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The All-Terrain Vehicle Case: A Safety Program That Is Working

James V. Lacy*

I. Introduction

Perhaps the biggest safety issue ever to confront the Consumer Product Safety Commission ("the CPSC" or "the agency") in the past decade has been the risks posed to consumers by all-terrain vehicles ("ATVs"). ATVs are three- and four-wheel motorized vehicles with balloon-type tires that are intended for off-road use. Originally developed in Japan for farming purposes, ATVs became the off-road recreational craze of the 1980s after being introduced in the United States.

As the popularity of ATVs increased, however, the number of deaths and serious injuries associated with the vehicles also increased. According to statistics compiled by the CPSC, the number of ATV-associated accidents treated in hospital emergency rooms grew from 8,600 in 1982 to 85,900 by 1986.¹ There have been at least 415 ATV-associated deaths since 1982.² By 1987, there were an estimated 2,500,000 ATVs in use, of which approximately 1,475,000 or 59% were the three-wheeled type.³ The tremendous increase in popularity of ATVs, as well as the number of ATV-associated accidents and deaths, set the stage for one of the most important and far-reaching regulatory actions in the history of the CPSC.

The CPSC, created in 1972,⁴ is the federal agency responsible for protecting consumers from unreasonable risks of injury posed by unsafe consumer products. The agency regulates, among other things, the safety of toys, fireworks, hazardous chemicals in household products, the packaging of poisonous products, and children's sleepwear.⁵ The CPSC is headquartered in Bethesda, Maryland, with regional offices in major cities across the country. The agency has about 520 full-time employees and an annual budget of approximately \$35 million to monitor and enforce its regulatory actions for emerging product safety problems.⁶

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II. The Consumer Product Safety Commission Compiles a Task Force

The CPSC began its regulatory action of ATVs in the spring of 1985 by announcing its intent to exercise safety jurisdiction over the vehicles.⁷ A multi-disciplinary Task Force that included experienced engineers, epidemiologists and safety experts was compiled to conduct a complete study of ATVs and the risks posed by their use.

In September of 1986, the ATV Task Force issued its report to the CPSC and the public.⁸ This report, some 12,000 pages in length, comprised the first comprehensive review of ATVs ever compiled by a government agency. Included in the report were detailed studies of 169 different accident patterns.⁹ The report reviewed complex engineering and human factor issues associated with ATV use, provided an objective analysis of the causes of ATV accidents, and made specific recommendations for reducing the risks posed to consumers. The report also provided an important element of evidence in support of obtaining mandatory safety relief from ATV manufacturers if voluntary efforts to obtain safety relief proved fruitless. The principle conclusions of the report were: three-wheeled ATVs are more likely to be involved in accidents than four-wheeled ATVs; suspensions systems play a major role in ATV handling; and children under the age of 16 who ride adult-size machines are about twice as likely to have an accident as adults. Significantly, rider inexperience is cited as the single biggest risk factor, with the likelihood of an accident for a new rider 13 times higher than that for a rider with one year of experience.¹⁰

The ATV Task Force was unable to pinpoint a specific mechanical defect in ATVs that caused accidents. It was clear, however, that the “tricky” use characteristics of ATVs, which are different from those necessary to operate a motorcycle, played a role in accident patterns, and that accidents could potentially be significantly reduced through comprehensive rider training.¹¹

The Task Force also determined that rider misuse played a statistically significant role in many of the more serious accidents. Problems such as riding on paved roads, riding with passengers (which interferes with the unique rider-

machine interaction necessary to avoid an accident) and not unexpectedly, riding while intoxicated, were contributing factors in numerous accidents.¹² Specifically, the Task Force found that 30% of all fatal accidents and 14% of all reported accidents involved alcohol use or abuse.¹³

The Task Force concluded that consumer awareness of the risks associated with ATV use was low. This low awareness level was compounded by the ATV industry’s advertisements. Such advertisements rarely emphasized safety warnings and sometimes depicted “thrill seeking, dare-devil” use of ATVs in visual displays, thereby suggesting to consumers that such behavior was safe, and the normal way to use an ATV.¹⁴

Based on its study, the ATV Task Force recommended that the CPSC promulgate consumer notices and warnings about the risks posed by ATVs to reduce the number of accidents and correct the lack of safety warnings in the ATV industry’s advertisements.¹⁵ The Task Force encouraged the CPSC to secure a training program for consumers, to be funded by the ATV industry, in order to reduce the number of accidents involving less experienced riders. Because the Task Force had been unable to pinpoint a specific mechanical defect in the ATVs, it did not recommend that any ATVs be recalled or banned. In substance, the Task Force concluded that while ATVs were risky products to use, the over-all risk to consumers could be brought down to reasonable proportions through notices, effective warnings, and training. Thus, completely removing ATVs from the marketplace was neither necessary nor appropriate.¹⁶

III. ATV Manufacturers Resist Task Force’s Suggestions

The ATV industry is comprised of the United States subsidiary corporations of Honda, Yamaha, Suzuki and Kawasaki, and the United States manufacturer, Polaris Industries of Minnesota. Initially, the industry resisted suggestions by the CPSC that the Task Force’s recommendations be implemented. After publication of the Advance Notice of Proposed Rulemaking by the CPSC, however, some manufacturers took voluntary action to improve safety labelling and other

warnings to consumers. Yet, even among those manufacturers who voluntarily had improved their consumer warnings, disagreements with the CPSC continued over the role of human behavior in connection with ATV accidents. By late 1986, it was clear that voluntary efforts on the part of the ATV industry were not going to result in the broad steps the CPSC and its staff experts thought necessary to address the growing number of accidents.

At this point, CPSC Commissioners were confronted with a choice among the three types of regulatory actions available to them: 1) ban ATVs all together; 2) attempt to recall ATVs based on a defect in their manufacture; or 3) seek a declaratory judgment that ATVs were unsafe and obtain appropriate injunctive relief.¹⁷ A total ban of ATVs would be prospective in nature only and would require three stages of hearings, and proscribed statutory findings supported by substantial evidence on the record. Moreover, the CPSC or the ATV manufacturers could appeal any decision requiring a ban, thus causing substantial delays.¹⁸ Recalling ATVs would require a hearing before an administrative law judge and a showing of substantial evidence of a “defect which could create a substantial product hazard.”¹⁹ Again, the decision could be appealed by either side, thus delaying its implementation. In fact, given the strong objections of the ATV manufacturers, both options, even if supported by the evidence, could be expected to take several years to implement. In the meantime, ATV users would continue to be injured or killed in accidents associated with ATV use.²⁰

The third option—seeking injunctive relief—would provide much quicker relief. Under Section 12 of the Consumer Product Safety Act (“Section 12”), the Commission could go directly into court to seek a declaration by a federal judge that ATVs constituted “imminently hazardous” consumer products, and seek appropriate injunctive relief.²¹ This little-used section of the statute is intended for use in only the most extreme circumstances, when other regulatory procedures can not be expected to move quickly enough to address a product safety problem.²² In addition, a court likely has the discretion under this statutory provision to order a remedy such as corrective advertising, and perhaps something as unique as a free training program.

In December of 1986, the three sitting Commissioners of the CPSC decided to proceed against the ATV manufacturers under Section 12. The CPSC sought a judicial order that would require ATV manufacturers to offer free training to ATV purchasers and immediate past purchasers, as well as widespread dissemination of notices and warnings concerning the risks of ATVs to consumers. The Department of Justice was asked to assist in representing the CPSC.

The process of achieving an ATV safety package from a federal judge was not without its pitfalls, however. The complex factual and legal issues presented in the case caused disagreement not just between the ATV manufacturers and the CPSC, but also within the CPSC itself. For example, Terrence Scanlon, the Chairman of the ATV Enforcement Action, supported seeking injunctive relief under Section 12 but did not believe that recalling ATVs was appropriate. Against the advice of most of their staff, two of the three CPSC Commissioners voted to seek another unique remedy, one that had not been recommended by their expert Task Force, and that had never before been ordered by a federal court in any prior product safety case. Termed a “voluntary refund,” this unique remedy would require the manufacturers to offer a refund to any consumer who had purchased a three-wheeled ATV or an adult-sized four-wheeled ATV for a child under 16 years old.

The purpose of this remedy was to provide restitution to consumers who allegedly had been led to believe that ATVs were safe by the misrepresentations of dealers and the advertising practices of the ATV industry. The problem with such a remedy was that it was not clearly within the CPSC’s jurisdiction.²³ It was not a remedy that created a safer environment because it required neither removal of an allegedly dangerous product from the marketplace nor repair or replacement of that product. Moreover, because it did not prohibit the resale of returned ATVs, different and perhaps even less experienced consumers would likely purchase the ATVs and ultimately be injured. This remedy was not justified by the safety-related evidence available to the CPSC and was unlikely to have a positive safety-related result. For these reasons, the Commissioners appeared to have overstepped their statutory authority by confusing

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the legal mandate and limitations of the CPSC's authority with their own notion of consumer equity. The legislative history of the CPSC demonstrates that Congress clearly did not intend CPSC Commissioners to second guess decisions consumers make to buy products in the marketplace.²⁴ Consumer protection beyond the range of product safety has been reserved to either the courts or other federal and state agencies that administer statutes requiring truth-in-advertising or prohibiting deceptive practices. The Commissioners' request that a "voluntary refund" be provided to certain ATV purchasers ultimately caused only confusion and delay.

IV. Both Sides Prepare For Trial

By February of 1987, CPSC lawyers, in conjunction with attorneys in the Civil Division of the United States Department of Justice, began to prepare the complicated case for trial. Initially, they needed time to identify experts who could conduct tests corroborating the CPSC report. Given the continuing toll of injury and death statistics, the desirability of an out-of-court settlement was self-evident. The attorneys for the ATV manufacturers made it clear they would appeal an unfavorable district court decision and seek a stay of any regulatory action pending their appeal. This action would postpone any potential benefits to consumers for two to three years. Even if the case were resolved in the CPSC's favor, an estimated 900 persons would die and 250,000 persons would be seriously injured in ATV-related accidents over the next three years. Such statistics strongly favored a settlement.

In May of 1987, the CPSC and Department of Justice responded to the ATV manufacturers' request to meet to discuss potential settlement terms. However, strong political opposition to the notion of a settlement with the Japanese ATV manufacturers, expressed through the intervention of the House of Representatives oversight committee chairman, Doug Barnard (D.-Georgia), contributed to lack of resolve on the part of two CPSC Commissioners and stopped settlement discussions almost as soon as they began. In a letter to Attorney General Edwin Meese, Representative Barnard stated, "I strongly urge the Department and the C.P.S.C. to...bring the action under Section 12 without

delay."²⁵ This intervention probably delayed a final settlement of the case by at least seven months, during which time approximately 40,000 ATV users were seriously injured.

By December of 1987, the CPSC was ready for trial and, apparently encouraged by Senator Albert Gore (D.-Tennessee), the CPSC oversight committee chairman in the Senate, the ATV manufacturers once again approached the CPSC regarding settlement discussions. The CPSC again felt pressure from Capitol Hill, but this time in the direction of immediate settlement talks. In a letter to Chairman Terrence Scanlon, Senator Albert Gore stated, "It is my understanding that, in this type of complex litigation, some negotiations are virtually always undertaken. Therefore, I encourage you to schedule within the next few days a meeting between the Commission and the distributors of ATVs.... I am hopeful that those discussions will produce an agreement regarding comprehensive, quick steps to reduce safety hazards associated with ATVs."²⁶ Unexpectedly, the CPSC majority decided to authorize staff counsel to organize a settlement meeting. CPSC counsel suggested to the ATV manufacturers in strong terms that they should bring their best offer to the bargaining table. From this point on, settlement discussions included the active participation of Justice Department lawyers.

The result of three weeks of intense negotiations was the immediate stop-sale of all new three-wheel ATVs in late December of 1987. The stop-sale was accomplished through a preliminary consent decree filed simultaneously with the Government's complaint.²⁷ In effect, new three-wheeled ATVs which had been shown to be riskier than four-wheeled models, were immediately banned from commercial sale without any of the delays that would result from the time-consuming regulatory process. In addition, the ATV manufacturers were required to repurchase the 40,000 or so new three-wheeled ATVs in their dealer inventories thereby removing them from the United States market. In return for the ATV manufacturers' agreement to the stop-sale, the Government agreed to drop its prior insistence on a "voluntary refund." This compromise encouraged both sides to settle the case and put safety remedies in place as soon as

possible.²⁸

The parties established a framework for what was to become a 154-page final consent decree²⁹ covering virtually every aspect of the marketing and advertising of ATVs. The consent decree also outlined the methods by which ATV manufacturers should disseminate widespread consumer notices and warnings, as well as information about comprehensive free training programs.

V. The Final Consent Decree

The defendant ATV manufacturers were required to spend close to \$8 million on an eight week television campaign, including advertisements during the World Series and Monday night football games, to inform consumers of the risks associated with ATV use and to encourage them to participate in the comprehensive training program.³⁰ This provision is unquestionably the largest cash payout for corrective advertising in the history of the CPSC.³¹ To reinforce the television campaign, the defendants were also required to conduct an outreach campaign utilizing mail and print media.³² Past purchasers of ATVs received updated safety information and new warning labels. Finally, the defendants were required to expand the safety information included in ATV operator's manuals.³³

The consent decree also placed great emphasis on point of purchase information, thus insuring that consumers have safety information readily available to them at the time of purchase.³⁴ ATV dealers are required to post prominent signs detailing the unique handling characteristics and safety risks associated with ATVs. Dealers must also provide a toll free number for consumers to enable them to obtain further safety information.³⁵ Lastly, dealers must place tags on showroom vehicles in order to further emphasize the safety information on the signs and safety labels, as well as in the owner's manuals that come with each vehicle.³⁶

The consent decree defines an adult-size ATV by engine size and requires the industry to recommend that only persons age 16 years old and older ride adult-sized vehicles.³⁷ It allows for the marketing of a smaller, statistically safe four-wheel vehicle to children age 12 to 15 years old.³⁸

Under the terms of the consent decree, the defendants are required to establish and staff permanent offices that will administer an ap-

proved safety training program to consumers. The program is available at no cost to immediate past purchasers.³⁹ New purchasers are offered a \$50 cash rebate for the training program, or other benefits at the purchaser's option.⁴⁰ Additionally, the CPSC agreed to establish a repository for public information regarding the consent decree, which consists of all consumer and public comments about the decree, as well as information supplied by the ATV industry in connection with enforcement of the decree.⁴¹

During testimony before a Congressional committee, one lawyer for the ATV manufacturers estimated that the costs involved in implementing the final consent decree would be in excess of \$100 million over the ten-year life of the decree.⁴² After conducting a hearing on the merits and rejecting requests to set aside the decree, Judge Gerhard Gesell wrote: "No decree designed to protect consumers has ever gone this far in meeting such a national consumer problem."⁴³

VI. Conclusion

The implementation of the consent decree has required continued vigilance on the part of the CPSC and the Department of Justice. The monitoring of sales representations of approximately 5000 ATV dealers around the country has revealed some non-compliance among eager salesmen in at least one state.⁴⁴ Steps by the manufacturers to correct this problem have included threatening dealers with the withdrawal of their franchise. The failure of many state legislatures to enact supplementary safety provisions on matters not within the CPSC's jurisdiction, such as minimum age licensing laws, helmet laws, and strict penalties for riding with passengers or for riding while intoxicated, continues to be a very serious public safety problem. Nevertheless, recent injury statistics from the CPSC demonstrate that the number of serious injuries associated with ATVs is finally decreasing. According to national estimates, the total number of serious injuries was reduced in 1988, subsequent to the stop-sale of three wheelers, by about 15,000 accidents. This is a 19% reduction in just one year.⁴⁵ ATV manufacturers' estimates concerning the injury rate per ATV in use also show a 19% reduction in the number of accidents in 1988. It is very likely that the injury rate will continue to decrease as more imme-

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diate past purchasers are trained, new purchasers are informed of the risks, and more of the less risky four-wheel ATVs are sold.⁴⁶ Assuming the ATV consent decree is given time to work, the number of injuries suffered by consumers will be significantly reduced and consumers will continue to have the benefit and utility of ATVs.

1. House Comm. on Government Operations, Consumer Product Safety Commission's Response to Hazards of Three-Wheel All-Terrain Vehicles (ATVs), ("House Report"), H.R. Rep. No. 678, 99th Cong., 2nd Sess. 2 (1986).
2. House Report, *supra* note 1.
3. Consumer Product Safety Commission, Reported Deaths and Estimated ATV-Related Injuries by Type Vehicle and Year (1988).
4. Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C. §§ 2051-2080 (1982 & Supp. V 1987)).
5. Federal Hazardous Substances Act, Pub. L. No. 86-513, 74 Stat. 380 (1960) (codified as amended at 15 U.S.C. §§ 1261-1291 (1982 & Supp. V 1987)); Flammable Fabrics Act, Ch. 164 § 2, 67 Stat. 111 (1953) (codified as amended at 15 U.S.C. §§ 1191-1204 (1982)); Poison Prevention Packaging Act of 1970, Pub. L. No. 91-601, 84 Stat. 1670 (1970) (codified as amended at 15 U.S.C. §§ 1471-1476 (1982)).
6. Pub. L. No. 100-404, 102 Stat. 1014, 1022 (1988).
7. 50 Fed. Reg. 23,139-44 (1985); 16 C.F.R. Ch. II (All-Terrain Vehicles; Advance Notice of Proposed Rulemaking; Request for Comments and Data; May 31, 1985). See 15 U.S.C. § 2058 (1982).
8. Consumer Product Safety Commission, Report of the Consumer Product Safety Commission All-Terrain Vehicle (ATV) Task Force, (1986). See also, All-Terrain Vehicles, Hearings Before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the House of Representatives Committee on Energy and Commerce, 100th Cong., 1st Sess. 100 (1987).
9. Consumer Product Safety Commission, Report of the Consumer Product Safety Commission All-Terrain Vehicle (ATV) Task Force, (1986) at Tab E.
10. *Id.* at Tab B, 13.
11. *Id.* at Tab B, 17.
12. *Id.* at Tab B, 8.
13. *Id.* at Tab B, 18.
14. *Id.* at Tab B, 11-12.
15. *Id.* at Tab B, 16-21.
16. *Id.*
17. 15 U.S.C. §§ 2057, 2058, 2061, 2064 (1982).
18. 15 U.S.C. § 2060 (1982).
19. 15 U.S.C. § 2064 (1982).
20. United States v. American Honda Motor Co., et al., Civ. A. No. 87-3525, slip op. (D.D.C. 1988) (Final Consent Decree). See also, Transcript of Oral Arguments on Final Consent Decree at 100, where Judge Gerhard A. Gesell estimated the appellate process would take two to three years, during which time no safety remedies would be in place.
21. Consumer Product Safety Act, Pub. L. No. 92-573, § 12, 86 Stat. 1218 (1972) (codified as amended at 15 U.S.C. § 2061 (1982)).
22. *Id.* Section 12 "imminent hazard" jurisdiction has rarely been exercised by the CPSC. CPSC v. Chance Manufacturing Co., et al., 441 F. Supp. 228 (D.D.C. 1977), where a non-fixed site amusement park ride was determined to be within Section 12 jurisdiction; CPSC v. Anaconda Co., 445 F. Supp. 498 (D.D.C. 1977) denied Section 12 jurisdiction over household wiring. See also, Kaiser Aluminum and Chemical Corporation v. CPSC, 414 F. Supp. 1047 (D.Del. 1976) and Kaiser Aluminum and Chemical Corporation v. CPSC, 428 F. Supp. 177 (D.Del. 1977); and CPSC v. Advance Machine Co., Inc. et al., Civ. A. No. 77-1323, slip op. (D.D.C. 1978) consent judgment entered May 8, 1979, where an automatic pitching machine alleged to be an imminent hazard, resulted in a consent decree.
23. Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified as amended at 15 U.S.C. §§ 2051-2080 (1982 & Supp. V 1987)). The CPSC may recall a product which it has proven to be defective. 15 U.S.C. § 2064 (1982). A judge may have discretion to order a recall on the basis of a defect under 15 U.S.C. § 2061 (1982). However, no clear statutory authority exists to order a manufacturer to honor a consumer's request for a refund, short of a finding of a defect based on evidence. Such a refund is equitable in nature, and is based on fairness rather than the required safety findings in an "imminent hazard" lawsuit.
24. Conf. Rep. No. 1593, 92nd Cong. 2d Sess., Conf. Comm. Joint Explanatory Statement, reprinted in 1972 U.S. Code Cong. & Admin. News, 4643.
25. 15 Prod. Safety & Liab. Rep. (BNA) 414 (1987).
26. Letter from Senator Albert Gore to CPSC Chairman Terrence Scanlon (Nov. 20, 1987).
27. United States v. American Honda Motor Co., et al., Civ. A. No. 87-3525, slip op. (D.D.C. 1988). See All-Terrain Vehicle Settlement, Hearings Before a Subcommittee of the House of Representatives Committee on Government Operations, 100th Cong., 2nd Sess. 404 (1988).
28. "Adults need to be warned that ATVs aren't toys. And kids should be kept off them.... The preliminary settlement last week of a suit by the Consumer Product Safety Commission against ATV manufacturers can help do both...." USA Today, Jan. 5, 1988, at 8A. *But cf.* a contemporaneous editorial stating that, "As stern as the Government's action was, ATV critics are not satisfied." TIME MAG., Jan. 11, 1988, at 59.
29. United States v. American Honda Motor Co., et al., Civ. A. No. 87-3525, slip op. (D.D.C. 1988) (Final Consent Decree).
30. *Id.* at Appendix N., 1-7.
31. *Id.*
32. *Id.* at 41-43.
33. *Id.* at 15.
34. *Id.* at 27-30.
35. *Id.* at 30-31.
36. *Id.* at 29.
37. *Id.* at 7.
38. *Id.* at 6.
39. *Id.* at 45.
40. *Id.* at 52-53.
41. *Id.* at 61-62.
42. Proposed ATV Settlement Hearing before the Consumer Subcommittee of the House Energy and Commerce Committee, 100th Cong., 2d Sess. (1988) (testimony of Howard P. Willens, attorney for American Honda, Inc.).
43. United States American Honda Motor Co., et al., Civ. A. No. 87-3525 (D.D.C. 1988) (Memorandum Opinion and Order).
44. Action by ATV Distributors Based on CPSC Survey of ATV Dealers, CPSC Press Release (Dec. 15, 1988).
45. Special Vehicle Institute of America, Press Release (March 31, 1989).
46. Specialty Vehicle Institute of America, The ATV Industry Safety Program: A Progress Report, 3 (April 14, 1989).