

2000

## The Product Recall Process: Mechanics and Shortcomings

Cassie Orban

Follow this and additional works at: <http://lawcommons.luc.edu/lclr>



Part of the [Consumer Protection Law Commons](#)

---

### Recommended Citation

Cassie Orban *The Product Recall Process: Mechanics and Shortcomings*, 12 Loy. Consumer L. Rev. 311 (2000).  
Available at: <http://lawcommons.luc.edu/lclr/vol12/iss4/3>

This Student Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola Consumer Law Review by an authorized administrator of LAW eCommons. For more information, please contact [law-library@luc.edu](mailto:law-library@luc.edu).

# ***STUDENT ARTICLES***

## **The Product Recall Process: Mechanics and Shortcomings**

Cassie Orban

### **I. Introduction**

According to the statistics of the Consumer Product Safety Commission, each year one American in ten will suffer an injury related to a consumer product. The staggering estimate of 29.5 million injuries and 22,000 deaths per year leaves consumer advocates wholly dissatisfied with the current consumer protection laws.

Protection against defective consumer products first gained statutory form in the Consumer Product Safety Act of 1972. Through the Act, Congress created the Consumer Product Safety Commission ("CPSC"), an independent federal regulatory agency. Congress commissioned the CPSC to protect the public from unreasonable risks and injuries caused by consumer products. Through its short history, the CPSC has led the charge in consumer advocacy, battled governmental downsizing, and recalled several thousands of products. Yet, the efforts of the CPSC have not adequately protected consumers from the dangers that continue to leak into the flow of consumer products.

This Note will address the recall process and current efforts to amend the Consumer Product Safety Act to give the CPSC more power to act on the behalf of consumers. First, this Note will briefly consider manufacturer's post-sale duties to warn, retrofit and recall. Second, the Note will discuss the CPSC's involvement in the product recall process and the new program

recently implemented to help streamline product recalls. Further, this section will discuss the problems that the CPSC currently encounters with defective product recalls and the statutory limits placed on them.

Third, this Note will outline the 1999 House Bill proposal to amend the Consumer Product Safety Act. The "Daniel Keysar Memorial and Childhood Consumer Product Safety Act of 1999" aims to improve the product recall process and help alleviate budgetary and other constraints on the CPSC. Finally, this Note will consider the future of product recalls. Specifically, the impact of the House proposal on the CPSC's ability to protect consumers and limit manufacturers' rights to keep recall information private.

## II. Manufacturer's Post Sale Duties

Traditionally, the law of products liability has centered on the manufacturer's duty at the time of the product's sale or the condition of the product at the time it enters the market. Increasingly, courts entertain lawsuits based on the manufacturers' duties toward the purchaser after sale.<sup>1</sup> The seminal case concerning a manufacturer's post-sale duty to warn of hazardous products came out of the Michigan Supreme Court in *Comstock v. General Motors Corporation*.<sup>2</sup> In *Comstock*, the court extended a manufacturer's duty to warn consumers even after the product has left the manufacturer's control.<sup>3</sup> The court held that because General Motors knew of the defective cylinders shortly after the products had been placed into the stream of commerce and did nothing to warn consumers, it was liable to the injured party.<sup>4</sup> The court further reasoned that if a duty to warn of a known danger exists at point of sale, . . . a like duty to give prompt warning exists when a latent defect which makes the product hazardous to life becomes known to the manufacturer shortly after the product has been put on the market.<sup>5</sup>

Although *Comstock* remains the seminal case on the post-sale duty to warn, it is a conservative approach vis-à-vis subsequent cases that have vastly expanded the duty.<sup>6</sup> In *Cover v. Cohen*, the highest New York court held that a manufacturer may be liable for failing to warn consumers of dangers in the use of a product which came to the manufacturer's attention post-sale through advancements in technology or through notice of accidents involving the product.<sup>7</sup> In *Cover*, the plaintiff was seriously injured when the defendant's car suddenly accelerated and ran him over.<sup>8</sup> The suit charged GM, the manufacturer, and Kinney Motors, the dealer that sold the car to the defendant, with breach of a post-sale duty to warn, among other claims.<sup>9</sup> The jury ultimately found against both the manufacturer and dealer even though the car was found to be reasonably safe when initially produced.<sup>10</sup>

The court in *Cover* expanded the *Comstock* view of the post-sale duty to warn in three significant ways.<sup>11</sup> First, while *Comstock* concerned only manufacturers, *Cover* also allowed an action to be brought against dealers involved in the transaction.<sup>12</sup> This expansion in the chain of liability is significant considering the many entities that handle consumer products before they reach the general public.<sup>13</sup> Second, *Comstock* held that a manufacturer was liable for a product that was defective at the time of sale.<sup>14</sup> *Cover*, on the other hand, intimates that a manufacturer may be held liable for a product that was reasonably safe at the point of sale but was subsequently determined defective.<sup>15</sup> Third, the *Comstock* court found significant the short time between the sale and realization of the defect while *Cover* did not clearly limit the time in which the manufacturer's duty expires.<sup>16</sup>

While the post-sale duty to warn is clearly established along a wide spectrum of court requirements, the post-sale duties to retrofit and recall are less recognized and rarely successful. A "duty to retrofit" is basically a "duty to upgrade" or a "duty to improve" a product and

can apply to any product subject to evolutionary design.<sup>17</sup> Generally, a manufacturer will provide a safety feature for the product at no cost to the consumer. This duty creates a great burden on the manufacturer which accounts for the rarity with which courts are willing to impose it on the manufacturer. Accordingly, the duty to retrofit has generally been limited to specialized markets such as helicopters and airplanes.<sup>18</sup>

Like the duty to retrofit, the duty to recall has yet to gain wide acceptance in the courts. The notion of a recall has become a common term meaning notification of a defect combined with an offer to repair or refund.<sup>19</sup> Several situations can trigger a product recall, including accident reports or statistics, customer complaints, warranty claims, test results, repair rates or statistics, or field reports.<sup>20</sup> These factors, along with the probability of the product failing, the potential severity of injury, the number of units in the stream of commerce and still in storage or on the shelves of distributors, and the product's unit cost, help determine if a recall is necessary.<sup>21</sup>

Most American courts reject the notion of a common law duty to recall.<sup>22</sup> Generally, these courts reason that recall decisions are best left to administrative agencies and legislatures.<sup>23</sup> The courts are reluctant to impose such a duty on manufacturers without the ability to properly weigh the costs and benefits of such a massive undertaking.<sup>24</sup> Accordingly, the courts are much more willing to allocate this type of inquiry to administrative agencies such as the Consumer Products Safety Commission or the Food and Drug Administration. These types of agencies are better equipped to deal with the "careful analysis of predictive models and studious comparisons to recalls of similar products" that are necessary in the world of effective product recalls.<sup>25</sup>

Like American courts, the Restatement (Third) of Torts has not recognized a common law duty to recall.<sup>26</sup> In commentary, the writers realize the significant burden that a common law duty to recall would place on a

manufacturer.<sup>27</sup> "If every improvement in product safety were to trigger a common-law duty to recall, manufacturers would face incalculable costs every time they sought to make their product lines better and safer."<sup>28</sup> Further, the Restatement agrees with most courts that governmental agencies are best equipped to gather adequate data regarding the ramifications of product recalls.<sup>29</sup>

However, the Restatement does endorse a cause of action concerning the liability of a seller or distributor for harm caused by post-sale failure to recall a product.<sup>30</sup> One engaged in the business of selling or otherwise distributing products is subject to liability for harm to persons or property caused by the seller's failure to recall a product after the time of sale or distribution if: (a)(1) a statute or other governmental regulation specifically requires the seller or distributor to recall the product; or (2) the seller or distributor, in the absence of a recall requirement under Subsection (1), undertakes to recall the product; and (b) the seller or distributor fails to act as a reasonable person in recalling the product.<sup>31</sup>

The Restatement's approach seems to be commonsensical, yet ultimately fails to encourage voluntary manufacturer action. Logic and reason dictate that if a manufacturer is directed by a federal agency to recall a defective product, it should proceed as a reasonable person would in the recall situation. Section 11(a)(1) provides for this situation and seems to adequately protect the consumer from a defective recall process. However, by imposing liability for voluntary recalls, Section 11 serves to discourage manufacturers from taking this type of action on their own.<sup>32</sup>

### **III. The CPSC's Role in Product Recalls**

Since the great majority of American courts have left the job of product recalls to federal administrative agencies, it is necessary to consider the history, current working doctrine, and potential obstructions to consumer

safety protection of these agencies. This Note considers only the Consumer Protection Safety Commission though there are several federal agencies that have the ability to recall products.<sup>33</sup>

## A. Creation of the CPSC

Congress created the Consumer Product Safety Commission ("CPSC") in 1972 through the Consumer Product Safety Act ("Act").<sup>34</sup> The Act sets forth four goals: (1) to protect the public against unreasonable risks of injury associated with consumer products; (2) to assist in evaluating the comparative safety of consumer products; (3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.<sup>35</sup> In furtherance of these goals, Congress gave the CPSC jurisdiction over about 15,000 types of consumer products and the ability to force manufacturers to recall products that are deemed hazardous.<sup>36</sup>

Although considered for many years a "dormant agency," the CPSC has recently moved into the public eye with an aggressive new chairman, Ann Brown.<sup>37</sup> Nominated in 1994 by President Clinton, Brown is one of three current heads of the CPSC.<sup>38</sup> Brown has been at the center of recent media attention and has made "keeping kids safe" her number one priority.<sup>39</sup> Accordingly, the CPSC's current efforts focus especially on children's products.<sup>40</sup> In her recent testimony before the House Appropriations Committee, Brown articulated the Commission's two main focal points: (1) reducing the product hazards to children and families and (2) identifying and researching product hazards.<sup>41</sup>

## B. Reporting Regulations

In order to encourage the widespread reporting of potential product hazards and help the CPSC reach its goals, Congress enacted several reporting requirements for manufacturers, importers, distributors and retailers of consumer products.<sup>42</sup> Failure to report under these statutes may result in a penalty as high as \$1.5 million.<sup>43</sup> There are three different reporting schemes under the CPSA: Section 15 Reports, Section 37 Reports, and Section 102 Reports. I will take each in turn.

### 1. *Section 15(b) Reports*

Under Section 15(b) of the CPSA, an entity must notify the Commission immediately if it obtains information which reasonably supports the conclusion that a product distributed in commerce (1) fails to meet a consumer product safety standard or banning regulation, (2) contains a defect which could create a substantial product hazard to consumers, (3) creates an unreasonable risk of serious injury or death, or (4) fails to comply with a voluntary standard upon which the Commission has relied under the CPSA.<sup>44</sup> The company must report this information to the CPSC immediately, i.e., within 24 hours, of obtaining this type of information.<sup>45</sup>

The Commission encourages these entities to report any potential hazards, but allows the company a reasonable time to determine if the hazard is one of reportable quality.<sup>46</sup> Any investigation should not last more than ten days unless the company can demonstrate that a longer time is reasonable under the circumstances.<sup>47</sup> The Commission will evaluate whether or not the company should have reported and when. Further, the evaluation will be based on what the company knew or should have known about the hazard.<sup>48</sup>

When a company reports under Section 15(b), any information given to the CPSC is considered confidential. "Section 6(b)(5) of the CPSA, 15 U.S.C. § 2055(b)(5),



prohibits the release of such information unless a remedial action plan has been accepted in writing, a complaint has been issued or the reporting firm consents to the release."<sup>49</sup> Companies also have an opportunity to claim that the information falls into a class of trade secrets or confidential commercial or financial information and must be marked as so in compliance with the statute.<sup>50</sup>

## *2. Section 37 Reports*

In addition to knowledge of a potential product hazard, Congress imposed a duty on manufacturers to report any litigation concerning their products.<sup>51</sup> Manufacturers must submit a Section 37 report to the CPSC if four criteria are met. First, a manufacturer must report if a particular model of their product is the matter of at least three civil actions filed in state or federal court.<sup>52</sup> Second, a report must be made if each of these suits alleges that the particular model caused the death or grievous bodily harm to the consumer.<sup>53</sup> Third, during one of CPSC specified periods of time, each of these three actions ended in a settlement or a court judgment for the plaintiff.<sup>54</sup> Finally, the manufacturer must also be involved in the defense of the claim or have notice of each action prior to any final judgment and be involved in settling any duty owed to the plaintiff as a result of the settlement or judgment.<sup>55</sup>

If a manufacturer deems that it fits all four requirements, it must submit a Section 37 report within 30 days after a judgment or final settlement in the last of three lawsuits.<sup>56</sup> Unlike the Section 15(b) reports, however, the information given to the CPSC in a Section 37 report is strictly confidential and cannot be publicized under any circumstances.<sup>57</sup> "By law, reporting under section 37 is not an admission of the existence of an unreasonable risk of injury, a defect, a substantial product hazard, an imminent hazard, or any other liability under any statute or common law."<sup>58</sup>

### *3. Section 102 Reports*

Finally, Congress created a reporting requirement in the Child Safety Protection Act that requires companies to report certain choking incidents to the CPSC.<sup>59</sup> Any manufacturer, distributor, retailer, or importer of marbles, small balls, latex balloons or toys or games which contain these types of materials are subject to Section 102 reports.<sup>60</sup> Such an entity must make a Section 102 report if it has information that (1) any child, regardless of age, choked on such a product and (2) as a result of the incident, the child died, suffered serious injury, ceased breathing, or was treated by a medical care professional.<sup>61</sup>

Companies in such a position must report the information to the CPSC within 24 hours of obtaining it. Section 6(b)(5) accords the Section 102 reports the same confidentiality as Section 15 reports. That is, the CPSC may only disseminate information that has been consented to by the parties involved, where a formal complaint against the company has been issued, or a remedial action plan has been accepted in writing.<sup>62</sup>

### **C. Evaluating Reporting Regulations and Instituting Recall Procedures**

In order to attain the goals set forth in the Consumer Product Safety Act, i.e., protect the public from dangerous products, one of the most effective tools that Congress granted the CPSC was the ability to require a manufacturer to recall a product.<sup>63</sup> If the CPSC determines that a product presents a substantial hazard to the public, it may require the manufacturer, distributor, or retailer to take corrective action.<sup>64</sup> Depending on the hazard that the product poses to the public, the CPSC will determine the necessary action.

## *1. The Traditional Recall Process*

Before the huge undertaking of a recall takes place, the Commission must make what it calls a preliminary determination ("PD") that the product is substantially hazardous.<sup>65</sup> This process involves the CPSC staff's technical evaluation of the product.<sup>66</sup> The evaluation itself could take several months to complete.<sup>67</sup> After a PD is made, the Commission then enters into negotiations with the company.<sup>68</sup> Negotiations cover a wide range of topics, from the length of a recall campaign to the aesthetics of the posters used to make the public aware of the defective product.<sup>69</sup> The negotiations can take a substantial amount of time and can easily be prolonged by companies who are less than willing to comply with CPSC guidelines.<sup>70</sup> PD and negotiations under the traditional process usually average 81 business days before the Commission gives final approval to go ahead with the recall.<sup>71</sup>

For years the CPSC's traditional recall process was criticized for its lack of effective recalls, amount of bureaucratic tape, and general inability to alert consumers in a timely fashion.<sup>72</sup> Many companies did not report potentially dangerous products for fear that the Commission's recall process would slow down their own recall efforts and subject them to liability.<sup>73</sup> Further, companies wanted to avoid the stigma of manufacturing a product that the government had formally considered substantially dangerous.<sup>74</sup> Therefore, many manufacturers declined to cooperate with the traditional process making the Commission's efforts to work with industry and protect consumers much more difficult.<sup>75</sup>

## *2. The Fast-Track Program*

In response to public and industry concerns over the flaws of the traditional recall process, the CPSC instituted a new program called the Fast-Track Recall

Process.<sup>76</sup> The program was officially instituted on a permanent basis in 1997 after a very successful run as a pilot program.<sup>77</sup> Unlike the traditional recall process, fast-track eliminates the process of preliminary determination ("PD").<sup>78</sup> The elimination of the PD allows companies to lessen their risk of liability by moving more quickly with a recall.<sup>79</sup>

The fast-track program is designed for companies willing and able to move quickly with a voluntary recall.<sup>80</sup> Fast-track eliminates months of technical determinations and allows the necessary information to move quickly to consumers.<sup>81</sup> After an initial report made to the CPSC, fast-track requires a company to propose a recall plan within 20 days.<sup>82</sup> If the Commission accepts the plan, the company is allowed to move ahead with the recall activity without being subject to a PD. Currently, companies are moving so quickly that a fast-track recall takes an average of nine days from initial report of a problem to initiation of the recall activity.<sup>83</sup>

Both industry and consumer advocates have praised the new fast-track program. Companies like the program because it allows them to be "in-and-out" in 20 business days.<sup>84</sup> Further, the speed of the program lessens the time that consumers are exposed to dangerous products therefore lowering the liability for companies. Several companies have used the fast-track process repeatedly because it is so cost-effective and speedy.<sup>85</sup>

Likewise, consumer advocates recognize the effectiveness of the fast-track program. The program has increased the rate of returned products from 30% under the traditional process to almost 60% under fast-track.<sup>86</sup> In fact, the fast-track program won the 1998 Innovations in Government Award.<sup>87</sup> The program was one of three federal programs honored based on four selection criteria: the program's novelty, effectiveness, solution to a significant problem, and replicability by other government entities.<sup>88</sup>

## D. Obstacles to Greater Consumer Protection

Although the fast-track program has dramatically increased the amount of recalled products, the CPSC continues to encounter obstacles to fully protecting the public from dangerous products. First, the CPSC has no budget for researching products to determine if they may be hazardous. Second, the CPSC lacks adequate funding vis-à-vis inflation and the boom of consumer products on the modern market. Finally, the Commission is silenced by Section 6(b) of the CPSA. This provision forbids the Commission to release any documents pertaining to potentially hazardous products for a significant period of time while consumers are unaware of possible harm.

### 1. *Lack of Research Budget*

Congress created in the CPSC a duty to "conduct research, studies, and investigations on the safety of consumer products and on improving the safety of such products."<sup>89</sup> Although Congress clearly envisioned the Commission to conduct such research, the CPSC has no budget to undertake such a project.<sup>90</sup> The heads of the CPSC find the lack of research funding to be one of the greatest obstacles to protecting the public from hazardous products.<sup>91</sup> In his testimony before Congress, Vice Chairman Moore reiterated to the House that the CPSC needs "the ability to research significant customer product safety problems that require substantial technical effort and expertise to adequately understand."<sup>92</sup>

Further, the general public is unaware that the government does very little research on products. A survey done in 1999 by the Coalition for Consumer Rights showed that two of three voters mistakenly believe that children's products are tested by the government for safety.<sup>93</sup> In addition, four out of five interviewed believe that manufacturers are required to test their products before release when in fact, the general public

often provides the testing.<sup>94</sup> With a research budget, the CPSC could remove injurious products from shelves before consumers are exposed to dangers. A research program would better protect the consumer and help to lessen industry's liability exposure.

## *2. A Budget That is Half of What it Should Be.*

When Congress created the CPSC in 1974, it allocated \$30 million to the Commission.<sup>95</sup> If Congress had kept up with inflation, the budget of the CPSC would be \$98 million today, compared to a 1999 allocation of a mere \$47 million.<sup>96</sup> Furthermore, the "Commission's staff of 480 is half of what it was nearly two decades ago and one-eighteenth of the Food and Drug Administration."<sup>97</sup> Although the duties of the CPSC have grown tremendously, the nation's investment into product safety has not kept up.<sup>98</sup>

In 1999, the CPSC requested a budget for the fiscal year 2000 of \$50.5 million, a modest \$3.5 million increase over the 1999 allocation.<sup>99</sup> This request included a sizable projection for many research initiatives.<sup>100</sup> However, Congress denied the request and approved a budget of only \$49 million.<sup>101</sup> Therefore, the Commission was forced to downsize its original projects, notably the Hazard Research and Integrated Database and other major research endeavors.<sup>102</sup> Although Chairman Ann Brown feels that the lack of resources isn't inhibiting the Commission's crucial work, more money would certainly make policing manufacturers and protecting consumers much easier and more effective.<sup>103</sup>

## *3. The Silence Clause of 6(b)*

While Congress gave the CPSC a number of powers, it did restrict the extent to which the Commission may disseminate information about products.<sup>104</sup> As discussed in Section B, *supra*, Section 6(b) of the CPSA

requires the CPSC to allow the manufacturer to preview and restrict any information bound for public scrutiny.<sup>105</sup> The Commission must give the manufacturer 30 days to comment on the release.<sup>106</sup> Further, 6(b) requires the Commission to take reasonable steps to assure the accuracy of the information, that the disclosure is fair under the circumstances, and that the information is reasonably related to carrying out a legitimate purpose under the Act.<sup>107</sup> Products that the Commission has set forth to declare imminently hazardous or which it believes are in violation of the prohibited acts section of the CPSA are excepted from this privilege.<sup>108</sup>

While to some extent industry and fairness require that the CPSC allow manufacturers to preview requested information, the processing time can be substantial and may potentially keep consumers unaware of dangerous products. Chairman Brown complains that "6b . . . is the bane of [the CPSC's] existence."<sup>109</sup> The provision gives industry the control over information which Brown believes belongs to the consumer.<sup>110</sup> However, Commissioner Mary Sheila Gall defends the provision citing fairness and accuracy of the information before it is released.<sup>111</sup>

In *CPSC v. GTE Sylvania, Inc.*, the Supreme Court held that even the Freedom of Information Act ("FOIA") does not require the 6(b) information to be disclosed.<sup>112</sup> Although a discussion of the decision in *GTE* is out of the scope of this Note, its effect on the restriction of information flow to the public is important. After *GTE*, the ability to gain information about potentially hazardous products now involves expanded proportions and requires many more staff members approval, significantly slowing down FOIA requests.<sup>113</sup>

#### **IV. The "Daniel Keysar Memorial and Childhood Consumer Product Safety Act of 1999"**

In response to the many obstacles that the CPSC faces to effectuating its goals, Representative Rod

Blagojevich (D- Ill.) and others have introduced H.R. 3208, the Daniel Keysar Memorial and Childhood Consumer Product Safety Act of 1999.<sup>114</sup> The bill seeks to amend the CPSA to improve the ability of the CPSC to reach consumers about hazardous products by (1) promulgating recall information in a more comprehensive manner, (2) lifting some 6(b) restrictions, (3) creating a system by which consumers of children's products can be easily identified in the event of a recall (4) requiring the CPSC to report to Congress annually on the effectiveness of recalls and (5) doubling the CPSC's annual budget.<sup>115</sup>

First, the bill requires the CPSC to establish a comprehensive list of all recalled children's products over the last 15 years and distribute it to a wide variety of entities.<sup>116</sup> The CPSC must take pains to make the list available to the general public, state and local governments, and the secondary children's market including retail stores and child care facilities.<sup>117</sup> Furthermore, H.R. 3208 requires the Commission to develop a strategy for partnering with state and local governments to produce and distribute the list.<sup>118</sup>

Second, the bill attacks Section 6(b) and loosens the CPSC's restraints on disseminating information thereunder.<sup>119</sup> H.R. 3208 states that 6(b) shall not apply to the announcement of corrective actions.<sup>120</sup> The announcements shall, with respect to the product for which the announcements are made - - (1) state clearly and concisely, in the strongest possible language, the nature and extent of the product hazard and any potential risk of injury; and (2) shall include the number of known deaths, injuries and incidents associated with the product hazard being corrected.<sup>121</sup> Furthermore, the Commission must proceed in a timely fashion and announce recalls in a manner that will induce consumers to participate.<sup>122</sup>

Third, H.R. 3208 requires the Commission to create a pilot program to work with manufacturers and retailers to obtain the identity of consumers in the event of a recall.<sup>123</sup> In addition, the bill mandates the Commis-



sion to report annually on the effectiveness of recalls.<sup>124</sup> This requirement seeks to create statistics on the number of products recalled or repaired.<sup>125</sup> Further, the Commission must make these statistics available to the general public through its toll free telephone hotline, electronic mail, and website.<sup>126</sup>

Finally, the bill addresses the Commission's lack of sufficient funds by doubling their budget.<sup>127</sup> "The first sentence of section 32(a) of the Consumer Product Safety Act (15 U.S.C.A. 2081) is amended by striking out 'not to exceed' and all that follows and inserting '\$100 million for each of the fiscal years 2001, 2002, and 2003.'"<sup>128</sup>

## V. Analysis

In light of the three major obstacles that the CPSC faces — lack of research budget, insufficient funding in general, and the inability to disseminate important information — the proposed bill properly alleviates these problems. By doubling the budget of the CPSC, the bill addresses the first two issues holding the Commission back from fulfilling its goal to protect consumers. As modern society evolves, the amount of consumer products that circulate in commerce grows exponentially. The public cannot expect the CPSC to properly protect it from hazardous products without paying the price in funding. Most Americans would agree that saving lives is money well spent.<sup>129</sup> Inflation as well as growth in industry dictates that the budget of the Commission must increase along with the demands placed upon it.

Furthermore, easing the restrictions upon the CPSC vis-à-vis information subject to section 6(b) allows for consumers and industry to move more quickly with recalls. Permitting the CPSC to announce recalls without the prior approval of manufacturers allows the information about hazardous products to reach consumers faster and lessens the likelihood of injuries. Likewise, the easing up of 6(b) standards benefits manufacturers. If haz-

ardous products are caught while still on the shelves, the manufacturer is exposed to less liability and will have to replace or refund fewer products. Although 6(b) originated from fear that the CPSC will erroneously announce product defects, H.R. 3208 deals with the recall notices or correction actions which the CPSC initiates only after negotiations with the manufacturer.<sup>130</sup> Therefore, the manufacturer already has had substantial contact with the Commission and can be assured that the information disseminated is accurate.

Lastly, the bill addresses the clear need for children's products to be tracked more aggressively. The majority of hazardous products recalled are children's products or toys.<sup>131</sup> In fact, 38 million individual units of children's products were recalled in 1998 alone.<sup>132</sup> The bill calls for the Commission to develop a procedure whereby the consumer is easily identified by the manufacturer in the case of a recall. Although this process may be difficult to maintain and puts a burden on the manufacturer, a death rate from consumer products of 22,000 annually, clearly demonstrates that current measures are not adequate.<sup>133</sup>

## **VI. Conclusion**

As the market for consumer products grows, so do the post-sale duties of manufacturers and the work of federal administrative agencies. Good government works toward not only protecting the public but also creating an alliance with industry to effectuate that goal. The CPSC has had some success within the current framework of the CPSA, but needs more resources and legislative intervention to fully realize its purpose of protecting the American people from hazardous consumer products. The Daniel Keysar Memorial Childhood Consumer Product Safety Act focuses on children, the most vulnerable consumers in the country. This amendment deserves the full support of Congress and the President.

---

## Endnotes

1. See Douglas R. Richmond, *Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall*, 36 IDAHO L. REV. 7,8 (1999)[hereinafter, Richmond].
2. See 358 Mich. 163 (Mich. 1959).
3. See *id.*
4. See *id.*
5. *Id.* at 177-78.
6. See Richmond, *supra* note 1, at 20.
7. See 461 N.E.2d 864, 871 (N.Y. 1984).
8. See *id.* at 871.
9. See *id.*
10. See *id.*
11. See Richmond, *supra* note 1, at 20-21.
12. See *id.* at 21.
13. See *id.*
14. See *id.*
15. See *id.*
16. See *id.*

17. *See id.* at 49 (citing Kevin M. Reynolds, *The "Duty" to Recall or Retrofit a Product*, FOR THE DEF., Oct. 1992 at 11) ("Product litigation in the 1990s has experienced an increase in the number of claims based on an alleged 'duty' to recall or retrofit a product").

18. *See id.* (citing *e.g.*, Noel Bell Helicopter Co. v. Bradshaw, 594 S.W.2d 519 (Tex. Civ. App. 1979) (holding manufacturer liable in negligence for failing to cause replacement of defective helicopter blades when it is authorized service station repurchased helicopter); Noel v. United Aircraft Corp., 342 F.2d 232 (3rd Cir. 1965)(finding duty to repair or recall based on continuing relationship between defendant and aircraft operator)).

19. *See* Jeffrey A. Lamken, *Efficient Accident Prevention As A Continuing Obligation: The Duty to Recall Defective Products*, 42 STAN. L. REV. 103, 104 (1989)[hereinafter, Lamken].

20. *See* Richmond, *supra* note 1, at 61.

21. *See id.* at 61-62. For a brief guideline of a manufacturer's safety approach, *see* Kitzes, Wm. F., *Safety Management and the Consumer Product Safety Commission* in *Professional Safety*, American Society of Engineers, April 1991, also adapted on "Bill Kitzes' Product Safety On Line <<http://www.productssafety.com/productsafety/rules.htm>>.

22. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 11 (1997). Rep. note a. "The most significant recent case supporting the general rule is *Gregory v. Cincinnati, Inc.*, 538 N.W.2d 325 (Mich. 1995). *See also* *Romero v. International Harvester Co.*, 979 F.2d.144-50 (10th Cir. 1992) (applying Colorado law) (no duty to recall and retrofit a product that was nondefective under standards existing at the time of manufacture, which could subsequently be made safer by a later-developed safety device or design

improvement); *Zettle v. Handy Mfg. Co.*, 837 F. Supp. 222, 224 (E.D. Mich. N.D. 1992) (where product was nondefective at time of original sale, product manufacturers have no duty to retrofit their products with safety devices that become available after the date of manufacture); *Eschenburg v. Navistar Int'l Transp. Corp.*, 829 F. Supp. 210, 214 (E.D. Mich. S.D. 1993) (no duty to recall product even if defective when it left the manufacturer's control); *Wallace v. Dorsey Trailers Southeast, Inc.*, 849 F.2d 341, 344 (8th Cir. 1988) (applying Missouri law) (court held that manufacturer was not negligent as a matter of law for failing to retrofit allegedly defective aerial bucket lift); *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 253 Kan. 741, 861 P.2d 1299, 1315 (1993) (court recognized a post-sale duty to warn but held that "product recalls are properly the business of administrative agencies as suggested by federal statutes"); *Lynch v. McStome and Lincoln Plaza Assocs.*, 548 A.2d 1276, 1279 (Pa. Super. Ct. 1988) (court leaves open the question of whether a manufacturer has a post-sale duty to warn of hazards that present a clear threat to the safety of the users but holds that there is no duty to retrofit or to inform users of new safety improvements). But see *Downing v. Overhead Door Corp.*, 707 P.2d 1027, 1033 (Colo. App. 1985) (when product is defective at time of sale, the manufacturer has a duty "either to remedy such defects, or if a complete remedy is not feasible, to give users adequate instructions concerning methods for minimizing danger"); *Braniff Airways, Inc. v. Curtiss-Wright Corp.*, 411 F.2d 451 (2d Cir. 1969) (suggesting that a manufacturer has a duty to remedy defects that are not discovered until after the product is sold)."

23 See *Richmond*, *supra* note 1, at 65.

24 See *id.*

25. *Id.*

26. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 11 (1997).

27. *See id.*

28. *Id.*

29. *See id.*

30. *See id.*

31. *Id.*

32. *See* Richmond, *supra* note 1, at 80. Richmond criticizes the Restatement's § 11 concerning voluntary recalls. "The assumed duty rule announced in Section 11 is unfair and makes for bad policy."

33. For example, cars, trucks and motorcycles are covered by the Department of Transportation; foods, drugs and cosmetics are covered by the Food and Drug Administration; and alcohol, tobacco and firearms are within the jurisdiction of the Department of the Treasury.

34. *See* 15 U.S.C.A. §§ 2501-2084 (1974)(approved 1999).

35. *Id.* § 2501.

36. *See The Official Website of the CPSC.* (visited March 21, 2000) <<http://www.cpsc.gov/cpscpub/pubs/103.htm>>.

37. *See Playing It Safe: Interview with Ann Brown*, 31-Oct Trial 20 (1998)[hereinafter, Trial].

38. The two other heads of the department are Commissioner Mary Sheila Gall, nominated by President Bush

and Vice Chairman Thomas Moore, nominated by President Clinton.

39. See Trial, *supra* note 28, at 20.

40. See FY 2000 House Appropriations Subcommittee Testimony: Submitted Before the VA, HUD, and Independent Agencies Committee, 106th Cong. (1999) <<http://www.cpsc.gov/test/2000.htm>>[hereinafter, Brown Testimony]. Brown also reiterated the eight strategic goals of the Commission: "Reduce the head injury rate to children from consumer products by 15%; Prevent any increase in the death rate from poisonings to children; Reduce the death rate from fires by 10%; Reduce the rate from carbon monoxide poisonings by 20%; Reduce the death rate from electrocutions by 20%; Increase public contacts through the Worldwide Web by 500% and through the Consumer Product Safety Review by 200%. Maintain capability to handle 250,000 Hotline calls annually; Attain 85% success with services CPSC provides industry through the Fast Track Recall Program, and 80% success in the Ombudsman Program; Sustain the current satisfaction of consumers with the CPSC's Hotline and Clearing House, and sustain the states' satisfaction with CPSC's State Partners Program at 90% or better."

41. See *id.*

42. See Recall Handbook (Revised 1999) <<http://www.cpsc.gov/businfo/8002.html>>[hereinafter, Handbook].

43. See 15 U.S.C.A. § 2069. The Commission assessed its largest penalty ever (\$1.5million) against Cadet Manufacturing of Vancouver, Washington. The company failed to report defective heaters to the CPSC. For further information on the settlement see *Consolidated Electrical Distributors Inc.*, 64 Fed. Reg. 43,990 (1999).

44. *Handbook*, *supra* note 42, at 4.

45. *See id.* at 8.

46. *See id.*

47. *See id.*

48. *See id.* at 6.

49. *Id.*

50. *See* 15 U.S.C.A. § 2055(a)(3).

51. *See Handbook*, *supra* note 42, at 6.

52. *See id.*

53. *See id.* Specifically, if the product caused mutilation or disfigurement, dismemberment or amputation, the loss of important bodily functions or debilitating internal disorder, injuries likely to require extended hospitalization, severe burns, severe electric shock, or other injuries of similar severity.

54. *See id.* The CPSC specifies each two-year period starting in 1991. The periods are as follows: January 1, 1991-December 31, 1992; January 1, 1993- December 31, 1994; January 1, 1995- December 31, 1996; January 1, 1997-December 31, 1998; January 1, 1999-December 31, 2000; subsequent periods repeat pattern.

55. *See id.* at 7.

56. *See id.*

57. *See* 15 U.S.C.A. § 2055(a)(3).



58. *Handbook*, *supra* note 42, at 7.
59. *See* 15 U.S.C.A. § 1278.
60. *See id.*
61. *See Handbook*, *supra* note 42, at 8.
62. *See* 15 U.S.C.A. § 2055(b)(5).
63. *See* 15 U.S.C.A. § 2064(d).
64. *See id.*
65. *See* THE CONSUMER PRODUCT SAFETY REVIEW, Vol.3, No. 1, at 3 (Fall 1998)(also available on-line <<http://www.cpsc.gov/businfo/compli.html>>). "Substantially dangerous" is defined in the CPSA in 15 U.S.C.A. § 2064. Substantially dangerous means "(1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or (2) a product defect which (because of the pattern of 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."
66. *See id.* at 1.
67. *See id.*
68. *See* Mitch Lipka, *Defects in the Nation's Product Recall System Are Putting Consumers in Jeopardy*, SUN-SENTINEL FT. LAUDERDALE, Nov. 28, 1999, at 1A. (First of a Three-Part Series)(hereinafter, Lipka 1).
69. *See Handbook*, *supra* note 42, at 12-14.

70. See Lipka 1, *supra* note 67.

71. See *id.*

72. See *id.*

73. See THE CONSUMER PRODUCT SAFETY REVIEW, *supra* note 65, at 2.

74. See *id.*

75. See *id.*

76. See *id.*

77. See Conditions Under Which the Staff Will Refrain From Making Preliminary Hazard Determinations, 62 Fed. Reg. 39,827 (1997).

78. See *id.*

79. See THE CONSUMER PRODUCT SAFETY REVIEW, *supra* note 65, at 1.

80. See *id.*

81. See *id.* at 3.

82. See *id.* at 2.

83. See *id.* at 3.

84. *Id.*

85. See *id.*

86. See Lipka 1, *supra* note 67.

87. See Brown Testimony, *supra* note 40. The CPSC was also honored by the Institute for Dispute Resolution for their innovative use of mediation in carrying out a recall of defective high temperature plastic vent pipes.

88. See THE CONSUMER PRODUCT SAFETY REVIEW, *supra* note 65, at 1. The Innovations Award is funded by the Ford Foundation and administered by the Kennedy School of Government at Harvard University in partnership with the Council for Excellence in Government.

89. See 15 U.S.C.A. § 2054(b)(1).

90. See Brown Testimony, *supra* note 40.

91. See FY 2000 House Appropriations Subcommittee Testimony: Submitted Before the VA, HUD, and Independent Agencies Committee, 106th Cong. (1999)(Testimony of Thomas H. Moore)[hereinafter Moore Testimony].

92. See *id.*

93. See Lipka 1, *supra* note 67.

94. See *id.*

95. See HR 3208, 106th Cong. (1999).

96. See *id.*

97. See Lipka 1, *supra* note 67.

98. See *id.*

99. See Moore Testimony, *supra* note 90.

100. See *id.*

101. *See Operating Plan 2000 –Budget Reductions Force Cuts in Projects* <<http://www.consumeralert.org/pubs/monitor/1999/Nov99.htm>>.

102. *See id.*

103. *See Mitch Lipka, Law Requires Agency to Keep Data Secret Companies Must Sign off on Whatever Information is Released to the Public*, SUN-SENTINEL FT. LAUDERDALE, November 30, 1999, at 15A. [hereinafter, Lipka 2].

104. *See* 15 U.S.C.A. § 2055(b)(1).

105. *See Frances E. Zollers, The implementation of the Consumer Product Safety Act Section 6(b) and the Conflict with the Freedom of Information Act Policies*, 39 ADMIN. L. REV. 61, 63. (1987) [hereinafter, Zollers].

106. *See id.* at 65.

107. *See id.* at 63.

108. *See id.*

109. *See* Lipka 2, *supra* note 102.

110. *See id.*

111. *See id.*

112. *See Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

113. *See* Zollers, *supra* note 104, at 65.

114. *See* HR 3208, 106th Cong. (1999). Blagojevich proposed the bill in memorandum of Daniel Keysar, a 16 month child who was killed by the collapse of a defective crib.

The Chicago boy was in a licensed day care in Lincoln Park that had been inspected just 8 days before the incident. The crib had been recalled by the CPSC in 1993 but the day care facility had not known of the recall. Danny was the 12th child to die in this type of defective crib. Three months later a 13th child died in Fair Haven, NJ in the same type of crib.

115. *See id.*

116. *See* H.R. 3208(a).

117. *See id.*

118. *See id.*

119. *See* H.R. 3208(b).

120. *See id.*

121. *Id.*

122. *See id.*

123. *See* H.R. 3208(c).

124. *See* H.R. 3208(d).

125. *See id.*

126. *See id.*

127. *See* H.R. 3208. Section 4. Authorization of Appropriations.

128. *Id.*

129. *See* Brown Testimony, *supra* note 40. Chairman Brown estimates that the cost of deaths, injuries and property damage caused by hazardous products to be approximately \$400 billion annually.

130. *See generally*, Lipka 2, *supra* note 102.

131. *See* H.R. 3208(5).

132. *See* H.R. 3208(6).

133. *See* Lipka 2, *supra* note 102.

