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THE HAND THAT *TRULY* ROCKS THE CRADLE: A REPRISÉ OF INFANT CRIB SAFETY, LAWSUITS AND REGULATION FROM 2007-2012

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And

*Melissa A Montuori***

The U.S. Consumer Product Safety Commission (CPSC) is charged with protecting the public from unreasonable risks of injury or death associated with the use of the thousands of consumer products under the agency's jurisdiction. Deaths, injuries, and property damage from consumer product incidents cost the nation more than \$900 billion annually. CPSC is committed to protecting consumers and families from products that pose a fire, electrical, chemical, or mechanical hazard. CPSC's work to ensure the safety of consumer products—such as toys, cribs, power tools, cigarette lighters and household chemicals—contributed to a decline in the rate of deaths and injuries associated with consumer products over the past 30 years. (Statement of purpose from the website of the Consumer Product Safety Commission (“CPSC”).¹

I. INTRODUCTION: CHILD PROTECTION AND THE CPSC

Few questions are as important for new parents as “where will the baby sleep”? The infant crib is one of the biggest, most expensive, and potentially most-researched purchases on the shopping list for the new arrival. After all, newborns sleep an

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¹ See <http://www.cpsc.gov/cpscpub/prerel/prhtml2/12273.html>.

average of 15-16 hours per day.² What could be more important than a crib that is comfortable, attractive, and above all else, safe? Who is or should be responsible for the safety of our children?

The U.S. Consumer Product Safety Commission (“CPSC”) is an independent agency founded in 1972 during the Nixon administration. It is “charged with protecting the public from unreasonable risks of serious injury or death from thousands of types of consumer products.”³ As one commentator noted, “The CPSC has jurisdiction over more than 15,000 kinds of consumer products used in and around the home, in sports, recreation and schools.”⁴ This jurisdiction was granted by the 1972 Consumer Product Safety act (CPSA).⁵ The act was passed with the goal of protecting the public from unsafe consumer products, standardizing the method of reporting injuries caused by products, and conducting research targeted at making products safer.⁶ In order to carry out these aims, the act granted the CPSC the power to investigate products that may present a hazard to the public.⁷ CPSA Section 2064(d) stipulates that⁸ a manufacturer, distributor, or retailer of a consumer product distributed in the United States that receives information which would reasonably support a conclusion that one of its products contains a defect that could create a “substantial product hazard”⁹ or an “unreasonable risk of serious injury or death”¹⁰

² *How Much Sleep Do Children Need?*, WEBMD, <http://www.webmd.com/parenting/guide/sleep-children> (last updated Feb. 6, 2012).

³ *About CPSC*, U.S. CONSUMER PROD. SAFETY COMM’N, <http://www.cpsc.gov/about/about.html> (last visited Aug. 18, 2012). In creating the CPSC, Congress acknowledged that “the 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.” 15 U.S.C. § 2051(a)(2) (2006). The term “consumer product” is generally considered to be synonymous with a “consumer good.” The term “consumer goods” is generally understood to mean goods “used or bought for use primarily for personal, family, or household purposes.” *See, e.g.*, *Aloha Lumber Corp. v. Univ. of Alaska*, 994 P.2d 991, 1002 (Alaska 1999).

⁴ Leslie Cornell, *Products Liability and Internet Prevention*, 24 LOY. CONSUMER L. REV. 254, 256 (2011).

⁵ Brandon D. Coneby, *A “Thrilling” Proposal: Federal Regulation of America’s Modern Day Scream Machines*, 39 DUQ. L. REV. 787, 792 (2001).

⁶ *Id.* at 793.

⁷ *Id.*

⁸ 15 U.S.C. § 2064(d) (2006).

⁹ 15 U.S.C. § 2064(b)(3) (2006).

must inform the CPSC of the existence of that defect.¹¹

The regulatory authority of the CPSC extends to a wide variety of parties typically involved in modern products liability litigation: manufacturers, distributors, retailers, and importers of consumer products. Unlike many regulatory agencies that must meet “threshold requirements” in terms of volume of business, sales, number of parties involved in the manufacturing process, etc., the CPSC maintains authority regardless of the size, number of employees or revenue of a business handling consumer products.¹² The CPSC as an agency bears primary responsibility for “obtaining the recall of products or arranging for their repair, conducting research on potential product hazards, informing and educating consumers through the media, state and local governments, private organizations, and by responding to consumer inquiries.”¹³

In 2008, Congress took steps to modernize the existing

¹⁰ 15 U.S.C. § 2064(b)(4) (2006).

¹¹ A defect may be considered to be a “fault, flaw, or irregularity that causes weakness, failure, or inadequacy in form or function.” *See* 16 C.F.R. § 1115.4. The regulations define the term “substantial product hazard” as either (1) a failure to comply with an applicable consumer product safety rule, which failure creates a substantial risk of injury to the public, or (2) a product defect which creates a substantial risk of injury to the public. *See id.* § 1115.2(a). The regulations set out an explanation of what constitutes an *unreasonable risk* in Section 1115.6(b). It requires that the “firm” should examine “the utility of the product, the utility of the aspect of the product that causes the risk, the level of exposure of consumers to the risk, the nature and severity of the hazard presented, and the likelihood of resulting serious injury or death.” *Id.* § 1115.6(b). “Serious injury” involves “grievous bodily injury,” which includes “injuries necessitating hospitalization, which requires actual medical or surgical treatment, fractures, lacerations requiring sutures, concussions, injuries to the eye, ear, or internal organs requiring medical treatment, and injuries necessitating absences from school or work of more than one day.” *Id.* § 1115.6(c).

¹² 2011-2016 U.S. Consumer Product Safety Commission Strategic Plan, U.S. CONSUMER PROD. SAFETY COMM’N 3 (2011) [hereinafter STRATEGIC PLAN], available at <http://www.cpsc.gov/cpsc/pub/pubs/reports/2011strategic.pdf>.

¹³ Cornell, *supra* note 4, at 257 (citing STRATEGIC PLAN, at 3). In addition, the CPSC is charged with administering several additional laws, dealing with specific areas of consumer product safety: Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 (1953); Federal Hazardous Substances Act, 15 U.S.C. 1261-1278 (1960); Poison Prevention Packaging Act, 15 U.S.C. §§ 1471-1477 (1970); Children’s Gasoline Burn Prevention Act, Pub. L. No. 110-278, 122 Stat. 2602 (2008); and the Virginia Graeme Baker Pool and Spa Safety Act, 15 U.S.C. §§ 8001-8008 (2008).

regulatory framework of the CPSC by enacting the Consumer Product Safety Improvement Act (“CPSIA”).¹⁴ Reflecting a major change in technology and in the way that Americans (and others) receive and disseminate information relating to consumer products, the CPSIA created an “*online, publicly available, and searchable database of product-related injuries*.” Congress created this online consumer database to promote a more preventative approach to consumer safety, wherein consumers could gather near-immediate alerts to dangerous products and risks of harm.¹⁵ This new online database was launched in March of 2011, pursuant to the deadline set by Congress in the CPSIA.¹⁶

The CPSIA, which became law on August 14, 2008, grants the CPSC the authority to require the manufacturer, distributor, or retailer of a consumer product that poses a “substantial product hazard”¹⁷ to provide *public notice* of such hazard and to repair or replace the product, or offer a refund of the purchase price of the product.¹⁸ The CPSIA grants the CPSC the authority to *recall* products that fail to comply with other rules and regulations, standards, or product bans that the CPSC chooses to enforce under other statutes or administrative regulations. The CPSC can also order the *corrective actions of a recall* or the “submission of a corrective action plan covering all brands of the product that have the same design and manufacturing process” for a product that contains a defect that creates a “substantial product hazard” or an “unreasonable risk.”¹⁹ Importantly, the CPSC may also require *repair or refund*, thus removing the choice of remedy from a manufacturer. The CPSC has the authority to withdraw approval of corrective action plans it deems ineffective and to order amendments to any corrective plans when recalls do take place. Finally, and perhaps most importantly from the standpoint of the consumer, the CPSIA

¹⁴ Consumer Product Safety Improvement Act of 2008, Pub. L. No. 110-314, 122 Stat. 3016 (codified at 15 U.S.C. §§ 2051-2089).

¹⁵ Cornell, *supra* note 4, at 255 (emphasis added) (citing Lyndsey Layton, *Consumer Product Safety Commission to launch public database of complaints*, WASH. POST, Jan. 10, 2011, www.washingtonpost.com/wp-dyn/content/article/2011/01/09/AR2011010902730.html).

¹⁶ For specific information concerning the online database, see Consumer Product Safety Improvement Act of 2008, 15 U.S.C. § 2055a (2006).

¹⁷ See 15 U.S.C. § 2064(d)(1)-(3) (2006).

¹⁸ See 15 U.S.C. 2064 (2006).

¹⁹ See TERRENCE F. KIELY & BRUCE L. OTTLEY, UNDERSTANDING PRODUCTS LIABILITY LAW, 210 (LexisNexis 2006).

prohibits the sale and export of recalled products.²⁰ On the importance of these key regulatory changes, one commentator notes that, “While the vast majority of recalls have been, and will continue to be, ‘voluntary’ the CPSC, under the CPSIA, is in a stronger position to carry out negotiations concerning corrective action plans.”²¹

It should be noted, however, that the CPSC does not independently test or certify products before they reach the consumer because it lacks the legal authority to do so. Moreover, the jurisdiction of the agency is limited. It does not have jurisdiction over products such as automobiles and other on-road vehicles, tires, boats, alcohol, tobacco, firearms, food, drugs, cosmetics, pesticides, and medical devices, which are all controlled by other federal regulatory agencies—most notably the Food and Drug Administration or the U.S. Department of Agriculture.²²

II. THE ISSUE DEFINED

From 1978 to 2012, the CPSC recorded more than 100 crib recalls and product warnings. More than half were issued between 2007-2012.²³ Defects in infant cribs have varied from detaching or badly-spaced slats, to issues relating to paints and finishes that contain harmful substances (such as lead). There have also been problems with mattress supports and hardware used on cribs. One of the most recent and highly publicized controversies concerned detaching drop-sides on cribs.²⁴

The following factual and statistical information is

²⁰ 15 U.S.C. 2064 (2006).

²¹ Cornell, *supra* note 4, at 261.

²² *Frequently Asked Questions*, U.S. CONSUMER PROD. SAFETY COMM’N, <http://www.cpsc.gov/about/faq.html> (last visited August 17, 2012). For a general discussion of issues surrounding regulation in the U.S. economy, see Richard J. Hunter, Jr., John H. Shannon, Susan O’Sullivan-Gavin & Mark S. Blodgett, *Regulation: A Historical Perspective and Discussion of the Impact of the Commerce Clause and the Fourteenth Amendment and the Move to Deregulate the American Economy*, 32 U. LAVERNE L. REV. 137 (2011).

²³ *Crib Information Center*, U.S. CONSUMER PROD. SAFETY COMM’N, <http://www.cpsc.gov/cgi-bin/cribs.aspx> (last accessed August 15, 2012).

²⁴ For a proper framing of the debate, see Cheryl A. Falvel et al., *Proposed Standards for Full-Size and Non-Full-Size Cribs under Section 104 of the Consumer Product Safety Improvement Act and Related Documents*, U.S. CONSUMER PROD. SAFETY COMM’N (June 30, 2010), <http://www.cpsc.gov/library/foia/foia10/brief/104cribs.pdf>.

abstracted from a Report issued by the CPSC in 2010, titled "Full-Size Baby Cribs and Non-Full-Size Baby Cribs: Safety Standards."²⁵ The CPSC reported that a *full-size crib* has specific interior dimensions of approximately 28 +/- 5/8 inches (71 +/- 1.6 centimeters) in width and 52 3/8 +/- 5/8 inches (133 +/- 1.6 centimeters) in length and is designed to provide sleeping accommodations for an infant. CPSC staff estimated that there were 68 manufacturers or importers supplying full-size cribs to the U.S. market. Ten of these firms were domestic importers (15 percent); 42 were domestic manufacturers (62 percent); 7 were foreign manufacturers (10 percent); and 2 were foreign importers (3 percent). The Commission reported that insufficient information was available about the remaining firms to categorize them.

Based on information from a 2005 survey conducted by the American Baby Group, referenced in the Report, CPSC staff estimated that annual sales of new cribs amounted to about 2.4 million units, of which approximately 2.1 million were full-size cribs. CPSC staff further estimated that there were approximately 591 models of full-size cribs compared to approximately 81 models of non-full-size cribs. Thus, approximately 88 percent of crib models surveyed were full-size cribs.²⁶

In contrast, a *non-full-size crib* may be either smaller or larger than a full-size crib, or shaped differently than the usual rectangular crib. The category of non-full-size cribs includes what are termed as oversized, specialty, drop-side, undersized, and portable cribs, but does not include any product with mesh/net/screen siding, non-rigidly constructed cribs, cradles, car beds, baby baskets, or bassinets. The CPSC standard for non-full-size cribs also did not apply to play yards, which are mesh or fabric-sided products. CPSC staff estimated that there are currently at least 17 manufacturers or importers supplying non-full-size cribs to the U.S. market. Five of these firms were domestic importers and 10 were domestic manufacturers. As in the case of full-sized cribs, the Commission reported that insufficient information was available to determine whether the

²⁵ SAFETY STANDARDS FOR FULL-SIZE BABY CRIBS AND NON-FULL-SIZE BABY CRIBS; FINAL RULE, 75 Fed. Reg. 81766-01, (Dec. 28, 2010) (citing crib dimensions, numbers of manufacturers (by countries of origin), and total numbers of cribs sold in the U.S. domestic market).

²⁶ *Id.*

remaining firms are manufacturers or importers. In the aggregate, CPSC staff estimated that of the approximately 2.4 million cribs sold to households annually, approximately 293,000 were non-full-size cribs.²⁷

The drop-side crib, originally designed for “mom convenience,” is meant to enable the parent to lower the side of the crib and more easily lift out the baby.²⁸ This convenience, however, came at a price. Broken hinges could leave gaps between the bed and side large enough to trap an infant, potentially causing injuries or even strangulation.²⁹ Drop-side cribs have been manufactured for several generations, but due to changes in design, materials, manufacturing protocols, and incidents with this style of crib have escalated in recent years. As a result, CPSC issued a ban on the sale of drop-side cribs as part of sweeping new standards for infant cribs, which were announced in December 2010.³⁰

A. Fast-Forward to 2010

In a statement issued on December 15, 2010, Inez Tenenbaum, current Chairman of the CPSC, cited 35 infant deaths since November 2007, which occurred when “crib components detached, disengaged, or broke, ending in unspeakable tragedy.”³¹ Following this determination, on December 28, 2010, the CPSC issued “Full-Size Baby Cribs and Non-Full-Size Baby Cribs: Safety Standards; Revocation of Requirements; Third Party Testing for Certain Children’s

²⁷ *Id.*

²⁸ Meredith Melnick, *U.S. Sets Rigorous New Safety Standards for Cribs*, TIME (June 28, 2011), <http://healthland.time.com/2011/06/28/u-s-sets-rigorous-new-safety-standards-for-all-cribs/>.

²⁹ *Id.*

³⁰ See Press Release, U.S. Consumer Prod. Safety Comm’n, CPSC Approves Strong New Crib Safety Standards to Ensure a Safe Sleep for Babies and Toddlers (Dec. 17, 2010), available at www.cpsc.gov/cpscpub/prerel/prhtml11/11074.html.

³¹ Statement of Chairman Inez M. Tenenbaum on the Commission Decision Regarding The Final Rule on the Mandatory Safety Standards For Full Size and Non-Full Size Cribs, U.S. CONSUMER PROD. SAFETY COMM’N, <http://www.cpsc.gov/pr/tenenbaum12152010.pdf>.

Record of Commission Action and Commission Meeting Minutes FY 2010, U.S. CONSUMER PROD. SAFETY COMM’N, www.cpsc.gov/library/foia/ballot/ballot10/ballot10.html (last accessed January 15, 2013).

Products; Final Rules,” which laid out the new regulations.³² These rules cited 147 fatalities between November 1, 2007, and April 1, 2010. The rules outlawed the drop-side variety of cribs and set more stringent manufacturing and testing guidelines. The regulations also provided for penalties for non-compliance relating to infant cribs of all sizes.³³

A notable and unprecedented aspect of the 2010 regulations was an expansion of the ground-breaking Consumer Products Safety Improvement Act (CPSIA) of 2008.³⁴ This expansion was specifically targeted at children’s products. The 2010 regulations required compliance not only by manufacturers and retailers, who were required to stop selling non-compliant cribs by June 28, 2011, but also by ‘places of public accommodation,’ including child care facilities, hotels, etc., which were required to replace non-compliant cribs by December 28, 2012.³⁵

What particular defects in drop-down cribs led to these regulations? What was the nature of lawsuits filed in the years leading up to them? How did the various lawsuits impact upon these policy changes? The history of infant crib regulation is a primer on the application and development of strict liability in tort law:³⁶ legal actions have been undertaken alleging

³² SAFETY STANDARDS FOR FULL-SIZE BABY CRIBS AND NON-FULL-SIZE BABY CRIBS; FINAL RULE, 75 Fed. Reg. 81766-01, (Dec. 28, 2010).

³³ *Id.*

³⁴ 15 U.S.C. § 2055(a) (2006) (effective August 12, 2011).

³⁵ Inez M. Tenenbaum, *Statement of Chairman Inez M. Tenenbaum on the Vote to Reaffirm the Retailer Compliance Date for the New Mandatory Standards for Full-Size and Non-Full-Size Cribs and to Grant Additional Time for Compliance with Those Standards to Companies who Provide Short-Term Crib Rentals*, U.S. CONSUMER PROD. SAFETY COMM’N (June 16, 2012), <http://www.cpsc.gov/pr/tenenbaum06162011.pdf>.

³⁶ See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900-01 (Cal. 1963) (“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. Although in these cases strict liability has usually been based on the theory of an express or implied warranty running from the manufacturer to the plaintiff, the abandonment of the requirement of a contract between them, the recognition that the liability is not assumed by agreement but imposed by law, and the refusal to permit the manufacturer to define the scope of its own responsibility for defective products make clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort”). After *Greenman*, the American Law Institute promulgated section 402A of the Restatement (Second) of Torts, which makes sellers of defective products strictly liable as if

manufacturing defects, *design* defects, and *marketing* defects,³⁷ as well as a class action lawsuit³⁸ brought by crib owners seeking

they were manufacturers. See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

³⁷ For a discussion of the sources of product defects in products liability cases, see Richard J. Hunter, Jr., Henry J. Amoroso & John H. Shannon, *A Managerial Guide to Products Liability: A Primer on the Law in the United States*, 2 INT'L J. LEARNING & DEV. 34 (2012) available at <http://www.macrothink.org/journal/index.php/ijld/article/view/1773>.

³⁸ Concerning the issues relating to class action lawsuits against manufacturing-defendants, see generally Sofia Adroque & Hon. Caroline Baker, *Litigation in the 21st Century: The Jury Trial, the Training & the Experts Musings & Teachings from David J. Beck, Lisa Blue, Melanie Gray & Stephen D. Susman*, 56 THE ADVOCATE 8 (2001) available at http://www.litigationsection.com/downloads/Advocate_Vol56_Fall2011.pdf.

One of the presenters, Lisa Blue, writes: Corporations also seek to increase the difficulty in bringing class action lawsuits as another tool to strong-arm individual litigants. For example, although aimed at reducing class action lawsuit abuse, the Class Action Fairness Act of 2005 harms individuals with legitimate claims due to the increased difficulty in bringing class action lawsuits. This act makes it too difficult and expensive for a consumer to bring a class action lawsuit; thus, it is more difficult to hold the corporate giant in check. Class action suits are invaluable because they afford consumers the opportunity to bring collective claims against large corporations that would otherwise be too small to bring separately. Absent the deterrent effect of class action litigation, corporations can profit at the expense of vulnerable consumers. *Id.* at 12 (providing a critique of the Class Action Fairness Act of 2005). For a discussion of the history of class action suits in products liability litigation, see Victor E. Schwartz & Christopher E. Appel, *Exporting United States Tort Law: The Importance of Authenticity, Necessity, and Learning from our Mistakes*, 38 PEPP. L. REV. 551, 571 (2011). Concerning the issue of certification in products liability cases, see Jenna G. Farleigh, *Splitting the Baby: Standardizing Issue Class Certification*, 64 VAND. L. REV. 1585, 1610 (2011): "Given these outcomes, the appellate courts suggest that products liability cases resist issue class certification of specific elements of liability, regardless of what those elements might be. The district courts therefore reasonably hesitate to grant issue class certification in products liability cases on any element of liability." (citing *Kemp v. Metabolife Int'l, Inc.*, No. 00-3513, 2004 WL 2095618, at 6 (E.D. La. Sept. 13, 2004); *Neely v. Ethicon Inc.*, No. 1:00-CV-00569, 1:01-CV-37, 1:01-CV-38, 2001 WL 1090204, at 14-15 (E.D. Tex. Aug. 15, 2001)). See Christopher Keleher, *Class Inaction: U.S. Supreme Court Reins in Class Actionsactions*, RES GESTAE, May, 2012 at 22 (citing Fed. R. Civ. P. 23(A)) available at <http://www.querrey.com/assets/attachments/355.pdf>. See also *Reiter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979) (noting that "District courts must be especially alert to identify frivolous claims brought to extort nuisance settlements" and that "they have broad power and discretion vested in them by Fed. Rule Civ. P. 23 with respect to matters involving the certification and management of potentially cumbersome or frivolous class actions").

monetary damages once cribs were deemed unfit for use. It is interesting to note that it is difficult to find resolutions in the public record for many of the publicized lawsuits. Presumably, most of these were settled privately, out of court.³⁹ It appears that American manufacturers are smart enough to realize it would be nearly impossible to prevail against parents who have lost an infant, arguably the most heartbreaking loss of all, in the “court of public opinion.”

³⁹ For a discussion of the issue of secrecy in settlement of product liability cases, see Katherine Sullivan, *Letting the Sunshine in: Ethical Implications of the Sunshine in Litigation Act*, 23 GEO. J. LEGAL ETHICS 923 (2010). The author noted “A host of legislation has been introduced to curb what is increasingly seen as an abuse of confidentiality by the courts.” *Id.* at 923. As an example, in 1990, the State of Florida enacted the Sunshine in Litigation Act, which prohibits a court from entering an order that has the “effect of concealing a public hazard,” and voids “any portion of an agreement or contract which has the purpose or effect of concealing a public hazard.” FLA. STAT. § 69.081 (2009). States such as Louisiana, South Carolina, Washington, and Texas have adopted similar anti-secrecy laws. *See* LA. CODE CIV. PROC. ANN. art. 1426(C) (2009); S.C. R. CIV. P. 41.1(c); WASH. REV. CODE § 4.24.611(2) (2009); TEX. R. CIV. P. 76a. Representative Robert Wexler (D-Fla.) and Senator Herb Kohl (D-Wis.) introduced the federal Sunshine in Litigation Act of 2009. The legislation would have limited the issuance of protective orders and the sealing of cases to two specific instances: first, where the order would not restrict the disclosure of information relevant to the protection of public health or safety; second, where the public interest in the disclosure of health or safety hazards is outweighed by a substantial interest in keeping the information private. In addition, the requested protective order must be “no broader than necessary to protect the privacy interest asserted.” *See* Sunshine in Litigation Act of 2009, H.R. 1508, 111th Cong. (2009) (House Bill); Sunshine in Litigation Act of 2009, S. 537, 111th Cong. (2009) (Senate Bill). Sullivan cites the settlements over products like Firestone tires, the Dalkon Shield, and drugs like Halcion and Prozac. Sullivan, *infra*, at 923. As to *Firestone*, see Keith Bradsher, *S.U.V Tire Defects were Known in '96 but not Reported*, N.Y. TIMES (June 24, 2001), <http://www.nytimes.com/2001/06/24/business/suv-tire-defects-were-known-in-96-but-not-reported.html> (discussing Firestone tire cases in which attorneys did not disclose an identified pattern of tire failure for fear that private lawsuits would be compromised); as to *Dalkon Shield*, see MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* 246 (Pantheon Books 1985) (describing the tactics used by A.H. Robins for over ten years to conceal defects in its intra-uterine devices); as to issues relating to drugs, *see* RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER: TRUTH, JUSTICE, POWER, AND GREED* 187 (Random House 1999) (“The makers of the prescription drugs Zomax, Halcion, and Prozac all experienced problems with their products, and all took great pains to keep their settlements secret”).

III. A BRIEF REPRISÉ OF LITIGATION

It has not always been the case that courts were responsive to complaints by consumers. In a case that arose nearly a quarter-century ago in 1988, *Odom v. Welsh Co.*,⁴⁰ the plaintiff, Donna Odom, brought a wrongful death suit on behalf of her deceased infant son, Yan Christopher, who was asphyxiated when his neck was caught between the crib's headboard and an unsecured slide rail. The plaintiff alleged that her son's death had been caused by a defective screw assembly in the crib—a defect in the overall design of the crib,⁴¹ which was not “random and atypical,” but one, which would affect all models of its kind. At trial, Donna Odom testified that when she put the infant to bed the evening before his death, she had not noticed anything unusual about the crib. Following the child's death, police investigators found the screw intended to bolt the metal slide rod to the crib headboard under a cot in the infant's room. The grommet nut intended to secure the screw in place was found under numerous items piled in a closet in the infant's room. The drop side of the crib was turned toward the wall; the crib was positioned approximately a foot from the wall. A rattle device was strung from both sides of the crib. The defendant claimed that the rattle device served to secure the side rail in place in the absence of the screw unit. On the evidence presented at trial, the jury found in favor of the defendant. It determined that the crib was reasonably safe for its intended use, i.e., nothing was wrong with the screw assembly. Further, because of the change made by Yan Christopher's mother in stringing the rattle device, the jury determined that the Odom crib was not being used in a reasonably foreseeable manner. It was apparent that the manufacturer had been able to convince the jury that a rattle device strung from the sides of the

⁴⁰ *Odom v. Welsh Co.*, 1988 Ohio App. LEXIS 4546 (8th Dist. Nov. 10, 1988).

⁴¹ *See Odom*, 1998 Ohio App. LEXIS 4546, at *11-12.

⁴¹ In determining whether a product design is in a defective condition, a single, two-pronged test should be used: under the consumer expectation standard prong, a defendant will be subject to liability if the plaintiff proves that the product design is in a defective condition because the product fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner; under the risk-benefit standard prong, a defendant will be subject to liability if the plaintiff proves, by using relevant criteria, that the product design is in a defective condition because the benefits of the challenged design do not outweigh the risks inherent in such design.” (citing *Knitz v. Minster Mach. Co.*, 432 N.E.2d 814, 815 (1982)).

crib had been used to hold the crib together by providing expert testimony⁴² about the safety and testing of the screw assembly to prove the design of the crib was sound.

Nearly twenty years later, Connie Bergey of Palm Beach, Florida filed a similar wrongful death lawsuit on behalf of her daughter, Serenity, against (then-defunct) Simplicity Inc. and its successor corporation,⁴³ the SFCA, and Walmart. This litigation ended differently. In September 2007, two-year-old Serenity was asphyxiated when her head became caught in the frame of her Simplicity crib. Two days after her death, the crib model in which she had been sleeping was one of over one million cribs recalled by Simplicity,⁴⁴ raising the issue whether there might

⁴² The requirement of expert testimony implicates what is called the *Daubert Rule* and entails a judge to act in a “gatekeeping role” to assure that any alleged expert testimony meets a basic threshold based on real and not junk science. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). The factors described in *Daubert* include: Whether a “theory or technique . . . can be (and has been) tested”; whether it “has been subjected to peer review and publication”; whether, in respect to a particular technique, there is a high “known or potential rate of error” and whether there are “standards controlling the technique’s operation”; and whether the theory or technique enjoys “general acceptance” within a “relevant scientific community.” See *Kumho Tire. Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999) (citing *Daubert*, 509 U.S. 579, 592-594 (1993)). The Supreme Court in *Kumho Tire* also noted that the *Daubert Rule* would apply to all expert testimony—not just to evidence that is scientifically based (noting that “the language makes no relevant distinction between “scientific” knowledge and “technical” or “other specialized” knowledge”; making clear that “any such knowledge might become the subject of expert testimony”; stating that “the Rule applies its reliability standard to all “scientific,” “technical,” or “other specialized” matters within its scope”; and conceding that “the Court in *Daubert* referred only to “scientific” knowledge”). *Id.* at 147 (citing *Daubert*, 509 U.S. at 589-90). The *Kumho* court further stated that the Court in *Daubert* referred to “scientific” testimony not as a limiting factor but “because that [wa]s the nature of the expertise” at issue. *Id.* at 148 (citing *Daubert*, 509 U.S. at 590 n.8).

⁴³ A corporation that acquires the assets of another corporation is liable for harm caused by defective products sold by the predecessor corporation under “certain circumstances.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 12 (1997). For a discussion of issues surrounding successor corporation liability and outlining several of these circumstances, see Richard J. Hunter, Jr., Henry J. Amoroso & John H. Shannon, *A Primer on the Law in the United States: Part III Scope of Liability in Products Liability Cases*, 2 INT’L J. LEARNING & DEV. 1, 9-10 (2012), available at <http://www.macrothink.org/journal/index.php/ijld/article/view/2049>.

⁴⁴ *Baby Crib Wrongful Death Lawsuit Filed over Defect Design*, ABOUTLAWSUITS (Sept. 18, 2009), <http://www.aboutlawsuits.com/baby-crib->

have been a problem with the design of the crib. Bergey eventually settled out of court for an undisclosed amount.⁴⁵

The case of Carter Michael Pack also focused on alleged design defects in the crib. In *Pack v. Stork Craft Manufacturing, Inc.*, filed on June 12, 2008,⁴⁶ Jessica and Michael Pack filed a wrongful death suit on behalf of their son Carter, who was found asphyxiated on January 16, 2007, with his face pressed against the crib's mattress between the railing and the crib. The Packs alleged that the death of their son was caused by a design defect involving screws that were in violation of CPSC regulations, and sought compensatory and punitive damages.⁴⁷ The plaintiffs claimed they "suffered sorrow; mental anguish; solace to include society, companionship, comfort, guidance in the kindly offices and advice of the decedent; loss of income of the decedent; services, protection, care and assistance provided by the decedent; and funeral expenses."⁴⁸

As in similar cases involving drop-down cribs, no information was readily available on the public record relating to any settlement in the case. However, the case was believed to have led to one of the largest ever crib recalls,⁴⁹ in which 2.1 million Stork Craft cribs were recalled for the same or similar design defect.⁵⁰ Many of the alleged problems that led to the massive crib recalls were originally thought to be the result of a

wrongful-death-lawsuit-filed-5937.

⁴⁵ Brian Haas, *West Boca woman settles suit against crib maker, Walmart*, SUN SENTINEL (Mar. 12, 2010), http://articles.sun-sentinel.com/2010-03-12/news/fl-crib-death-settlement-20100312_1_drop-rail-crib-maker-serenity.

⁴⁶ See Cara Bailey, *Fayette Couple Sues Cribmaker over Son's Death*, W.WEST VA. RECORD (July 23, 2008 at 10:00 AM), <http://www.wvrecord.com/news/213832-fayette-couple-sues-cribmaker-over-sons-death>. The case may be accessed from the records of the Kanawah Circuit Court at 08-C-1149.

⁴⁷ For a general discussion of issues relating to damages in product liability suits, see Henry J. Amoroso & Richard J. Hunter, Jr., *Damages for Pain and Suffering and Emotional Distress in Products Liability Cases Involving Strict Liability and Negligence*, 3 FAULKNER L. REV. 277 (2012).

⁴⁸ Christopher Dickerson, *Local Lawsuit Helped Spur Crib Recall*, W. VA. RECORD (Nov. 25, 2009 at 8:52 AM), <http://www.wvrecord.com/news/223316-local-lawsuit-helped-spur-crib-recall>.

⁴⁹ *Id.*

⁵⁰ See Press Release, U.S. Consumer Prod. Safety Comm'n, *Infant Entrapment and Suffocation Prompts Stork Craft to Recall more than 2.1 Million Drop-Side Cribs* (Nov. 23, 2009), *available at* www.cpsc.gov/cpscpub/prerel/prhtml10/10046.html.

manufacturing defect — defined as a random, atypical breakdowns in the manufacturing process.⁵¹ How did the various manufacturers attempt to deal with these issues?

What is known is that the manufacturer often recalled the products, offering a retrofit kit that consumers could use to repair the crib, rather than the option of a full refund. However, Amber Spitzer, whose daughter had been sleeping in a crib that fell into this category (but thankfully was not harmed), was not willing to accept those terms. She became the lead plaintiff in a 2007 class action lawsuit against Target Corp. and Simplicity. Her lawyer, Charles Kelly, alleged that the “recall (of 1 million Simplicity cribs for a repair kit) is grossly inadequate and irresponsible. Simplicity should be required to tell consumers to dismantle their crib, and return it for a full refund.”⁵² The same lawsuit also alleged a marketing defect — or failure to warn consumers of the potential dangers of the Simplicity cribs that had cost three children their lives, trapping seven others, and injuring 55 more. Attorney Kelly also represented the Johns family of Citrus Heights, California, whose nine-month-old son Liam had died in April 2005 when he became trapped between a detached rail and

⁵¹ See, e.g., *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 881 (Tex. App. 1985), *aff'd in part and rev'd in part*, 715 S.W.2d 629 (Tex. 1986) in which the court stated: “[m]anufacturing defect cases involve products which are flawed, i.e., which do not conform to the manufacturer’s own specifications, and are not identical to their mass-produced siblings.” In contrast, and perhaps more appropriate in “crib cases,” the cause of an injury may be a “design defect.” In a case involving a design defect, the plaintiff must show that “the design [of a product] resulted in a product that was unreasonably dangerous by using [either the] consumer expectation test and/or the risk-utility analysis.” KIELY & OTTLEY, *supra* note 19, at 134. In most cases, this determination whether or not a plaintiff has met its evidentiary requirement (burden of proof) is a question of fact for a jury. See *Korando v. Uniroyal Goodrich Tire Co.*, 637 N.E.2d 1020 (Ill. 1994); *Cole v. Lantis Corp.*, 714 N.E.2d 194 (Ind. Ct. App. 1999). Pennsylvania makes a policy determination that it is for a judge, not the jury, to determine whether a product was unreasonably dangerous. See *Azzarello v. Black Bros. Co., Inc.*, 391 A.2d 1020 (Pa. 1978) (requiring a court to balance the risks and benefits of a design choice by a manufacturer before permitting argument that product was unreasonably dangerous to proceed to the jury). It appears that “no other state has adopted the *Azzarello* approach.” KIELY & OTTLEY, *supra* note 19, at 134 n.67.

⁵² Maurice Possley, *Lawsuit Filed Against Crib Manufacturers Filed Against Crib Manufacturers*, CHICAGO TRIBUNE (Sept. 25, 2007), www.chicagotribune.com/services/newspaper/eedition/chi-crib_websep25,0,5172048.story.

the side of the crib,⁵³ another case that was likely settled out of court in favor of the plaintiffs.

A. Other Potential Plaintiffs and Theories of Recovery

Since a crib can be a major investment for many parents, some whose children have not necessarily suffered any physical injury or death, have claimed monetary damages citing “financial injury.” One plaintiff group, *O’Neil v. Simplicity, Inc.*, filed a class action lawsuit, alleging that the plaintiffs had not received the full “benefit of the bargain” for the drop-side cribs they had purchased, as they were no longer safe to use, and that the retrofit kit offered in this case, which would disable the drop side, caused an economic injury to the buyers.⁵⁴ The lawsuit, which was combined with the case filed by Amber Spitzer, was dismissed on the grounds that because the plaintiffs’ cribs did not actually display a defect, they had, in fact, received the benefit of the bargain. The court stated: “Simply put, the O’Neil’s bargained for a crib with a functioning drop side, and that is precisely what they received.”⁵⁵ The court continued: “The O’Neil’s benefit-of-the-bargain damages theory, therefore, does not aid their cause. And, having failed to allege any cognizable damages, their claims

⁵³ Maurice Possley, *Missteps delayed recall of deadly cribs*, CHICAGO TRIBUNE (Sept. 24, 2007), http://articles.chicagotribune.com/2007-09-24/business/chi-070922cribs-story_1_simplicity-cribs-liam-johns-full-size-cribs/2.

⁵⁴ *O’Neil v. Simplicity, Inc.*, 553 F. Supp. 2d 1110 (D. Minn. 2008) The procedural history of the case is interesting. On September 24, 2007, Amber Spitzer, a resident of Illinois, filed a class action complaint against Simplicity, Graco, and Target in the United States District Court for the District of Minnesota. In November 2007, Spitzer withdrew the complaint and filed a first amended complaint. Simplicity and Target filed a motion to dismiss, after which Spitzer withdrew her pleading and voluntarily dismissed Target as a defendant *without prejudice*. On January 30, 2008, the district court granted Spitzer’s motion for leave to file a second amended complaint. This pleading replaced Spitzer with the O’Neil’s as named plaintiffs. *O’Neil*, 553 F. Supp. 2d at 1111-12. Later, the court would label this procedural history as taking “three bites [of] the pleading apple” in ultimately dismissing the lawsuit *with prejudice*. *Id.* at 1119-1120 (stating that “the Court believes that there have been “ample opportunities to research and plead” sufficient claims here”).

⁵⁵ *Id.* at 1118 (noting “[A] plaintiff who purchases a [crib] that never malfunctions over its ordinary period of use cannot be said to have received less than what he bargained for when he made the purchase”) (citing *In re Canon Cameras Litig.*, 237 F.R.D. 357, 360 (S.D.N.Y. 2006)).

falter.”⁵⁶

Other cases were based on alleged marketing defects — failure on the part of the manufacturers and/or retailers to warn about defects in the cribs and to instruct parents on the proper use of infant cribs.⁵⁷ A wrongful death lawsuit was filed against Simplicity, SFCA, and retailer Hayneedle Inc. in Boston in January 2011 by the parents of one-year-old Landon Zimmerman. Landon was asphyxiated on January 30, 2008, when he became trapped between his Simplicity crib’s frame and mattress. The suit alleged that Hayneedle had been grossly negligent for failing to warn Landon’s parents, Laura Zimmerman and Jeremy Fontaine, concerning the crib’s “dangerous and defective characteristics, and of the safe and proper method of assembling, using and maintaining (it).”⁵⁸ The presence of the word “assembling” is a reminder that many parents will undertake the assembly of home-use cribs as a “do-it-

⁵⁶ *Id.*

⁵⁷ Even if a product meets the manufacturing and design requirements, a product may still be “unreasonably dangerous” if the manufacturer fails to adequately warn or to provide warnings about the dangers posed by a product or if the manufacturer fails to provide adequate instructions about the safe use of a product. *See, e.g.,* Donohue v. Phillips Petroleum Co., 866 F.2d 1008 (8th Cir. 1989). Courts in the United States “often use the term ‘failure to warn’ to include *both* the failure to provide adequate warnings about the dangers of a product and the failure to supply adequate instructions about a product’s use.” KIELY & OTTLEY, *supra* note 19, at 180 (citing Delaney v. Deere and Co., 999 P.2d 930 (Kan. 2000)). The duty to warn is most often applied to the manufacturer of a product. *See* Germann v. F.L. Smithe Mach. Co., 395 N.W.2d 922 (Minn. 1986). The case of *First Nat’l Bank in Albuquerque v. Nor-Am Agric. Prod., Inc.* . . . provides an excellent summary of the requirements of an adequate warning. They include: A warning must indicate adequately the scope of the danger; A warning must communicate reasonably the extent or seriousness of the harm that could result from the danger; The physical aspects of the warning, including *conspicuousness, prominence, relative size of the print*, must be adequate to alert a “reasonably prudent person” to the danger; a simple, direct warning, such as “*Do not use. . .*” may be adequate; and the means to convey the warning must be adequate. *See* First Nat’l Bank in Albuquerque v. Nor-Am Agric. Prod., Inc., 537 P.2d 682, 691-92 (N.M. Ct. App. 1975). *See also* Spruill v. Boyle-Midway, Inc., 308 F.2d 79 (4th Cir. 1962) (holding that a manufacturer must also be expected to anticipate the environment which is normal for the use of his product and where the environment is the home, the manufacturer must anticipate the reasonably foreseeable risks of the use of his product in such an environment).

⁵⁸ Donna Goodison, ‘*Deadliest*’ Crib Sellers Sued, BOSTON HERALD (Jan. 7, 2011), http://www.bostonherald.com/business/general/view/20110107deadliest_crib_seller_sued_family_says_it_was_never_warned/.

yourself” project, and that the directions can be confusing or misleading — leading to a potentially dangerous situation — and thus to an allegation of a marketing defect.⁵⁹

Although Simplicity was one of the most high-profile manufacturers involved in recalls and in the tragic deaths of infants (ultimately leading to the company’s demise), dozens of other manufacturers including LaJobi, Graco, Babi Italia, Evenflo, Delta, Pottery Barn Kids, Ethan Allen, Bassettbaby, Land of Nod, and many more, all followed Simplicity’s lead between 2007 and 2011 and recalled drop-side cribs. One manufacturer, Sorelle/C&T International, in a letter that is still on the Internet today, assured its customers after the first round of recalls in 2009 that “none of the cribs that have been produced by Sorelle/C&T International have been recalled, nor were they part of the recent recall of drop-side cribs”⁶⁰ — only to issue a

⁵⁹ Questions relating to assembly may be seen within the larger context of “foreseeability” of how the product will be used, or in this case, assembled by parents or others. *See* *Smith v. Cent. Mining Equip. Co.*, 2012 U.S. Dist. LEXIS 89036, at *16 (W.D. Okla. Nov. 19, 2012) (noting that “The most important consideration in determining whether a defendant owes a duty of care is the foreseeability of harm to the plaintiff” (citing *Lowery v. Echostar Satellite Corp.*, 160 P.3d 959, 964 (Okla. 2007))). *See also, e.g.*, *Tomkins v. Log Sys., Inc.*, 385 S.E.2d 545, 547-546 (N.C. Ct. App. 1989) (“plaintiff alleged that defendant was negligent in connection with the manufacture and sale of the log home kit in that defendant failed to (1) use reasonable care in selecting a design safe for the use for which it was intended; (2) make reasonable tests and inspections of the prepackaged home to discover latent hazards involved in the use of the product; and (3) provide adequate instructions for erection of the home, given the defendant’s representation that the log home could be built as a “do-it-yourself” project”). The basis for liability may be found in the RESTATEMENT (SECOND) OF TORTS, Section 388 (1965): One who supplies directly or through a third person a chattel for another to use, is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier (a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied; (b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition; and (c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous. *See also* *Vogt v. S.M. Byrne Constr., Co.*, 115 N.W.2d 485, 486 (Wis. 1962).

⁶⁰ For a discussion of the Sorelle/C&T recall, see Warning Letter from Sorelle Furniture/C&T International (Jan. 1, 2010) *available at* http://www.sorellefurniture.com/warning_letter.php.

recall of 170,000 cribs on May 6, 2010.⁶¹ The CPSC subsequently reported that Sorelle had itself documented reports of “104 incidents of drop-side and slat detachments.”⁶² Sorelle/C&T offered nothing but a repair kit for all but four older models, for which Sorelle provided a \$100 credit toward the purchase of a new crib.⁶³

IV. THERE IS SOME “GOOD NEWS”

The good news is that since 2011, no manufacturer has been allowed to make a traditional drop-side crib, and no retailer or consumer has been allowed to sell one, even second hand — or even give one away.⁶⁴ As noted by the *CPSC Blogger*, “Beginning June 28, 2011, all cribs manufactured and sold (including resale) must comply with new and improved federal safety standards. The new rules, which apply to full-size and non full-size cribs, prohibit the manufacture or sale of traditional drop-side rail cribs, strengthen crib slats and mattress supports, improve the quality of hardware and require more rigorous testing.”⁶⁵

This good news, however, is tempered by the fact that thousands of hotels and child care centers were given a six month period to replace the defective, dangerous cribs, with the

⁶¹ See Press Release, U.S. Consumer Prod. Safety Comm’n, C&T International/Sorelle Recalls Cribs due to Strangulation and Suffocation Hazards (May 6, 2010) *available at* <http://www.cpsc.gov/cpscpub/prerel/prhtml10/10222.html>.

⁶² *Id.*

⁶³ The first author’s son slept in a Sorelle/C&T drop-side crib beginning in September of 2002—*three years before* the earliest cases reported in the data base. In January of 2003, the crib’s drop-side mechanism malfunctioned and detached, prompting calls to the manufacturer, the retailer, the CPSC, and the authors of the book “Baby Bargains,” which had recommended the crib. A home visit was conducted by a CPSC representative to inspect the crib in January of 2003, and C&T provided a repair kit, but the author chose to immobilize the drop side instead for safety. The CPSC inspector noted that he had seen a number of these problems with drop-side cribs. Since no one was injured, however, the case was just a note in the record and potentially one of the 104 “incidents” cited by C&T/Sorelle.

⁶⁴ SAFETY STANDARDS FOR FULL-SIZE BABY CRIBS AND NON-FULL-SIZE BABY CRIBS, 75 Fed. Reg. 81766-01 (Dec. 28, 2010).

⁶⁵ See CPSC Blogger, *Updated: The New Crib Standard: Questions and Answers*, U.S. CONSUMER PROD. SAFETY COMM’N (June 14, 2011), <http://www.cpsc.gov/onsafety/2011/06/the-new-crib-standard-questions-and-answers/>.

generous December 28, 2012, deadline established. Recalls aimed at consumers who still have the dangerous models in their homes will continue, even a year after the new regulations outlawing drop-side cribs, with the latest one on CPSC's list in April 2012,⁶⁶ though the CPSC cannot force consumers who have the defective cribs to stop using them. This will continue to be an issue essentially of parental responsibility and no doubt, a point of contention and perhaps future litigation.

Despite the lingering problems, it is encouraging from a policy perspective that the CPSC has taken such a strong stand in making sure that manufacturers, retailers and private and public consumers are doing everything they can to protect the smallest, most helpless end users in our society. It should be noted, however, that the CPSC did not issue a simple ban on the sale of all drop-side rail cribs. Why wasn't a simple ban enacted? The CPSC commented: "[T]hese are sweeping new safety rules that will bring a safer generation of cribs to the marketplace in 2011. CPSC's new crib standards address many factors related to crib safety in addition to the drop-side rail. A crib's mattress support, slats, and hardware are now required to be more durable and manufacturers will have to test to the new, more stringent requirements to prove compliance."⁶⁷ One question yet remains: *Will this be enough?*

⁶⁶ Press Release, U.S. Consumer Prod. Safety Comm'n, Nan Far Woodworking Recalls to Repair Drop-Side Cribs due to Entrapment, Suffocation and Fall Hazards; Sold Exclusively at jcpenny (April 12 2012), available at <http://www.cpsc.gov/cpsc/pub/prerel/prhtml12/12148.html>.

⁶⁷ CPSC Blogger, *supra* note 65.