure which might be exerted via party machinery could as easily be exerted by personal contact or by way of the budget. Therefore it appears that the very physical location of the office, Washington D.C., operates to make less significant the fact that the Agency is independent of the Executive department.

The Act balances two competing interests in the area of disclosure of relevant information. It cannot be gainsaid that the consumer has a pressing interest in learning about product defects. Similarly, a manufacturer has such an interest in desiring to keep to a minimum derogatory information about his product. The procedure in the Act will allow for this disclosure to the public only after giving the manufacturer 30 days notice in which time the manufacturer may comment to the Commission on the content of the disclosure, either by explanation or by use of additional information. There is no requirement that the Commission include the manufacturer's information in the same release. While this procedure is fair to both sides, it should be noted that there is no mandatory requirement that such product related information be disclosed. During the 30 day moratorium on disclosure, a man-

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143. Sec. 6. Also provided for in this section is the retraction of erroneous or misleading releases, and for a less than 30 day waiting period should the product defect require a faster release.

144. Section 25(c) requires that accident or investigation reports be made
manufacturer may, instead of explaining, take some other actions, such as removing the defect from the product, or giving notice of the defect himself. It could be said that such actions accomplish a purpose of the Act, viz., to protect the consumer from unreasonable risk of injury, or to aid the consumer in evaluating the comparative safety of consumer products. The Commission should nonetheless voluntarily make the disclosure, for any of several reasons. For instance, the manufacturer cannot be expected to be as objective or complete in voluntary disclosure or repair; the consumer has a right, or at least an intense interest, in knowing which manufacturers are being scrutinized by the Commission in order to be more vigilant in other dealings with the manufacturer; the consumer may be totally unaware that certain products he thought fool-proof can in fact be unreasonably dangerous; or for the more selfish reason that the Commission should be active in the public eye. Lack of a statutory requirement of disclosure will doubtless result in a lesser amount of information being disseminated. It is asserted that it is the exception rather than the rule that the consumer would be benefited in any significant sense by receiving anything less than full disclosure of product defects.

The two largest drawbacks to the Act, which threaten to reduce the Act's virility to that of a mule, are its failure to consolidate all consumer protection functions in a single agency, and the associated failure to provide for the regulation of all consumer products in the Act. The Senate proposed that the inspections divisions of the Department of Agriculture be transferred to the new consumer protection agency, because it "has so poorly performed its duties in connection with meat, and poultry inspection that the situation has become a national disgrace." The Senate also suggested that the duties of the Secretary of H.E.W. administered un-available to the public, and that reports on research projects, demonstration projects and the like shall be public information.

This section implies that the information will be disclosed if a consumer requests it, i.e., it will not be denied to the consumer. "Not being denied access" is a far cry from a mandatory disclosure requirement.

145. Sec. 2(b) (1), (2).

This charge was responded to with the retort: "There is nowhere in the world where consumers are getting purer food than in the United States . . ." Id. (remarks of Sen. Young). For four reports substantiating Sen. Ribicoff's charges, see Reports on the Food Inspection Programs of the Department of Agriculture, id. at S9884-87.
der the Food and Drug Administration be transferred to the new agency, because the F.D.A. was, at best, inept:

the [F.D.A.] requires elementary restructuring in the public interest. Stripping it of much of its consumer protection functions and reposing them in a separate consumer protection agency seem to be the only reasonable solution.147

The House rejected these proposals and the final shape of the Act did nothing "to upgrade the quality of Government regulation of foods and drugs."148

Logic dictates that if a need for consumer protection exists, and that if the method selected to fill this need has been ineffective or worse, then some other method should be substituted. It is no argument to say that although the first 60 years of regulation were ineffective, the past few months show that the F.D.A. has begun to function more effectively than ever.149 It is postulated that even if the alternative to past ineptitude is a new untested agency, it would be unreasonable not to at least attempt progress.

Laying aside the failure of Congress to fully consolidate consumer protection functions, obviously cutting costs involved in duplication of efforts, the second major drawback to the effectiveness of the Act merits discussion. Congress responded to an obvious national problem, if not an emergency, in passing this legislation. The Act broadly defines consumer products, then stringently regulates them, while allowing wide latitude to interested parties to interject their own ideas. In this regard, this legislation offers the most comprehensive and fair alternatives to all concerned. It cannot be disputed that no other existing safety regulations are more far-reaching in their scope.150 Yet why did Congress apply such stringent regulations on articles defined as consumer products151 and allow the excluded products to be either unregulated or regulated by already existing and less consumer oriented legislation?

It is difficult to suggest a rational explanation why Congress chose to exclude the broad spectrum of goods regulated elsewhere, especially in view of the fact that the National Commission on Product Safety so cogently indicated the need for more comprehensive and flexible legislation which Congress accepted without

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147. Id. at S9896 (remarks of Sen. Montoya).
150. See Appendix I.
151. See p.15 supra for the definition of "consumer product".
question in other areas.\textsuperscript{152}

As to tobacco and firearms, there is no logical explanation why these products are unregulated.\textsuperscript{153} The familiar reports of the Surgeon General have had virtually no effect on Congress, save for the television cigarette advertising ban.\textsuperscript{154} The blatant admission that Congress has yet to determine that tobacco should be subjected to safety regulations as envisioned in the Act\textsuperscript{155} belies congressional ignorance.\textsuperscript{156} Yet what evidence would Congress require before initiating any performance-related consumer product safety standards? Surely the numerous cases where consumers sought recovery for damages due to unsafe products\textsuperscript{157} cannot have eluded congressional scrutiny.

Given the current trend of the judiciary toward extending more and more protection to the consumer, in all likelihood these products will one day be regulated by statute. Future analysis will undoubtedly fail to disclose the reasons behind the congressional reluctance to enact these regulations when the chance presented itself.

\textbf{Michael T. Fox}

\textsuperscript{152} See \textit{NCPS} at 114.

\textsuperscript{153} Unregulated here does not mean the absence of regulation. There is certainly no dearth of regulations of these product types, but one will search in vain for any regulations relative to safety requirements, or, as the Act requires in Sec. 7(a) (1), and (2), any requirements as to performance, composition, contents and design, construction, finish, or packaging, or any requirements as to markings of warnings or instructions.


\textsuperscript{155} House Report at 27. The safety standards envisioned are not of the sort which would be enacted because tobacco consumption is "bad" or because the government knows what is best for the consumer in this area. Rather than protecting the consumer from lung cancer, safety regulations which should have been included under the Act would protect the consumer from hazards such as exploding cigarettes, or cigarettes containing razor blades. See authorities cited in note 156 \textit{infra}.

\textsuperscript{156} See, \emph{e.g.}, 118 Cong. Rec. H8568 (daily ed. Sept. 20, 1972) where Rep. Springer blithely says "[t]obacco is covered in \cite{the} FDA. . ." but cites no authority in support.

## Appendix I

### Products Excluded Because of Adequate Coverage Elsewhere

<table>
<thead>
<tr>
<th>Type of Regulation</th>
<th>Product Regulated</th>
<th>Included Products</th>
<th>Motor Vehicles</th>
<th>Economic Poisons</th>
<th>Aircraft</th>
<th>Boats</th>
<th>Food and Drugs</th>
<th>Tobacco and Tob. Prods.</th>
<th>Firearms and Ammo</th>
<th>Non-consumer Products</th>
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<tbody>
<tr>
<td>Setting Standards at instigation of other</td>
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<td>Disclosure of non-complying articles by government</td>
<td>Sec. 6</td>
<td>§ 135(d)(3)</td>
<td>§ 1504</td>
<td>§ 1464(e)</td>
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<td>§ 375</td>
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<td>Banning sale of Hazardous products</td>
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<td>Product Certification</td>
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<td>Recall, Replacement, refund</td>
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<td>§ 1400</td>
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<td>Civil penalties</td>
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<td>Criminal penalties</td>
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<td>Injunction and seizure</td>
<td>Sec. 22</td>
<td>§ 1399</td>
<td>§ 135(e)</td>
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<tr>
<td>Providing for private cause of action</td>
<td>Sec. 23</td>
<td>§ 1397</td>
<td>§ 135(a)</td>
<td>No Provision</td>
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<td>Applicable to imports</td>
<td>Sec. 17</td>
<td>§ 1399</td>
<td>§ 135(h)</td>
<td>§ 1460</td>
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<td>Record keeping and inspection</td>
<td>Sec. 16</td>
<td>§ 1401</td>
<td>§ 135(c)</td>
<td>§ 1472(f)</td>
<td>§ 1463</td>
<td>§ 373</td>
<td>§ 364</td>
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1. Specifically, the goods that are excluded are those which would be subject to a special tax under § 4181 of the Internal Revenue Code of 1954, which includes pistols, revolvers, other firearms, shells and cartridges.
2. The standards relate to labeling requirements.
3. The Act implicitly defines its standards by defining that quality which is substandard.
4. Only publication of judgments of litigation is required.
5. Disclosure is not mandatory under § 336.
6. This requirement is not directly aimed at manufacturers.
7. Directed to manufacturer and consumer alike.
8. This applies to certain drugs only.
9. See Larsen v. General Motors, 391 F.2d 495 (8th Cir. 1968).
12. No cases yet, and no express provision allows for a private cause of action, but the similarity of this statute to others where a private cause of action has been allowed imply that a private cause of action would be allowed here also.
15. Applies to new drugs only.
16. Provides for criminal penalty if reports not filed, or filed with false information.
Appendix II

Section 30 of the Act transfers to the Commission the responsibility of administering the Federal Hazardous Substances Act, The Poison Prevention Packaging Act of 1970, the Flammable Fabrics Act and the regulations dealing with refrigerator safety. Section 30 of the Act, which transfers these functions, has a Proviso that Commission regulation of products governed by these enactments must be in accordance with the provisions of those acts. Additionally, the Commission is restrained from regulating consumer product safety hazards if the risks could be eliminated under the Occupational Health and Safety Act of 1970, the Atomic Energy Act of 1954, or the Clean Air Act. The content of these regulations is briefly examined in the following chart.

The immediate realization after an examination of the chart is that the conclusion of the National Commission on Product Safety was correct in its assessment of the state of federal consumer product safety regulation before the Act, i.e., that the regulations were too inflexible and limited. See p. 16, supra.

(Footnotes to following table)

1. Violations are deemed a deceptive practice under the Federal Trade Commission Act.
2. The standards and definitions are very technical. See also § 1261.
3. This section refers to review of toy safety standards only.
6. No case law here yet, but in view of what is required to be found by the Commission before it promulgates any standards (set forth in § 1472(b)), it seems likely that violation of a standard here would clearly mean that the violator had acted negligently.
7. No express provision allowing private actions, but several sections are statutory limitations on liability, implying a contemplation of litigation.

(See previous page for footnotes)
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<th>Type of Regulation</th>
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<td>Flammable Fabrics</td>
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<td>Standard Setting</td>
<td>§ 1192&lt;sup&gt;1&lt;/sup&gt;</td>
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<td>§ 1193</td>
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<td>Provides for or allow for a private cause of action</td>
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<td>No provision&lt;sup&gt;2&lt;/sup&gt;</td>
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<td>Primary method of regulation</td>
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