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## A New Consumer Remedy: Product Recall

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# LOYOLA CONSUMER LAW REPORTER

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## Alternative Dispute Resolution and Consumer Protection: An "Odd-Couple" Thriving in the Offices of State Attorneys General

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Alternative dispute resolution ("ADR") and consumer protection are an "odd-couple." ADR elicits images of peacemaking while consumer protection evokes thoughts of rigorous governmental regulation and aggressive law enforcement on behalf of the consuming public. Both ADR and consumer protection have had a roller-coaster history of application in the United States. The emergence of each as a concept with significant social impact has been cyclical, and, historically, their respective cycles have been "out of sync." Only in the last twenty years have their cycles been merged successfully in the public's interest. Surprisingly, this has occurred where one might least expect—in the law enforcement activities of the state attorneys gen-

eral. This article will briefly examine 1) the nature of ADR and consumer protection, 2) the cyclical history of ADR and consumer protection and their recent synchronization, and 3) the operation of ADR programs in consumer protection divisions of several representative state attorneys general offices.

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## A New Consumer Remedy: Product Recall

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### Scope of the Problem

One of the principal focuses of the American tort law system is the two-pronged objective of discouraging the marketing of unsafe, dangerous, or defective products<sup>1</sup> and, where that is not accomplished, compensating those injured by or because of such products.<sup>2</sup> Until recently, the law has devoted little or no effort to getting products that have proved unsafe, dangerous or defective out of the homes, schools and playgrounds of consumers.

For the purposes of this article, it is immaterial whether the product was (a) defectively designed or manufactured, or (b) considered to be safe and beneficial to consumers when manufactured and distributed, but later determined to be dangerous.<sup>3</sup> Once such products are placed in the chain of distribution, whether

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these products have a relatively long useful life in the hands of the consumers, such as an electrical appliance or a car, or whether they have a short useful life but a relatively long shelf life, such as sanitary products or canned food, the traditional discouragement/compensation dichotomy is not an effective means of preventing or reducing loss or injury.

The legal system has responded both judicially and legislatively to the problem of defective products which have already reached the distributor or the consumer. While there are a number of statutes regulating consumer products, the most pervasive is the Consumer Product Safety Act of 1972.<sup>4</sup>

The nature of the response has varied and grown more prospective or proactive (i.e., geared to preventing further or future injuries rather than merely compensating for past injuries). Early on, courts concluded that when a product is inherently dangerous, the manufacturer or distributor of that product has a duty to warn consumers of the dangers involved in using the product at the time of distribution.<sup>5</sup> Many of the early cases involved disputes over the following: (a) whether the danger was patent (thereby not requiring a warning) or latent (thereby requiring warning);<sup>6</sup> (b) whether a warning was required where the danger was remote or the possibility of the injury was small;<sup>7</sup> and (c) whether the warning was adequate,<sup>8</sup> especially in light of the sophistication or lack of sophistication of the user.<sup>9</sup> The duty to warn by label, instructions, etc., however, is of little value when the product has already reached the consumer. Consequently, courts have recently created a continuing duty to warn of dangers involved in the use of a product even after the product is in the hands of the consumer.<sup>10</sup> However, even here, the courts are split over whether the continuing duty to warn is limited to circumstances where the risks associated with the product were unknown at the time of the design or manufacture,<sup>11</sup> or whether the duty extends as far as later discovered data or state of the art developments.<sup>12</sup>

Beyond the possibility of a continuing duty to warn, courts provide no general remedy for defective products in the hands of consumers. A leading text flatly states that "[a] manufacturer is not under a legal duty to recall an allegedly dangerous product absent a statute requiring such a recall."<sup>13</sup> In a small number of cases, for example, *O'Gilvie v. International Playtex, Inc.*,<sup>14</sup> the courts have fashioned novel recall remedies.

In *O'Gilvie*, the court conditioned a reduction of the punitive damage award upon the defendant's agreement to a "voluntary" product recall.<sup>15</sup>

### The Development of Interest in Consumer Product Recalls

While the Food and Drug Administration had, for a period of time, the statutory authority to recall certain medical devices, the impetus to expand this remedy on a broad basis occurred in the courts. In 1970, Consumers Union filed a complaint in district court to force the Department of Health, Education and Welfare to compel the recall of several "toys that don't care," including lawn darts.<sup>16</sup> Although a recall was not ordered by the court, the attendant publicity focused attention on the question of whether product recall was a desirable remedy. Ironically, the issue of lawn darts is still in the news. The Consumer Products Safety Commission voted on October 28, 1988, eighteen years after the filing of the original suit, to ban the sale of lawn darts and remove them from stores but not to require a recall.<sup>17</sup> The tension between recall and the prior remedy of mandatory safety warnings is illustrated by an interview of a toy store manager in connection with the lawn darts ban. "I guess the potential is there for [lawn darts] to be dangerous," he said, "but I think they would be all right if there were proper warnings and people used common sense when they were playing with them."<sup>18</sup>

Partly as a result of the wave of consumerism in the 1960's and partly as a result of dissatisfaction with piecemeal statutory attempts to cover specific areas such as flammable fabrics, toys, poisons, etc., a National Commission on Product Safety was established in 1967. The Commission completed its final report on June 30, 1970.<sup>19</sup> Legislation based on the report was introduced in Congress, and on October 27, 1972, President Nixon signed the Consumer Product Safety Act of 1972 ("the Act").<sup>20</sup>

### The Consumer Product Safety Commission

The Act created and empowered the five member Consumer Product Safety Commission ("CPSC"), granting it jurisdiction over "consumer products," which are defined as:

...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 tem-

porary household or residence, a school, in recreation, or otherwise...<sup>21</sup>

While the CPSC is empowered under Section 12 of the Act, in the case of an "imminent hazard," to proceed to federal court to enjoin the distribution of a product,<sup>22</sup> this remedy is not potentially as far reaching as the recall guidelines which may be issued by the CPSC pursuant to Section 15 of the same Act, entitled "Notification and Repair, Replacement, or Refund."<sup>23</sup> Over one hundred products are subject to "corrective actions" or recalls under Section 15 of the Act each year.<sup>24</sup>

Two experts noted that "Congress offered scant guidance as to what constitutes a defect under Section 15 and no court has interpreted its meaning."<sup>25</sup> However, the CPSC has by interpretative rule codified its view of the recall provision.<sup>26</sup> The CPSC's interpretative rule, discussed in more detail below, notes that defects that can cause "death or grievous bodily injury (e.g., mutilation, amputation/dismemberment, disfigurement, loss of important bodily functions, debilitating internal disorders, severe burns, severe electric shocks, and injuries likely to require extended hospitalization)" must be reported and, even absent such risk, "other information may indicate a reportable defect."<sup>27</sup> The rule also gives a number of examples of what the CPSC considers reportable defects.<sup>28</sup>

Besides jurisdiction over "consumer products" under the Act, the CPSC administers the Federal Hazardous Substance Act,<sup>29</sup> the Poison Prevention Packaging Act,<sup>30</sup> the Flammable Fabrics Act,<sup>31</sup> and the Refrigerator Safety Act.<sup>32</sup> The CPSC, however, does not have jurisdiction over tobacco products, motor vehicles, motor vehicle equipment, boats, pesticides, fire arms and ammunition, aircraft and related parts, and drugs, medical devices, and cosmetics. Jurisdiction over those products rests with other federal agencies.

The Directorate for Compliance and Administrative Litigation, one of the CPSC's six directorates, is responsible for investigating potentially hazardous consumer products. The Directorate is informed of potentially defective consumer products by consumer complaints, or reports submitted to it by manufacturers or sellers under CPSC regulations. In order to encourage consumer complaints, the CPSC has established both a toll-free telephone hotline (1-800-638-2772) and a toll-free teletypewriter hotline for the hearing impaired (1-800-638-8270) (in Maryland 1-800-638-8104). The CPSC may also initiate investigations of consumer products without receiving a consumer complaint.

If the CPSC determines that a consumer product contains a "substantial product hazard,"

the CPSC may order the manufacturer or seller to warn the public of the hazardous conditions. In addition, the CPSC may order the manufacturer or seller to recall any such defective product and repair or replace those which are returned. The recall remedy, as noted earlier, was a major change away from traditional tort law. Although prior to the formation of the CPSC some manufacturers voluntarily recalled defective products, this was the exception rather than the rule. Under traditional tort law, the general rule was to provide compensation for past injury. By contrast, recalls are geared towards preventing future injury.

### The Recall Process

In order for the CPSC to order warnings or recalls, it must first determine that the product contains a "substantial product hazard."<sup>33</sup> Section 15(a) of the Act defines a substantial product hazard as:

- (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.

The second definition has been the source of most CPSC recalls because comparatively few "product safety rules" have been issued by the CPSC.

Section 15(b) of the Act requires every manufacturer or seller of consumer products to notify the CPSC of the failure of any product to comply with a CPSC safety standard. In addition, notification of any product which contains a potentially substantial product hazard is required, unless the manufacturer is certain that the CPSC has knowledge of the product defect or of the failure to comply with the standard. The reporting requirement under Section 15(b) arises when the manufacturer or retailer obtains information that "reasonably supports the conclusion" that a product defect "could create" a substantial product hazard. This standard for reporting reflects a congressional intent to mandate product defect reporting in less clear or less compelling situations, and at the earliest moment.

The CPSC guideline for the reporting of product hazards<sup>34</sup> sets forth the procedures and timetables for manufacturers, distributors and retailers to follow, and mandates that the CPSC be notified.<sup>35</sup> It is sometimes difficult for manufacturers, distributors, and retailers to determine whether a defect exists, or whether it could create a substantial product hazard, because not all product defects necessarily have safety risks, and some may have only minor

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safety risks. Thus, manufacturers and sellers must exercise critical judgment in determining whether to report a defect to the CPSC.

Experienced practitioners who represent manufacturers or sellers rarely rely solely on the judgment of the manufacturer or seller to determine whether the defect may be a substantial product hazard. Rather, practitioners frequently encourage their clients to retain an independent consultant to advise them in making a determination whether the product creates a substantial hazard. An impartial consultant also may be necessary to prevent obvious client bias, and likewise may protect against a hasty determination that the product is in fact hazardous and thus reportable.

The initial determination by the manufacturer or seller of whether a substantial product hazard exists (especially if a negative conclusion is reached) should be well documented by the manufacturer or seller in the event the CPSC later seeks civil or criminal penalties based on a failure to report. High level management, as well as corporate and outside legal counsel, should be involved in the decision because of the potential legal and market-place consequences of not reporting (should it later be determined that a report should have been made) or of reporting (when it was not required).

Once the decision to report has been made, the product defect should be reported by the manufacturer or seller to the Product Defect Correction Division of the CPSC. The CPSC policy guideline indicates that the report of the defect should be made immediately, but reporting firms are allowed ten days to conduct a "reasonable, expeditious investigation in order to evaluate the reportability of a death or grievous bodily injury or other information."<sup>36</sup>

The CPSC guideline indicates that the CPSC may seek redress for the failure to comply with the ten-day period for reporting set forth in the guideline. As a practical matter, the CPSC does not sanction companies which take longer than ten days to conduct an investigation and make a report to the CPSC where the delay can be shown to be reasonably necessary. Apparently, the CPSC is reluctant to discourage manufacturers and sellers from reporting potential product defects by enforcing the deadline too strictly.

If the manufacturer or seller, after consulting its lawyer, concludes that there is (a) a failure to comply with the safety rule, or (b) a defect in the product may be a substantial product hazard, the manufacturer must report the results of its investigation to the CPSC within twenty-four hours,<sup>37</sup> by telephone or in writing. If by tele-

phone, the notification must be followed by a written report within forty-eight hours.<sup>38</sup> The initial report should identify and describe the product, provide the name and address of the reporting party, describe the nature and extent of the possible defect or failure to comply with the applicable safety standard, describe the nature and extent of the injury or risk of injury, furnish the name and address of the informant, and report other detailed information readily available.

Following the initial report, the reporting company must submit a full report in compliance with the policy guidelines. The time to file the full report usually is set forth in a letter from the CPSC staff to the company after the initial report is received. It is a good practice to inform the CPSC in the initial report of the projected time necessary to prepare and file the full report. Obviously, if the full report cannot be filed by the dates established by the CPSC, the company should request additional time to submit it. At a minimum, the full report should include the following:

1. The date when the information of the potential defect or noncompliance with the safety standard was received.
2. The total number of products involved.
3. The dates when the products were manufactured, imported, distributed, and/or sold at retail.
4. The number of products in the possession of various parties, such as the number held by wholesalers, retailers, and consumers.
5. A description of the changes that will be made in the design or manufacture of the product, if necessary, to remedy the potential defect.
6. A description of the information given or to be given to consumers of the details for the proposed refund, replacement, and/or repair.
7. A description of the marketing and distribution channels of the manufacturer.

The above discussion concerned situations in which the initial report of a possible safety defect came from the manufacturer or retailer, because this is the largest and most important source of reports. Potential hazards also come to the CPSC's attention by way of agency inspections, complaints from consumers, and reports from competing manufacturers. In such cases, the CPSC assigns a compliance officer to investi-

gate the suspect product. After investigation and consultation with CPSC epidemiologists and engineers, the compliance officer may conclude that a substantial hazard exists. If so, he will contact the manufacturer or retailer by letter or visit the site in order to gather the necessary information.

If the data reveal a substantial hazard, the officer will recommend action to the Director of the Division of Corrective Actions. Upon the Director's concurrence, a "case opening letter" is sent with a procedure, comparable in result to that described for substantial hazard reports by manufacturers or retailers.<sup>39</sup> If the matter cannot be settled, a formal adjudicative proceeding is begun and an involuntary recall may be ordered.

The CPSC may obtain a recall either voluntarily from the manufacturer or seller, pursuant to a consent order under Section 15 of the Act, or under a formal proceeding authorized by the Act. Fortunately for the CPSC and for consumers, most recalls are voluntary. Therefore, the remaining discussion will center on voluntary recalls.

### **Reaching the Consumer**

Once a seller agrees to a voluntary recall, the seller must submit a corrective action plan to the CPSC for review and approval.<sup>40</sup> This plan sets forth the manner in which consumers will be warned and how the products will be recalled for repair or replacement. Specific details must be given as to the language and distribution of the warnings, and the recall and repair or replacement procedures.

In practice, warnings can take several forms. Frequently, manufacturers provide warranty registration cards or other registration cards for consumer products, especially the more expensive appliances. Those cards can be used by the manufacturer to trace product owners. However, not all purchasers return registration cards to the manufacturer; many manufacturers do not even distribute such cards with their products. Accordingly, reaching unregistered consumers can be difficult.

Manufacturers, sellers and the CPSC have developed various alternatives to reach unregistered consumers. First, display materials may be furnished by manufacturers to retailers. For example, the retailers may be requested to place a poster furnishing the details of the recall at cash registers. Frequently, letters are sent to distributors and retailers with materials which the sellers are requested to make available to product users.

The CPSC often requires the issuance of a press release on the recall. This press release is issued by the CPSC and is distributed to the

media, which generally reprints or broadcasts its contents. The manufacturer or seller should attempt to be involved in the drafting of the press release. Surprisingly, press releases have been effective, even where as few as 400 individual consumer products are involved. Unfortunately, however, CPSC press releases do not reach every product user.

As a supplemental method of reaching consumers in recall campaigns, manufacturers often establish a toll-free telephone number. Thus, consumers may contact the manufacturer to verify whether a product is being recalled and also learn more about the details of the campaign.

The major problem continually facing sellers and the CPSC is reaching unregistered consumers. Accordingly, in some situations the CPSC has attempted to have manufacturers or sellers agree to go beyond registration cards, display materials, and press releases, and has attempted to persuade sellers to undertake paid advertising campaigns to reach the unknown consumers. Although sellers are reluctant to agree to such advertising because of the costs and the potential negative market impact, nevertheless, there have been several voluntary recall advertising campaigns. Because there is no clear authority for requiring an advertising campaign, the CPSC is more responsive to the manufacturer's request for a role in shaping the form and language of the advertisements.

As indicated above, other federal agencies have jurisdiction over specific consumer products. The National Highway Traffic Safety Administration enforces the National Traffic and Motor Vehicle Safety Act, which requires manufacturers who discover safety defects in automobiles to remedy the defects at no cost to the consumer.<sup>41</sup> The Food and Drug Administration ("FDA") may order the recall of certain medical devices and other products under the Food, Drug, and Cosmetic Act.<sup>42</sup> Manufacturers have agreed to these recalls despite the fact that the FDA lacks specific statutory authorization for such orders. Under the National Mobile Home Construction and Safety Standards Act, the Department of Housing and Urban Development may order mobile home manufacturers to notify the purchasers of defects.<sup>43</sup> The U.S. Coast Guard, pursuant to the Federal Boat Safety Act, may order the repair of certain boats that do not comply with specific safety standards or are otherwise defective.<sup>44</sup> The U.S. Environmental Protection Agency is responsible for recalls of vehicles or engines not meeting emission standards.<sup>45</sup>

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### Conclusion

A safety-motivated product recall is, indisputably, a more effective method of reducing injuries from products already in the hands of consumers than the traditional tort compensation system. Whatever the relative cost-effectiveness of other alternatives may be, the product recall is still preferable. Insofar as the recall is effective, it eliminates the need to compensate for injuries from product defects which develop after the sale or distribution of the product.

There are, however, serious questions about the overall effectiveness of product recall. First, how effective are warnings,<sup>46</sup> whether in the form of warning labels, operating instructions or CPSC-required corrective action plans (which can be warnings as well as recalls)? Second, while recalls of automobiles<sup>47</sup> and major appliances, for which there is usually a purchaser registration for warranty purposes, are generally successful, recall results for other products are often very low. As one commentator observed, "[i]t is interesting to note that, for a product which is entirely in the hands of consumers, with no lag between distribution and the recall, no notice, no home repair, and which is not a 'sports' product, the [recall] success rate is only 7%, so that low rates of return for products should not be surprising."<sup>48</sup> Moreover, the risks of a needless recall include: a reluctance to report borderline substantial hazards, damage to the reputation of the product, the manufacturer, and the retailer, and the possibility that the fact of a recall may be admitted into evidence in injury cases in spite of the general exclusionary rule set forth in Federal Rule of Evidence 407.<sup>49</sup>

Perhaps the existence of recall authority under the Consumer Product Safety Act and other federal statutes will encourage courts to follow the example set by the court in *International Playtex*,<sup>50</sup> *supra*. Conditioning the reduction of a punitive damage award upon a defendant's agreement to a product recall would go a long way toward removing defective products from the marketplace. Such a condition would also allow punitive damage awards in product liability cases to play the role originally anticipated for them by the courts.

1. Williams, *The Aims of The Law of Tort*, 4 CURRENT LEGAL PROBS. 137 (1951).
2. PROSSER & KEETON ON TORTS, 4 (5th ed. 1984).
3. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734 (1983).
4. 15 U.S.C. 2051-83.
5. See, e.g., *Howard v. Avon Products, Inc.*, 155 Colo. 444, 395 P.2d 1007 (1964).
6. *Garrison v. Heublin, Inc.*, 673 F.2d 189 (7th Cir. 1982).
7. *Davis v. Wyeth Laboratories, Inc.*, 399 F.2d 121 (9th Cir. 1968).

8. *LeMarbe v. Dow Chemical Co.*, 102 Ill. App. 3d 587, 430 N.E.2d 177 (1981).
9. *Antcliff v. State Employees Credit Union*, 414 Mich. 624, 327 N.W.2d 814 (1982).
10. *Gracyalny v. Westinghouse Electric Corp.*, 723 F.2d 1311 (7th Cir. 1983).
11. *Alm v. Aluminum Co. of America*, 687 S.W.2d 374 (Tex. App. 1985).
12. *Cover v. Cohen*, 61 N.Y.2d 261, 461 N.E.2d 264 (1984). See also Schwartz, *The Post-Sale Duty to Warn*, 58 N.Y.U. L. REV. 892 (1983).
13. AMERICAN LAW OF PRODUCT LIABILITY 3d32:8 (1987), (citing *Smith v. Firestone Tire & Rubber Co.*, 755 F.2d 129 (8th Cir. 1985)).
14. 609 F. Supp. 817 (D. Kan. 1985).
15. See Note, *Civil Procedure—Remittitur of Punitive Damages in Exchange for Product Recalls—O'Gilvie v. International Playtex*, 34 U. KAN. L. REV. 823 (1986).
16. *Consumers Union of United States, Inc. v. Richardson*, No. 3467-70 (D. D.C. filed Nov. 23, 1970).
17. Chicago Tribune, Oct. 29, 1988, 1 at 3.
18. Daily Herald, Oct. 29, 1988, 1 at 5.
19. See generally, THE CONSUMER PRODUCT SAFETY ACT (BNA) (1973).
20. Pub. L. No. 92-573, 86 Stat. 1207 (1972).
21. 15 U.S.C. 2052 (Supp. IV 1986).
22. 15 U.S.C. 2061 (1982).
23. 15 U.S.C. 2064 (1982).
24. Murphy and Rubin, *Determinants of Recall Success Rates*, 11 J. PROD. LIAB. 17 (1988).  
Under the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. 1381-1431 (1982), over 133 million motor vehicles have been recalled. Similarly, the Food and Drug Administration, under an essentially voluntary program, recalls many hundreds of products each year.  
See Schwartz and Adler, *Product Recalls: A Remedy in Need of Repair*, 34 CASE W. RES. 401 (1984).
25. Schwartz and Adler, *supra* note 24, at 430.
26. 16 C.F.R. 1115 (1988).
27. 16 C.F.R. 1115.12(c)-(d) (1988).
28. 16 C.F.R. 1115.4 (1988).
29. 15 U.S.C. 1261, *et seq.* (1982).
30. 15 U.S.C. 1471, *et seq.* (1988).
31. 15 U.S.C. 1191, *et seq.* (1982).
32. 15 U.S.C. 1211, *et seq.* (1982).
33. 15 U.S.C. 2064(a) (1982).
34. 16 C.F.R. 1115 (1988).
35. 16 C.F.R. 1115.4 (1988).
36. *Id.*
37. 16 C.F.R. 1115(e) (1988).
38. 16 C.F.R. 1115.3(c) (1988).
39. For a description of this process, see Schwartz and Adler, *supra* note 24, at 433-38.
40. 16 C.F.R. 1115.20 (1980).
41. 15 U.S.C. 1381, *et seq.* (1982).
42. 21 U.S.C. 301, *et seq.* (1982).
43. 42 U.S.C. 5401, *et seq.* (1982).
44. 46 U.S.C. 1451, *et seq.* (1982).
45. 42 U.S.C. 7521 (1982).
46. A case clearly on point is the required warning labeling on cigarettes. Do the warnings (and warning symbols) that are now common become merely "white noise" that we filter out totally? See also Goodman, *Obedying All The Warnings A Full-Time Job*, Daily Herald, Oct. 28, 1988.
47. Schwartz and Adler, *supra* note 24, at 420 ("While about 50% of car owners respond to recalls, only about 10% of consumers respond to recalls under the CPSC's jurisdiction.")
48. Murphy and Rubin, *supra* note 24, at 27.
49. See Note, *Excluding Subsequent Design Modifications in Product Liability Litigation*, 29 ARIZ. L. REV. 622 (1987).
50. See *supra* note 14.

## Alternative Dispute Resolution and Consumer Protection (from page 2)

Arbitration, mediation, and conciliation are the principal ADR processes. These processes are sometimes used in conjunction with fact-finding (commonly used in labor negotiation and mediation), a neutral expert, or both. Combinations of these processes include Med-Arb (a combination of mediation and arbitration), the mini-trial (akin to arbitration), and the summary jury trial (a condensed trial before a jury whose verdict is advisory). In the state attorneys general offices, the ADR processes are tailored to meet the specific needs of each office.

### Consumer Protection Defined

One commentator has defined consumer protection, or “consumerism,” as:

an effort to put the buyer on an equal footing with the seller. Consumers want to know what they’re buying. What they’re eating. How long a product will last. What it will do and will not do. Whether it will be safe for them and/or the environment.... Consumers do not want to be manipulated, hornswoggled or lied to. They want truth, not just in lending, labeling and packaging, but in everything in the whole, vast, bewildering marketplace.<sup>5</sup>

This definition suggests consumers need protection from sellers who deliberately, through acts of commission or omission, defraud or injure them. Focusing on the precise interest to be protected, the same author points to the following testimony presented to Congress in 1969 by a representative of the Consumers’ Union of the United States:

The consumer interest is not the interest of individuals as such, but of all citizens viewed from the point of view of consumption.... [It concerns] itself with the question of both the best use of productive resources from the point of view of consumers and also the matter of distribution of these resources.... It should be considered at the highest levels of government, not only to increase consumption, but also to forcefully contribute to creating a better economic structure and thus contribute to the creation of a better society....

The consumer interest cuts across the entire spectrum of economic problems.<sup>6</sup>

Thus, consumer protection is generally concerned with the fundamental nature of the seller-consumer relationship, and strikes at the very heart of our economy. Since ADR is primarily concerned with the resolution or management of conflicts, its application to consumer protection in recent years is not surprising. But the reason ADR was not applied to consumer protection until about the last third of this cen-

tury is not completely clear. In order to better understand this current “marriage” of movements, particularly in the public sector, and to predict the potential for future co-existence, one needs to examine their history and the social, economic, and political factors which precluded their earlier association.

### Early Applications of Alternative Dispute Resolution in the U.S.

As an identifiable concept, ADR is much older than consumer protection. ADR can be traced to ancient Greek culture, or before.<sup>7</sup> The use of ADR as a process outside the formal legal system, spread throughout Europe over succeeding centuries and surfaced in America during the early colonial period.<sup>8</sup>

On the basis of religious beliefs, Pilgrims, Quakers, and Mormons all separated themselves from external legal regulation.<sup>9</sup> Disagreements which arose in these close-knit religious communities were invariably settled through various forms of mediation. As one commentator has noted:

... [i]nsular religious colonies which avoided the legal system had two motives. The communities sought, first, to regulate conduct based on Christian principles and, second, to establish and preserve community harmony. Litigation was antithetical to both of these goals; it represented self-aggrandizement at the expense of group security, ignoring important religious tenets. Those who were unwilling to accept these restrictions could not be tolerated, and were expelled from the community.<sup>10</sup>

Nineteenth century communities attempted to follow their seventeenth century predecessors and adopt non-court methods of resolving disputes.<sup>11</sup> In the early nineteenth century, Pennsylvania, New York, Massachusetts, and South Carolina experimented with arbitration as an alternative to litigation. But these experiments were short-lived. A skeptical judiciary and a dissatisfied, competitive mercantile community caused non-legal forms of dispute settlement to virtually disappear.<sup>12</sup> By the mid-nineteenth century, the once widespread use of ADR processes in religious, community, and mercantile settings had substantially abated. Social change had diluted community insularity; religious and immigrant minorities were being acculturated into mainstream society.<sup>13</sup> Immigrants became more inclined to turn to the courts to seek justice, though some ethnic communities clung to their culture-dictated methods of dispute resolution.

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