DEVELOPMENT OF CONSUMER PRODUCT MANUFACTURER'S LIABILITY THROUGH PASSAGE OF FEDERAL AND STATE LEGISLATION AND CASE INTERPRETATION

DISSERTATION

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by

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This research examined the development of consumer product manufacturer's liability between 1890 and 1981.

A large percentage of the manufacturers were involved in monopolies, suppression of free trade, price conspiracies, and fraudulent advertisements. Negligence in design and manufacture frequently resulted in defective products.

Responsible writers exposed: dangerous foods; chemicals; insecticides; unethical manufacturing methods; and numerous injuries or deaths from defective consumer products.

Three periods of organized consumerism, 1890-1917, 1927-1941; and 1962-1981, created congressional pressure for consumer-oriented legislation. Five presidents used the power of their offices to pressure congress to protect the public. The states adopted the federal Workmen's Compensation Law of 1908 to provide assistance for individuals who suffered job-related injuries or death. Additional consumer-oriented laws enabled injured workers to sue for damages through the courts.

Organized women's clubs worked through industrial representatives and congress to correct flagrant manufacturing abuses and establish standards.
Increasing injuries and deaths from defective consumer products generated astronomical increases in the manufacturer's insurance premiums. Other than establishing in-house pre- and post-production testing, or utilizing private facilities, manufacturers have done little to decrease their insurance and litigation costs. Failure to enforce industry standards, within their own field, establish new standards, and refusing to acknowledge that anything may be wrong with their manufacturing methods has increased the manufacturer's liability.

Examination of landmark decisions rendered by state courts revealed that manufacturers are strictly responsible for their defective products and fraudulent advertising. On the other hand, courts use comparative fault to weigh the responsibility of both manufacturer and consumer in rendering a verdict. There is a nation-wide move underway by powerful lobbyists and state legislatures to curb recent court decisions and provide more affirmative defenses to the manufacturer.

The Consumer Product Safety Commission administers regulations and standards for approximately 10,000 products. Recently, funds have been drastically reduced by the Reagan administration and proposed plans will further reduce the effectiveness of the Commission.
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CHAPTER I

PRODUCT LIABILITY AND CONSUMERISM

Introduction

Since the late 1800s American consumers have fought for protection from manufacturers who placed unsafe products in the marketplace. Needless injury, illness and death from contaminated foods and medicine, as well as defective merchandise, provided the necessary ingredients for consumer action. From a very small beginning in the early 1900s, consumer movements slowly gained momentum.

Anyone who reads a newspaper and listens to news reports knows that awards for product liability damages run into the millions of dollars. Damage awards have also generated astronomical increases in product liability insurance rates. These increases not only affect the manufacturer, they also involve subcontractors who make component parts of consumer products, wholesalers who distribute to retailers, retailers who sell to the public, and the public who pays a higher price for their consumer goods.

Background

In today's modern market system, characterized by highly technical and complex manufacturers producing a vast selection of consumer goods, product safety has become a major concern. For many years, consumer activist organizations, federal
and state governments have been working to overcome the major safety problems. Their concern, intensified by consumer movements, has been partially responsible for increasing consumer expectations (10, pp. 144-145). These expectations have been: (a) translated into new product safety legislation; (b) the cause of acceleration in federal and state government agencies issuing administrative directives; and (c) responsible for enforcement of safety requirements. The social and legal demands that manufacturers produce and distribute safer consumer products have been responsible for manufacturers: (a) seeking better methods of design; (b) attempting to furnish accurate and complete information regarding the contents and use of their products; and (c) educating the public through proper labeling and promotion (11, p. 26).

Subject of the Study

This study examined the growth and development of federal and state legislation, as well as decisions of the state supreme and appellate courts, which worked to ensure consumer product safety. Federal and state legislation moved from "Let the Buyer Beware" to "Let the Seller Beware." Laws of the United States, concerned with consumer protection shifted from "negligence" to "strict liability" on the part of the manufacturers (3, p. 72).

Federal and state laws, as well as the decisions of the state supreme and appellate courts from the late 1800s to the present time, have greatly increased the responsibility of manufacturers. Failure to comply with regulations and standards often resulted in verdicts that proved expensive for the
manufacturers (3, pp. 72-73). The number of state product safety laws has increased and some states now have their own unique laws that establish product safety standards. Consumers have the right to sue manufacturers for injuries, illnesses or deaths resulting from the use of their products (5, p. 1).

Since May 1977, more states have joined Utah in developing laws that limit the liability of manufacturers and protect the consumers (3, p. 74). These laws have a tendency to move away from "strict liability" on the part of manufacturers and include consumers in the total picture of responsibility. Reducing the liability of manufacturers tends to lower costs of litigation that is usually passed on to the consumer in the form of increases for products (5, p. 1).

Manufacturers who fail to comply with existing regulations often spend millions of dollars to defend their actions in federal and state courts. The manufacturers also lose money in lost sales as a result of bad publicity. Even if the manufacturer had not been involved in a liability suit, premiums on product liability insurance are extremely high. The premiums are also increased if a company has been previously involved in litigation. Again, these costs must be absorbed by the consumer (9, pp. 48-50).

Failure to remain alert to the changes taking place in safety standards results in a rude awakening for the manufacturer. The customer can—and does—sue for damages.
Purpose of the Study

The purpose of this study was to research the historical development of product safety legislation in order to define the extent of expansion and boundaries of federal and state laws as they related to marketing management.

Research Questions

Some basic questions concerning the development of product safety laws explored in this research were:

1. How has the federal product safety legislation evolved over the years?
   A. What major pieces of federal legislation compose this body of product safety regulations?
   B. What requirements were placed on manufacturers to provide consumers with safe products?
   C. To what extent did Congress intend to make manufacturers liable for mishaps involving their products?
   D. Who is responsible for enforcing the laws?
   E. What direction does future product safety legislation appear to be taking?

2. What states have developed product safety laws?
   A. How do these states differ from federal product safety legislation?
   B. What standards must be met by manufacturers in providing consumers with safe products?
   C. How do these state laws limit the manufacturer's liability?
   D. Has the federal government taken steps to bring about uniform state product safety laws?
3. Have landmark case decisions significantly expanded safety enforcement?
   A. Have these court decisions increased the manufacturer's liability?
   B. What guidelines have these decisions established for manufacturers to reduce their liability?
   C. Is there a change taking place in the most current court rulings to decrease the manufacturer's liability?
   D. What is the economic impact of these rulings on the manufacturer?
   E. What is the economic impact of these rulings on the consumer?

4. What preventative action can be taken by manufacturers to reduce their liability?
   A. What can be done when designing the products to reduce the manufacturer's liability?
   B. What can be done to reduce product liability claims stemming from various methods of promotion?
   C. What can be done to reduce the manufacturer's liability from mishaps occurring from improper usage?

Methodology

Data for this study were derived from a review of the literature. Primary sources include: Atlantic Reporter, 1959 and 1972; Federal Consumer Product Safety Act, 1975; Northeastern Reporter, 1916; Pacific Reporter, 1962, 1975 and 1978; Donald P. Rothschild and David W. Carrol, Consumer Protection:

Research procedures included: (a) compiling a history of the consumer movement from 1890 to 1981; (b) tracing federal and state legislation that dealt with product safety; (c) determining the intent of congressional changes in consumer protection; (d) examining state statutes that balance manufacturer liability and consumer claims; (e) studying state supreme and appellate court cases that resulted in landmark decisions for consumer protection; and (f) determining how these landmark decisions influenced application of federal and state laws.

Study Limitations

It was not the intent of this study to examine all of the federal and state legislation usually grouped under the heading of "consumer protection." Product safety legislation is intended to hold manufacturers responsible for products they offer consumers who are not fully informed or trained in the use of the product. Therefore, research was limited in two areas: (1) federal legislation that was intended to provide the consumer-user with safer products and (2) state laws considered unique in striking a balance between liability on the part of the manufacturers and protection of consumers. Laws in each of the fifty states are not sufficiently consistent to permit identification and establishment of general trends.
Definitions

**Comparative Fault**—used interchangeably with comparative negligence and contributory negligence.

**Comparative Negligence**—"negligence of the defendant in an action to recover damages for negligence as compared with that of the plaintiff, the comparison being made for the purpose of applying the rule of admiralty, which has been adopted by statute for negligence cases . . . the more gross the negligence of the defendant's appears, the less degree of care is required of the plaintiff to permit a recovery by him; that the negligence of the plaintiff operates, not to relieve the defendant entirely from liability, but merely to diminish the damages recoverable" (2, p. 232).

**Contributory Negligence**—mutual contributory or co-operative negligence occurs when both parties are to blame for injury or death (2, p. 266).

**Express Warranty**—"any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain" . . . any description of the goods which is made part of the basis . . . that the goods shall conform to the description" (12, p. 548).

**Foreseeability**—the ability to see and know beforehand (14, p. 546).

**Implied Warranty**—"fitness for particular purpose—where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods" (12, p. 548).

**Liability**—"(a) something that works to one's disadvantage; (b) anything for which a person is liable (14, p. 813).

**Merchantability**—"the implied warranty of merchantability is only given by merchants who deal in goods of the kind being sold . . . goods must pass without objection in the trade under the contract description . . . are fit for ordinary purposes for which such goods are used . . . are adequately contained, packaged, and labeled as the agreement may require; and conform to the promises or affirmations of fact made on the container or label if any" (12, pp. 565-566).

**Negligence**—(law), failure to use a reasonable amount of care when such failure results in injury or damage to another (14, p. 952).
**Privity**—participation in private or secret knowledge; mutual interest in the same property or right established by law or legalized by a contract (14, p. 1131).

**State of the Art**—the current level of sophistication of a developing technology (14, p. 1391).

**Statute of Limitations**—a statute limiting the period within which a specific legal action may be taken (14, p. 1392).

**Statute of Repose**—same as Statute of Limitations

**Strict Liability**—involves anyone "who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property [and they are] subject to liability for physical harm thereby caused to the ultimate user or consumer, if (a) the seller is engaged in the business of selling such a product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold; . . . (c) even though the seller has exercised all possible care in the preparation and sale of his product, and (d) the user or consumer has not bought the product from or entered into any contractual relation with the seller" (12, p. 531).

**Strict Liability in Tort**—a manufacturer is held strictly liable when it is determined that a defect in his product caused an injury.

**Tort**—a wrongful act, injury or damage for which suit can be brought against the offending party—not involving a contract (14, p. 1501).

**Warranty**—(law) "guarantee, specifically . . . a guarantee or assurance, explicit or implied, of something having to do with a contract, as of sale, esp., the seller's assurance to the purchaser that the goods or property is or shall be as represented" (14, p. 1602).
CHAPTER BIBLIOGRAPHY


CHAPTER II

THREE CONSUMER MOVEMENTS: 1890-1981

Introduction

This chapter will examine three periods of consumerism and show the relationship of women, the Federal government, industry, advertising, consumer testing facilities, and Ralph Nader to the three consumer movements.

The concept of product liability is not new; it comes from English Common Law. The United States adopted the English format when our own laws were being formulated (33, p. 1). Thirteenth-century England penalized brewers, butchers, cooks, etc., for making or selling unsanitary foods (4, p. 11). Customary law was a forerunner of common law because customs and social values influenced the development of a common law system. The Church of England, prior to the seventeenth-century, restricted market behavior because it was considered sinful to trade-for-gain. The Church imposed—and the courts enforced—standards of conduct for merchants that resulted in open markets, fair prices, honest measures, and good quality products. The phrase caveat emptor (let the buyer beware) first appeared in the late sixteenth-century (33, pp. 107).

According to two authorities (16, p. 6; 32, p. 2), Adam Smith signaled in his The Wealth of Nations (1776), the beginning of a laissez-faire (people acting without interference or
direction) commercial society. He stated "consumption is the sole end and purpose of all production; and the interest of the producer ought to be attended to, only so far as it may be necessary for promoting that of the consumer" (6, p. 42). It was believed that in the free market place, where producers and consumers interacted through the bargaining process—products were produced for consumer consumption (16, p. 6). In the mercantile system, however, "the interest of the consumer is almost constantly sacrificed to that of the producer; and it seems to consider production, and not consumption, as the ultimate end and object of all commerce and industry" (6, p. 42).

In these early markets, buyers examined goods on display in the local shops. Although buyers compared and haggled over prices, the reputation of the seller guaranteed fair play. "Let the Buyer Beware" had meaning because the producer and marketeer were favored in English law and in English courts (16, pp. 6-7).

There have been three periods of consumer activity in the United States: 1890-1917; 1927-1941; and 1962-1981. Numerous federal and state laws to protect the consumer have been enacted as a result of active consumerism (25, p. 38).

The First Consumer Movement: 1890-1917

The first consumer movement was a result of several decades of fluctuating income and retail prices. In the latter part of the 1800s, prices rose and real income decreased. Already overburdened with low incomes, the high prices imposed additional burdens on the people. They began to distrust the
powerful and prosperous corporations (18, p. 55).

Women and Consumerism

Although research failed to directly link women to the passage of the Sherman Antitrust Act of 1890, it would not be unrealistic to believe they played an important role. It was pressure from the public domain that forced Congress to enact this first major antitrust law (3, p. 802).

Lacking the right to vote failed to deter the General Federation of Women's Clubs, National Consumers League, both organized in 1890, and State Food Commissioners (acting as coordinators) from organizing the American Pure Food League. In 1904, the General Federation organized a Pure Food Committee. This committee prepared exhibits, petitions, and gave speeches to arouse public interest in the need for a pure food law (42, p. 7).

Consumer activists and unions aided the organized women's groups. Journalists who attacked industries that were involved in oil, meatpacking, railroads, and patent medicines joined the crusade. Both Collier's Weekly and the Ladies' Home Journal published articles criticizing the patent medicines. The determined opposition of industry proved ineffective, and the long road to congressional action on a pure food law began (41, p. 14; 42, p. 7).

Federal Government Activity

Two antitrust evils of this period were "(a) the conspiracy or combination of business entities for the purpose of artificially restraining commerce and trade; and (b) the monopolistic activities of the newly developing industrial giants"
which stifled competition and destroyed the traditional concepts of free and competitive trade" (3, p. 802). Public pressure forced Congress to enact the first major antitrust law, the Sherman Antitrust Act of 1890. This act was instrumental in disbanding some of the industrial giants. The people, however, felt the law was inadequate because it only applied after violations had occurred and many anticompetitive practitioners escaped prosecution (3, p. 802).

Public indignation over impure foods and medicines gained momentum through the assistance of Dr. Harvey W. Wiley, Chief of the Bureau of Chemistry, Department of Agriculture. He published numerous reports on food adulteration that were available to the public. With the publication of Upton Sinclair's *The Jungle*, President Theodore Roosevelt was so incensed about the conditions prevailing in the meatpacking industry that he added the power of the presidency to the movement (34, p. 646; 42, p. 6).

In *The Jungle*, published in 1906, Sinclair exposed fraud and filthy working conditions existing in a Chicago meat-packing plant. He reported:

... There was never the least attention paid to what was cut up for sausage; there would come all the way back from Europe old sausage that had been rejected, and that was moldy and white—it would be dosed with borax and glycerine, and dumped into the hoppers, and made over again for home consumption. There would be meat that had tumbled out on the floor, in the dirt and sawdust, where the workers had tramped and spit uncounted billions of consumption germs. There would be meat sorted in great piles in rooms; and the water from leaky roofs would drip over it, and thousands of rats would race about on it. It was too dark in these storage places to see well, but the man could run his hand over these piles of meat and sweep off handfuls
of the dried dung of rats. These rats were nuisances, and the packers would put poisoned bread out for them; they would die, and then rats, bread, and meat would go into the hoppers together. This is no fairy story and no joke; the meat would be shoveled into carts, and the man who did the shoveling would not trouble to lift out a rat even when he saw one—there were things that went into the sausage in comparison with which a poisoned rat was a tidbit. There was no place for the men to wash their hands before they ate their dinner, and so they made a practice of washing them in the water that was to be ladled into the sausage. There were the butt-ends of smoked meat, and the scraps of corned beef, and all the odds and ends of the waste of the plants that would be dumped into old barrels in the cellar and left there. Under the system of rigid economy which the packers enforced, there were some jobs that it only paid to do once in a long time, and among these was the cleaning out of the waste barrels. Every spring they did it; and in the barrels would be dirt and rust and old nails and stale water—and cartload after cartload of it would be taken up and dumped into the hoppers with fresh meat, and sent out to the public's breakfast (40, p. 135).

President Theodore Roosevelt added the power of the presidency to the massive cry of the American people and forced a reluctant Congress to enact the Pure Food and Drug Act of 1906 (1, p. 11).

This act not only regulated the manufacture and labeling of drugs and foods, it also banned the sale of adulterated products (44, p. 28). Penalties were imposed for non-compliance and questionable products were subject to cease-and-desist orders, served by the Bureau of Chemistry personnel of the Department of Agriculture (33, pp. 147-148). Although the act was considered weak and only met the essential requirements, it would be 1938 before Congress made any improvements (33, pp. 147-148).

Continued activity by the women's groups, and the public, resulted in the passage of the Meat Inspection Act of 1907. This act required veterinarians of the Department of
Agriculture to inspect animals before and their meat after slaughtering. Firms engaged in slaughtering, packing and canning were compelled to destroy diseased animals before they could receive the government "seal of inspection" (23, p. 19). Evidently Congress felt it had been prodded long enough, it would take them nearly sixty years before amendments would be enacted.

In 1908 Congress established, for federal civilian workers, the Workmen's Compensation Laws "providing health care, income maintenance, and survivor protection for workers disabled or killed due to occupational injury or illness" (46, p. 177). By 1948, forty-eight states had adopted their own individual compensation laws and "it is the only broad-scale social insurance program in the U. S. still operated by the states without federal control" (48, p. 177). "Employees are entitled to benefits whenever a disability is in any way job-related. Even in cases where employees may have been clearly negligent, employers must assume almost absolute liability for costs without regard to fault" (48, p. 177).

By 1972 Workmen's Compensation would no longer be the sole source of job-related injury awards. This change would create increases in manufacturer's liability and generate higher prices for consumer goods. (Chapter V discusses this in greater detail).

Again public outcries led to congressional action. Anti-competitive practices were out-of-hand and people were the victims. The Federal Trade Commission Act of 1914, and establishment of the Federal Trade Commission, brought some order out of chaos. The Federal Trade Commission was charged with
the responsibility of preventing anticompetitive practices, whenever possible (3, p. 802).

Later that same year, the **Clayton Antitrust Act** supplemented the 1890 **Sherman Act**. This act was an attempt to halt the creation of monopolies, trusts, and conspiracies before they occurred (3, p. 803; 20, pp. 6-7). The **Clayton Act** specifically restrained price discrimination, binding and exclusive agreements, stock acquisition of one company and then interlocking the corporate directors (20, pp. 6-7).

**Industry and Consumerism**

Through advertisements in newspapers, magazines and their catalogues, Sears, Roebuck in 1911 provided customers with information about their products, i.e., type of fabrics, colorfast, etc. These advertisements were supposed to prevent the return of merchandise from dissatisfied customers. Inadvertently, Sears, Roebuck became consumer-oriented—via the backdoor (6, p. 48; 42, p. 11).

Better production methods began to appear. Products poured into competitive markets. A new network of railroads transported a five-fold increase of consumer goods across the nation. Trade-mark products were advertised nationally through the new mass-circulated magazines. Some manufacturers, however, utilized unorthodox methods that eventually led to fraud, deception, and shoddy goods (1, p. 10; 26, p. 2; 34, p. 31).
Advertising and Consumerism

Advertising had grown from the handmade signs in the corner grocery window to newspaper and magazine ads. These advertisements, although highly descriptive of a manufacturer's product, were deceptive. In a highly competitive field, store sample, flyers, newspaper and magazine articles had proved effective. They were instrumental in moving such firms as Uneeda Biscuit and Quaker Oats from small companies to giant corporations (33, p. 25). Reliable writers report that "advertising evolved from an isolated phenomenon to encompass virtually all of the essential forms, function, and forces of the contemporary institution (34, p. 42).

A small group of New York merchants joined forces in 1911 to protest dishonest advertising. From this joint effort the Better Business Bureau and its motto "Truth in Advertising" emerged (42, p. 198; 43, p. 7).

Consumer Products Testing Facilities

Consumer product testing facilities would not emerge until the second consumer movement. American households could be considered the first product testing facilities. Housewives, dissatisfied with their local merchants, protested by words and examples to their neighbors. This probably resulted in neighbors refusing to buy certain products in their town. These actions, however, were restricted to individual towns and did not have a national effect at the time. With the furor created by the drive for a pure food law, these isolated towns joined forces throughout the nation. Eventually the demand to know what a product contained would provide testing facilities.
The Second Consumer Movement: 1927-1941

The second consumer movement, according to recognized authorities (6, p. 17; 9, p. 17; 34, p. 647), began when Stuart Chase and Frederick Schlink, formerly with the Federal Trade Commission and National Bureau of Standards, respectively, published Your Money's Worth. This best seller revealed that a bar soap, used in the average household, contained some creosol. Creosol was a commonly used cheap disinfectant, recommended by the federal government to disinfect cars, barns and chickenyards. For hundreds of thousands of embattled housewives, farmers, teachers, professional economists, and special interest groups of the consumer movement, this publication became the handbook for purchasing.

One source (9) reported Chase and Schlink placed the consumer in an Alice in Wonderland setting where they were manipulated into buying products by bright advertising promises, fancy packaging, and meaningless phrases by manufacturers and advertising agencies. These authors also indicated the advertisers could not be trusted to bring consumers quality goods for low prices because the manufacturers shortened the product-life and reduced weights to improve their competitive positions. Another source (6, p. 17) reported advertisers used "exaggerations, pseudo-scientific statements, the use of misleading names or terms, misleading labels, testimonial letters, comparative prices, and such use of premiums, prizes, and contests as to confuse the customer as to the true value of the product."

Consumers were psychologically conditioned through their disillusionment with the economic system following World War I.
The complacency of the early 1920s was followed by the stock market crash in 1929. Millions lost their jobs and life-savings. Widespread unemployment and extremely low incomes increased public insecurity (5, p. 38).

Women and Consumerism

In 1939, an article in *Business Week* stated "when it comes to lobbying for or against legislation, it is the organized women's groups that constitute the real strength of the consumer movement" (6, p. 46). Women's groups and professional organizations were gaining not only strength in the number of organizations formed, their massive membership was also apparent through various consumer protests and activities. Four of these groups will be examined: American Association of University Women (1882); American Home Economics Association (1908, professional organization); General Federation of Women's Clubs (1890); and the National League of Women Voters (1920) (42, pp. 56–99).

The American Association of University Women "was among the pioneering groups to prepare study outlines indicating available data on testing, standardization, and the informative labeling of foods, drugs, household equipment, and clothing. . . . Study groups in approximately 300 branches studied consumer purchasing" (42, p. 85). Local activities included education in purchasing, forums and demonstration exhibits, protective measures on the municipal, state and federal levels, providing information on standards and furnishing representatives for committees and conferences on the national level (42, p. 85). This association also had representation on the
Advisory Committee on Ultimate Consumers' Goods of the American Standards Association (a national clearinghouse for standards). It is also a charter member of the National Consumer-Retailer Council (42, p. 89).

In November 1939, the general director of the American Association of University Women wrote to President Franklin Roosevelt urging the "establishment of a central agency 'as a separate entity or as a bureau in some department where it could be thoroughly representative of the consumer interest'" (42, p. 88). This was not a new idea. In 1933, Leon Henderson, who headed the Office of Price Administration, wrote:

I believe the consumer's voice must be heard, and will be heard. If I did not so believe, then must I be resigned to a progressive decline in the standard of living? The consumer will find some means of mass expression . . . It may come through one of many types of associative organizations . . . through government agencies such as County Councils or a Department of the Consumer (42, p. 19).

The idea of a consumer department was voiced by many organizations and by 1939 "it was an idea even business interests looked at favorably" (42, p. 19). Business Week reported "one government department would be easier to deal with than ten or twenty million rugged individualists" (42, p. 19). Although numerous consumer-oriented laws would be enacted by Congress, thirty-three years would elapse before the Consumer Product Safety Act of 1972 became law.

The American Home Economics Association (a professional organization), was one of the original groups to foster consumer education. By 1940 this association had "in affiliated state associations, more than 15,000 members including deans, directors, supervisors, teachers, research workers and
executives in federal and state governments, rural extension workers, home economists in institutions, in commercial and business enterprises in magazine and newspaper work, in relief and public health agencies, and in the practical business of home making. There are in addition about 2,300 home economics clubs in college and high schools with around 80,000 members, and 6 homemaking groups. It has 18 standing committees, 13 special committees, and is affiliated with 16 other organizations" (42, p. 60).

Special interest was centered "(a) on financial planning for the family in relation to business cycles and in relation to cash income for family living and outgo; (b) purchasing commodities for the women in relation to quantities and price change; (c) buying electrical equipment for the farm home; (d) textile identification; (e) durability problems caused by weave and finish; (f) selection of canned food; (g) food advertising; and (g) cost of installment buying" (42, p. 64).

Participation in textile studies with the National Bureau of Standards and American Standards Association led to the establishment of manufacturing standards for blankets, sheets, lingerie, upholstery, clothing, waterproof materials and, safety rules for radio installations (42, pp. 66-67).

Through its legislative committee, representation at Federal Trade Commission hearings and trade practice conferences is assured. Legislative programs include "protection of the ultimate consumer under the Foods, Drugs, and Cosmetics Act, block booking and blind selling of motion pictures; punitive taxation against chain stores, and federal aid for housing (42, pp. 70-71).
The General Federation of Women's Clubs, originally a literary and artistic club, was now "a large, loosely integrated federation of over 15,000 clubs with a membership of well over two million" (42, p. 89). The federation has nine departments and "consumer interests and programs are advanced through the Division of Family Finance and the Division of Consumer Information of the Department of the American Home. In cooperation with the Institute for Consumer Education, the federation has drawn up study outlines on such topics as the consumer and the chain stores; buyers guidance; consumer and the agricultural programs of the federal government; food and drug laws; consumer financing; grades, labels, and brand names; consumer testing; consumer cooperation" (42, pp. 90-91).

The General Federation works closely with the University Women and the American Home Economics Association. Legislative programs are adopted and forwarded through their representatives at hearings on appropriate bills, particularly the food and drug legislation (42, pp. 90-91).

Federation influence was felt by the Federal Trade Commission and they promulgated fair trade rules for rayon, silk and cotton that required labels stating the percent of fiber used in the goods (6, p. 47). In 1931, the federation and the Department of Commerce conducted a joint study which resulted in a bulletin "The Consumer Viewpoint on Returned Goods."

This bulletin was the official sanction for the "Shoppers Creed":
I believe that the American Woman, through control of a large share of the family budget, exerts a vital influence upon today's economic order.

Therefore, I hold it my duty to help make this influence constructive; to govern my buying so that waste will be reduced and the greatest good to all realized from my expenditure.

I believe that, as a measure of true economy, I should: (1) make known my merchandise needs and preferences in advance whenever the opportunity is presented; (2) remember that cheapness in itself is not always a bargain, and consider suitability and durability as well as price; (3) avoid merchandise known to be produced under unfair competitive conditions, such as sweat shop or prison made goods; (4) be reasonable in my demands for service, such as credit, alterations, and deliveries; (5) refrain from returning merchandise unless the goods or the store is at fault. This is my creed, I believe in it; and I shall support it (42, p. 90).

Attempts by commercial interests and self-seeking leaders to obtain the endorsement of this powerful group were rebuffed. The General Federation provided instructions to help clubs maintain strict independence when dealing with all special interest groups (40, p. 90). From the business groups viewpoint "the general Federation of Women's Clubs is undoubtedly one of the most important forces in the consumer movement, both because of its numbers and because it represents consumers who are economically powerful and can be called upon to indicate the reactions of the middle- and upper-class housewife" (42, p. 91).

Founded in 1920 by the leaders of the National Women's Suffrage Party, the National League of Women Voters "is unique among the women's organizations because its primary purpose is the development of a program of legislative action, based on a study of the issues involved" (42, p. 96). By 1938 "there were 533 local leagues in 30 affiliated state leagues and 26 college leagues, having a total membership of 50,000" (42, p. 96).
Although the primary interest of the league is the "development of good government on democratic principles" (42, p. 97), economically the need for the "protection of consumers lies in the cardinal principle 'private business must be either subject to effective competition or else government regulation or control or the evils of monopoly are to be avoided'" (42, p. 97). Basic to problems related to consumers "is the question of consumer representation in all agencies—federal, state, or local—that deal with problems affecting the consumer. . . . The consumer should be represented on them" (42, p. 97).

The league tries to maintain a "strictly nonpartisan position" and only enters joint action with other groups at the point of action. The league lobby at the U. S. capital "possesses a particular influence insofar as it presents the deliberated sentiment and disinterested opinion of a large and highly organized body of women voters. A high percentage of the measures advocated by the league have been passed by Congress" (42, pp. 97-98).

**Federal Government Activity**

During the early years (1933-1935) of President Franklin Roosevelt's administration, the federal government "attempted to stimulate recovery by providing aid to the producing groups, by price-raising programs and by setting up rules of market behavior. . . . Nevertheless, it soon became apparent that the interests of the consumer-public also required specific considerations" (42, p. 15).
The establishment of the Consumer's Advisory Board was for the benefit of individuals in their "capacities as owners and laborers; as consumers they were not to be injured" (42, p. 15). For example, "the oil industry incorporated an article in its code providing that no rebates could be paid to purchasers of petroleum products. This provision threatened to destroy 1,500 cooperative oil-distributing societies and to check the formation of new ones which were being organized at the rate of two a week. . . . The President issued a special executive order exempting legitimate cooperative organizations from those provisions in codes which prohibited the payment of rebates, and thus prevented the destruction of cooperative consumers' societies by private enterprise through their power of control over NRA [National Recovery Act] measures" (42, p. 16). In spite of the many difficulties experienced by the Board, some gains were obtained when consumer advisers were granted the right to make statements and ask questions at code hearings. Unfortunately, this board failed because its recommendations were ignored by business (6, p. 45; 42, p. 15).

The Bureau of Agricultural Economics and the Agriculture Extension Service aided by establishing farm standards and advised farmers on their crop problems. Three-quarters of the farm population had incomes under $1,500 per year (6, p. 46).

The National Bureau of Standards developed industry standards and indirectly benefited the consumer. This bureau published the names of manufacturers and their specifications for producing government purchased goods. Although the
manufacturer's names and specifications were available to the public, the testing results were furnished only to federal, state, and municipal governments (6, p. 46).

Another government agency, the Bureau of Home Economics, provided information to the consumer. Studies were conducted on numerous materials relating to grade and quality standards. The result of these studies provided consumers information on purchasing, use and care of household goods, i.e., washers, radios, refrigerators, etc. In cooperation with the Bureau of Labor Statistics, the Home Economics agency surveyed various sections of the United States on the purchasing habits of the public in order to determine their requirements for education in the consumer field (6, p. 46).

The National Emergency Council established a Consumer Division and initiated local consumer councils throughout the country to "make consumers' wants known" (6, p. 46). This council published information concerning changes in food supplies and prices in its free bi-weekly publication "Consumer Guide." The guide was distributed to 135,000 people (6, p. 46).

Local councils exchanged information and took joint-action in keeping prices down through their publications "Consumer Division Bulletin" and "Consumer Notes." Before coordination between the National Emergency Council and local business groups could be achieved their operating funds were withdrawn. This council was the only consumer group to survive for six years during the Roosevelt administration (6, pp. 45-46).
Although numerous consumer-oriented bills were introduced by members of Congress, some failed because of (a) congressional inactivity; (b) strong manufacturer opposition; and (c) public apathy. Changes in the market place, however, created situations that resulted in passage of the Federal Caustic Poison Act of 1927 (15, p. 58; 16, p. 7; 41, p. 141). This act will be discussed in greater detail in Chapter III. For a partial listing of additional legislation passed during this period see Appendix A.

Industry and Consumerism

Manufacturers and retailers began to enter the consumer movement. Retailers, because they were closer to the consumer, were the first group to take the movement seriously. Sears, Roebuck and Montgomery Ward had entered the field as early as 1911, "now there's hardly a department store left in the country that hasn't got a bureau of standards with equipment to test and label its own products" (6, pp. 39, 48-49).

Retailers were joined by groups of "manufacturers, publishers, and various professional organizations [that] have heard the consumer's cry for facts, for information, for grades and [they have] sought to answer it by the development of special guarantees and seals of approval by varying adequacy and validity" (6, p. 49).

The American Standards Association, prior to 1934, established standards for the benefit of industry, i.e., steel and related products. Now, in response to the consumer question, "who will certify the certifiers" (6, p. 49), the association organized an Advisory Committee for Ultimate Consumer Goods.
Members consisted of various government bureaus, retail interests, National Retail Dry Goods Association, and the American Home Economics Association. From this committee, the National Retail Dry Goods Association, in 1937, organized the Consumer Retailer Relations Council. The members of the Retailer Relations Council believed that "the development of reliable standards and the use of those grades on labels would go far to reduce the expensive return of goods from dissatisfied buyers" (6, p. 49). This council also developed uniform retail advertising terminology (6, p. 49).

Advertising and Consumerism

With the advent of radio in the 1920s, advertising the products of numerous manufacturers became a normal way of life. Special sales, contests, give-aways, superlatives describing a variety of products as better than others (often made by the same company) was the birth of mass-media advertising (6, p. 40; 34, p. 43). It created confusion then—and times have not changed, only the population has increased.

From its small beginning in 1911, the Better Business Bureau and its "Truth in Advertising" slogan expanded to seventy cities and 69 million customers. Approximately 25,000 firms and professional men support the organization in order to establish fair competition and eliminate fraudulent advertising. These members have pledged to maintain fair-trade practices and bring pressure on nonconforming merchants. The bureaus publish guides promoting informative advertising and selling by prohibiting terms and phrases that confuse the customers (42, pp. 198-200).
In 1939, 106 radio stations donated 1,400 commercial hours to the Better Business Bureaus. More than six million lines of free advertising were donated by 371 newspapers that had a combined circulation of over twelve-million subscribers (12, pp. 576-577; 42, p. 201).

Consumer Products Testing Facilities

An in-depth study of the consumer movement from 1882 to 1939 (42) revealed three consumer firms, namely, Consumer Research, Intermountain Consumers and Consumers Union, were formed to test and evaluate products.

Frederick Schlink formed Consumer Research, Inc., in 1932 by expanding his local consumer club. Two goals were established: "to provide a clearinghouse where information of importance to consumers may be assembled, edited, and promulgated; and to develop an art and science of consumption by use of which ultimate consumers may defend themselves against the invasion and aggression of misleading advertising and high pressure salesmanship" (42, p. 46).

The Intermountain Consumers' service was organized in 1932 to serve the consumers in the western United States by Dr. S. A. Mahood. Intermountain's purpose was to contribute to the health and well being of consumers. Mahood advanced the rights of scientific and technical workers by exposing the manufacturers who demanded that any new process or product developed by their employees—on their own time, in their own workshops and unrelated to the company business, be turned over to their employers (42, p. 51). These unethical practices deprived the employee of his rights to market or sell
his own inventions to any company that might have been interested. This facility tested consumer products, provided lecture courses and was involved in consumer education. Dr. Mahood reported that the facility contributed to the "health, economic well-being, and happiness of ultimate consumers, whose scientific and technical counselor it is a pleasure to be" (42, p. 51). In addition, he stated "any economy which is scientific on its production side and pre-scientific—on its consumption side is unworkable and that attempts to make it workable through the mediums of advertising and salesmanship only create greater imbalance" (42, pp. 51-52).

Consumers Union was formed in 1935 as a result of a strike. In September 1935, members of Consumers Research went out on strike because the president, Arthur Kallet and three members of the organization were dismissed. These dismissals resulted because other members of the company refused to recognize the Technical, Editorial and Office Assistants Union that was affiliated with the American Federation of Labor. Kallet and other members of the strike-group then formed Consumers Union (42, p. 48).

The aim of Consumers Union was to "give information and assistance on all matters relating to the expenditures of earnings and family income; to initiate, to cooperate with, and to aid individual and group efforts of whatever nature and description seeking to create and maintain decent living standards for ultimate consumers" (42, p. 49). This included helping workers in their effort to obtain an honest wage. This placed Consumers Union in a position of consumer-labor
representative in the struggle for a higher standard of living (42, pp. 49-50).

Although the success of the three testing facilities was limited (approximately 150,000 combined membership) to active subscribers they did, however, create concern within the area of magazine publishers, advertising agencies and manufacturers. As a result the publishers, advertising agencies and manufacturers formed their own individual testing facilities. They claimed to test and analyze products of their members. Ironically, the products they recommended were usually the same products not recommended by Consumers Research. They considered Consumers Research and its allied testing facilities as pressure groups who used publicity to expose deception, false measures and poor quality goods (6, p. 41; 21, pp. 141-142; 42, p. 33).

Consumer-Oriented Literature

Frederick Schlink and Arthur Kallet published 100,000,000 Guinea Pigs and by 1939 this book was in its thirty-second printing. The authors charged that poisoned and decayed foods, as well as impure drugs, were being produced for public consumption. Statements contained in this book created more enemies for advertisers, involved more people in the consumer movement and started reform within the ranks of manufacturers and their advertising agencies (6, p. 40).

Other noteworthy books published during this period were: Harding, The Popular Practice of Fraud; Kallet, Counterfeit: Not Your Money But What It Buys; Lamb, American Chamber of
The Intervening Years: 1942-1962

World War II brought an end to the second consumer movement. The 1950s were a period of increasing affluence resulting from post-war recovery and consumer complacency. The early 1960s showed a strong economy, however, before the end of 1962, the "consumer movement emerged for the third time in this century, and with a vigor and persistence that have led it to be a permanent fact of the American economic system" (34, p. 648).


The third consumer movement began in March 1962 when President John Kennedy declared that consumers have four basic rights: The right to (a) be informed; (b) safety; (c) choose; and (d) be heard (13, p. 617). The pinnacle of this movement was reached when Ralph Nader published Unsafe at Any Speed in 1965. He then began campaigning for high standards of automobile safety (12, 574). A fuller discussion of Nader's contribution to the consumer movement is contained in the last part of this section.

Unlike the previous movements, the third consumer movement occurred during a time of high employment, greatly increased incomes, and an abundant economy where subsistence needs were normally filled (1, pp. 14-16).
There were extenuating factors that led up to the re-emergence of consumerism that will have to be examined. Three reliable sources (34) reported that Professor Eric Zanot, in his doctoral dissertation aptly described the major events.

- Intense and long-lasting inflation.
- Continuing unemployment.
- A questioning of the country's technological priorities, e.g., the space race, the deterioration of the environment.
- Disclosure of unsafe products and services, e.g., media exposés on the fat content of hot dogs, best sellers such as Rachel Carson's Silent Spring (pesticides) and Ralph Nader's Unsafe at any Speed (automobiles).
- Consumer activists such as Nader, Ralph Denenberg, and Betty Furness.
- An activist Democratic administration with a belief in the power of government to deal with economic and social ills.
- A growing distrust of established institutions, fueled by the Vietnam war, political assassinations, and well-publicized government and business corruption (34, p. 648).

In the early 1960s, inflation was approximately 1 percent. By the mid-1960s, however, inflation had increased at a rapid rate. When retail food prices rose by 7 percent between March 1965 and June 1966, housewives and militant consumers picketed supermarkets in protest. Even with rising incomes the middle-income group found it difficult to make ends meet. On the other hand, since the early 1960s, the low-income group had already turned to the federal government for additional assistance (1, pp. 14-15).

Prior to 1962 consumerism had been a by-product of federal trade regulations and labeling laws, designed primarily to maintain competition rather than consumer protection (35, p. 17). A majority of consumer activists felt there was a growing imbalance between manufacturers and consumers. The
activists relayed to Congress the public fear that the giant corporations, unconcerned with the needs of consumers, would shape the future (41, p. 146). A disinterested Congress only added to the consumer's problem.

Women and Consumerism

In order to update the activities of the women's clubs and the professional organization discussed in the two previous consumer movements, this researcher conducted telephone interviews with qualified representatives of each organization. Without exception, the American Association of University Women, American Home Economics Association (professional organization), General Federation of Women's Clubs, and the National League of Women Voters reported they were still actively involved in some form of consumer activity. The American Home Economics Association and the National League of Women Voters reported that men have been admitted to membership (2, 17, 29, 30).

The American Association of University Women now has over 190,000 active members. They are involved with legislators on consumer rights relating to pensions, taxes, incomes, and educating the consumer. They are also actively engaged in lobbying for passage of the Equal Rights Amendment. The members are kept informed of current activities through the newsletter, "Leader in Action" (2).

With a membership of over 38,000 men and women who have one or more degrees in home economics, the American Home Economics Association continues to influence Congress to enact legislation relating to consumers and family economics. Their
educational programs are conducted on the local level to inform the public on home finances, family relations, children's school lunches, etc. Their publications "Date Line" carries information on what is happening in Washington, D. C., and "AHEA Action" covers information concerning the family (17).

The General Federation of Women's Clubs has a membership of more than 600,000 active members. The headquarters in Washington, D. C., is presently involved in lobbying for a balanced budget. The state local clubs are actively participating with state and local politicians concerning crime, alcoholism, wife and child abuse, and free enterprise. They publish a monthly magazine, "The Club Women" (30).

Membership has expanded to 120,000 active members in the National League of Women Voters. This organization is quite active in educating the average citizen and encouraging public participation in the democratic system. Sponsorship of the presidential debates has brought the league national attention. It is, however, one of the backers for a windfall profit tax, clean air, fair housing; and against a tuition tax credit for private schools. "National Voter" is published quarterly for its members (29).

Federal Government Activity

When President John Kennedy initiated consumer activity, over 400 federal activities, in more than forty federal departments and bureaus, began to participate in consumer-oriented programs. Congressional inquiries were conducted and new laws were enacted. A consumers affairs assistant was appointed to assist Kennedy. Federal advisory commissions were
organized to conduct consumer product studies (7, pp. 5-6; 35, p. 17; 44, p. 559).

Congressional inquiries indicated that overpricing, deceptive advertising and performing unneeded automobile repairs accounted for 30-40 percent of all consumer spending. The congressional investigative boards estimated that $1 billion was spent annually on useless or misrepresented medical supplies. In addition, consumers spent $1 to $3 billion annually for unnecessary insurance coverage. Another $45 billion was spent because of overcharges from monopolistic pricing. Twenty-million people suffered injuries using consumer products. Fourteen percent of the consumer purchasing power was wasted because consumers lacked adequate information concerning the manufacturer's product (41, pp. 1-3).

Dissatisfaction on the part of the American public had been consistently ignored by manufacturers, retailers, and the automobile industry. It was not until Nader exposed the automobile industry for its flagrant disregard for consumer safety that the federal government began to wake up to its responsibility to the consumer (41, p. 4).

On March 2, 1966, President Lyndon Johnson delivered a message to Congress on transportation and traffic safety. Seventy-nine bills were proposed in 1966 and one resulted in the National Traffic Safety Act of 1966 (19, p. 11). The purpose of this act was to reduce traffic accidents and deaths and injuries to persons resulting from traffic accidents. Therefore, Congress determined that it is necessary to establish motor vehicle safety standards for motor vehicles and equipment in interstate commerce; to undertake and support necessary safety research and development and to expand the national driver register (19, p. 1).
In 1968 Johnson advanced the role of government in protecting the consumer. He made it clear that it is the government's role to protect the consumer—and the honest businessman alike—against fraud and indifference. Our goal must be to assure every American consumer a fair and honest exchange for his hard earned dollar (26, p. 60).

While Johnson acknowledged the progress already made in consumer protection, he added "the needs of the consumer change as our society changes, and legislation must keep pace" (26, p. 61).

Johnson proposed legislation to "(a) crackdown on fraud and deception in sales; (b) launch a major study of automobile insurance; (c) protect Americans against hazardous radiation from television sets and other electronic equipment; (d) close the gaps in our system of poultry inspection; (e) guard the consumer's health against unwholesome fish; (f) move to prevent death and accidents on our waterways; (g) add new meaning to warranties and guarantees; and seek ways to improve repair work and servicing; (h) appoint a government lawyer to represent the consumer" (27, p. 61). Johnson did not want these proposals to be viewed as partisan but as a "program for all of us—all 200 million Americans" (27, p. 67).

President Richard Nixon continued the consumer-oriented trend and stated: In today's marketplace, however, the consumer often finds himself confronted with what seems an impenetrable complexity in many of our consumer goods, in the advertising claims that surround them, the merchandising methods that purvey them and the means available to conceal their quality. The result of a degree of confusion that often confounds the unwary and too easily can be made to favor the unscrupulous. I believe new safeguards are needed, both to protect the consumer and to reward the responsible businessman (27, p. 61).
In 1969 and again in 1971, President Nixon sent to Congress a "Buyer's Bill of Rights" that proposed:

1. The creation of an office of Consumer Affairs by Executive Order.
2. Establishing a product safety program in the Department of Health, Education, and Welfare that would allow the Secretary to set minimum safety standards and ban products not meeting those standards.
3. Passage of a Consumer Fraud Prevention Act that would clearly define practices unfair and deceptive to consumers. The Act would be enforced by both the Department of Justice and the Federal Trade Commission.
4. Amending the Federal Trade Commission Act to increase its effectiveness.
5. Passage of a Fair Warranty Disclosure Act requiring clear warranties and prohibiting deceptive warranties.
6. Passage of a Consumer Products Test Methods Act to increase the amount of accurate and relevant information provided to the consumer.
7. Passage of the Drug Identification Act that would require coding of all drugs, tablets and capsules.
8. Establishment of a National Business Council to assist business in meeting the consumer's needs (27, pp. 68-69).

In 1967 Congress established the National Commission on Product Safety. The purpose of the Commission "was to review the scope, adequacy and uniformity of existing voluntary industry self-regulation, and Federal, State, and local law relating to consumer protection under hazardous substances" (23, p. 1).

Before the two year product safety study was complete, the Commission had considered approximately 7,000 pages of testimony. When faced with the results of the study, Congress passed the Consumer Product Safety Act, and President Nixon signed it into law on October 27, 1972 (23, pp. 1-2). For a partial listing of consumer-oriented bills passed during this movement see Appendix B.
It was impossible, during the course of this research, to discuss each piece of legislation that was consumer-oriented. Therefore, the **Consumer Product Safety Act** of 1972 was selected because it contained four acts that had been previously administered by several federal agencies. The large number of consumer products covered by these acts offered an insight into some of the reasons for the consumer product manufacturer's liability problems.

How far the administration of President Ronald Reagan will go in curtailing the benefits derived by consumers under the **Consumer Product Safety Act** remains to be seen. Plans are already underway in Congress to curtail the powers of the Consumer Products Safety Commission that was established in 1973 to carry out the provisions set forth in the Act (11, p. 16). The following chapter contains a more detailed discussion.

**Industry and Consumerism**

The old "sellers' market" has become the new "buyers market." Old methods of putting something new in the consumer arena, merely because an item was more important to the manufacturer, are no longer valid. Failure to reap excessive profits has caused manufacturers to conduct research programs into the needs and wants of consumers (34, pp. 103, 118).

Manufacturers face another problem, namely, self-regulation. When one manufacturer does not force all manufacturers, in the same line of production within their city, to conform to industry standards, they fail to self-regulate. Two factors are related to this failure. First, "it is often
difficult to get a consensus among industry members regarding an acceptable set of product or promotion standards. The net result is that industry settles for the least common denominator as the level for its standards." Secondly, "executives often fail to see anything wrong in various business practices in their industry—practices which are highly criticized by outside observers" (44, pp. 565-566).

Manufacturers have finally realized that a large section of the consumer arena are asking questions prior to buying their products. They have also discovered consumers are demanding satisfaction through the courts for injuries and death resulting from the products they sold to other industries or the consumer in general. Product liability premiums began to escalate because the manufacturers failed in their obligation to the public and courts were deciding litigation in favor of the consumer. (These factors are discussed under "Landmark Decisions" in chapter IV.)

On the whole, manufacturers "have made organizational changes to implement their response programs" to fulfill part of their consumer responsibility (44, p. 565). Quality control methods have been reevaluated and improved to pinpoint some product defects and malfunctions prior to and after assembly (37).

The mass media and personal communications are used to provide instructions when a product has to be recalled for defect correction (40). Better methods of communication have resulted in the "right to be heard." A large percentage of manufacturers have installed toll-free lines for handling
complaints, service assistance and product-usage education (44, p. 564). Instruction manuals have been rewritten and warranties no longer favor the manufacturer (37, p. 40). Manufacturers, however, have not resolved their own contribution to high product liability insurance.

Product Liability Insurance and Consumerism

The astounding lack of product liability figures, according to a reliable source (31) was due to the built-in lag between filing and settlement of law suits. Other factors contributing to this lack of data include: "the loss experiences of many big corporations that partially or wholly self-insure" was unavailable; and insurance companies felt this information "was of so little account statistically, no attempt was made to segregate it from many other forms of corporate liability coverage" (p. 50).

Awards granted by the courts, in the early days of product liability, were usually low. The manufacturer's insurer was usually able to absorb these awards through normal increases in premiums. Today, the premiums paid by industry for product liability insurance presents a horrendous problem. For example, one manufacturer's premiums increased from $4,600 in 1971 to $467,000 in 1976. This represents a 10,000 percent increase for a company whose total volume of business was only $16 million a year (31, p. 50).

Business Week (1) reported "manufacturers and retailers paid an estimated $2.75 billion for product liability insurance" (p. 72). Some insurance firms, by 1975, had increased their premiums by 1,000 percent, almost overnight. What
created this catastrophe was the insurers apparent fear that a large and little understood change was taking place in the product liability laws where industry would be exposed to limitless financial danger (p. 72).

Companies indirectly involved with product liability are also compelled to carry insurance to protect themselves from litigation. For a small firm, these premiums are so excessive that their financial resources are severely affected—or the firm faces the prospect of bankruptcy in the event of legal action on the part of consumers (24, pp. 2-3).

It has been estimated (31) that the cost of defending a product liability suit, including court costs, attorney fees, expert witnesses, etc., amounts to thirty cents per dollar of settlement. In other words, if the settlement was $100,000, the cost of defense was approximately $35,000. The insurance industry reported the amount paid in both in and out of court settlements rose approximately 686 percent between 1966 and 1973. Payments per settlement rose from $11,644 to $79,943. In many cases, the claimant received an award substantially outweighing actual damage (p. 48).

Between 1978 and 1979 product liability litigation rose more than 40 percent. In FY 1978, 4,372 suits were filed; 5,300 of the 6,103 suits filed in FY 1979 represented personal injuries (24). A percentage of the personal injury suits resulted from employees injured at work who were now able to sue for damages over and above the Workmen's Compensation awards. (Chapter V covers the Workmen's Compensation problem in greater detail.)
Advertising and Consumerism

Three authors (34), in a cooperative effort, made it quite clear that the theory of advertising has moved from the hand-painted sign in a corner grocery store to the field of psychology. Producers of consumer goods are now able to reach every segment of America through television, radio, magazines, newspapers, direct mail, billboards and posters.

During the third consumer movement television, in particular, played a dual role, good and bad, when advertising reached its peak. Recognized authorities (34) indicated that no other event in the industrial periods of progress, including the automobile, has had a greater impact on the American public. This many faceted, multibillion dollar industry has produced innumerable jobs, provided entertainment and education for the general public. It has brainwashed viewers into buying products they did not need, brought the world closer together and frustrated educators who feel television has been a bad influence on children. Children have not only been influenced by the advertising directed toward them but they have also been entertained through programs produced for their benefit.

Truth in advertising will eliminate some of the consumer product litigation that escalated during this movement. A better understanding of the influence advertising has on the consumer is presented through several landmark decisions by supreme and appellate courts in chapter IV.
Consumer Products Testing Facilities

The variety of same use products, e.g., television, automobiles, refrigerators, etc., created buyer confusion. This confusion was created through advertising claims that one product was far superior to another. In order to clarify some claims, consumer rating services were organized and assumed the task of testing and evaluating consumer products. Consumers Union has more than a quarter of a million members and sells its magazine throughout the United States (41).

Some manufacturers have gone one step further than the rating services and have formed their own laboratories. On the other hand, other manufacturers rely on independent laboratories to act as "third parties" as a defense against product liability suits (27, pp. 46-47).

Specialization by some of the independents is an outgrowth of the vast consumer market and the complexity of testing. For example, Underwriters Laboratories, a nonprofit organization, handles 50,000 tests each year from 15,000 client-companies. The cost of a typical two-year study increased from $60,000 to $100,000 during one five year period (27, pp. 58-59).

Increased costs for testing, either through inhouse or outside facilities, adds to the cost of products. It is the consumer who must absorb these charges through increased prices of consumer goods.

Ralph Nader and Consumerism

Ralph Nader graduated from Princeton University and the Harvard Law School. In 1965 he was an unpaid assistant on
the federal government Operations Committee and engaged in highway safety hearings. It was during this period that Nader wrote *Unsafe at any Speed*. This book shocked the American public and finally moved Congress to enact the *Highway Safety Act* in 1966 (8, p. 129).

Nader reported that 49,000 were killed on the nation's highways in 1965; 180,000 became disabled and another 180,000 were injured. In order to remain blameless for the carnage on the highways, defective workmanship and materials, the nation's automobile industry had oriented the American public into believing "it is not our fault" (28, p. 194).

*Unsafe at any Speed* made it clear that people were not to be used in experiments or research to discover latent dangers and that all manufacturers must begin to foresee potential hazards (28, p. 85). Nader publicized the hazards of distorted vision through windshields, potentially lethal instrument panels, overloaded tires, and poorly placed controls (28, p. 95). Special emphasis was placed on the Corvair and its peculiarities that eventually led to a nationwide class action suit against General Motors (32).

Nader has challenged both the federal government bureaucracy and the inner sanctums of big business through his Center for Study of Responsive Law and "Nader's Raiders." The latter investigative group were Harvard and Yale law students who came to Washington at their own expense to produce a Federal Trade Commission report (8, p. 130).

It was inevitable that other groups would be formed such as Nader's Public Interest Research. Members of this group investigated phosphate content in detergents, corporate tax
assessments, pushed for and got warnings on birth control pills. The Project on Corporate Responsibility provided a louder voice for shareholders in corporate policy. Nader's Public Citizens contains several branches, e.g., tax, health, litigation, nuclear power, and lobbying. The staff consists of paid and volunteer workers. They publish Congress Watcher six times a year. This newspaper contains information on bills pending before Congress; articles on budget, deregulation of oil and gas, food stamps, utilities, nuclear reactor construction, and activities of local Public Citizens groups.

Consumer-Oriented Literature

Books of this period that stimulated consumer activism included: Blake, God's Own Junkyard; Goulden, Monopoly; Metcalf, Overcharge; Mitford, The American Way of Death; Magnuson, The Dark Side of the Marketplace; Packard, The Hidden Persuaders; Reynolds, The Mortality Merchants; Ralph Smith, The Health Huckster and The Bargain Huckster; and Udall, The Quiet Crises.

Unlike the two previous movements that ended with America's involvement in two wars, the third consumer movement may end because of an unstable economy and a change in the presidential administration. Unfortunately, these factors will divert attention from consumer protection to consumer survival.
Summary

America based her laws on English Common Law. This law enforced standards of conduct on manufacturers to prevent dishonesty in weights and prices; it also banned the production or sale of unsanitary products. This chapter has examined the progress of consumer product liability law through three periods of consumerism that took place between 1890 and 1981 in America.

Important events occurred during this ninety-one year period that were either directly or indirectly responsible for consumer-oriented legislation. Several times public outrage forced congressional action by banning monopolies, suppression of fair trade and unfair trade practices.

Responsible writers, as well as publishers of newspapers and magazines, exposed: meat packers; food adulteration; dangerous or hazardous equipment; pesticides that endangered the environment; fraud; false advertising; and the automobile industry. Exposure created awareness, and it was this awareness that generated action within the women's clubs.

Industry agreed that it was the organized women's clubs that were the driving force in consumerism. Working through federal agencies and industrial representatives, the women's clubs were instrumental in establishing industrial standards for a variety of consumer products and enactment of consumer-oriented laws. As club activities expanded, permanent legislative action groups were formed within these organizations to lobby for bills of general public interest on the federal and state level.
Five presidents, namely, Theodore and Franklin Roosevelt, Kennedy, Johnson and Nixon used the power of their office to compel Congress to enact consumer protection laws. In addition, these presidents, in their own time, advanced the cause of consumers through federal advisory agencies, special programs and publications on consumer goods. President Reagan and his administration will change the course of consumer safety.

Many years of industrial lobbying against consumer interests and the evasive tactics of Congress in meeting consumer needs finally came to an end. The results of a consumer product safety committee report, combined with public and presidential demands, provided the necessary pressure on Congress to enact the 1972 Consumer Product Safety Act.

Through determined efforts of honest businessmen and organized consumer activists to curtail unethical practices, it was quite apparent that the manufacturing industry was well educated. Their education was not only in the art of deception in their production methods, they also knew how to write contracts to prevent liability resulting from negligence.

Manufacturers established and operated under self-regulated standards. It is in this area of self-regulation that the manufacturing industry has failed. They do not enforce any standards within their own particular area of production. Manufacturers cannot, or will not, agree collectively. Their company executives fail to accept the fact that something is wrong with their state of the art. The federal government, shackled by its own laws of free trade and competition, is powerless to intercede.
Manufacturers have conceded to the consumer's "right to be heard." This has resulted in better methods of communication and consumer education. Revision in quality control procedures has prevented some defective or dangerous products from reaching the marketplace.

Inhouse or independent laboratory product testing had been beneficial, but expensive, to the manufacturing industry. Consumer product testing facilities, operated for the education of the consumer, have expanded. Products are also tested by the larger retailers to decrease the possibility of product liability litigation.

Advertising, good or bad, was always an important factor in the growth of any industry. Angered over fraud and advertising practices, a small group of merchants organized the Better Business Bureaus. This organization has 60 million members throughout the United States who still evoke their "truth in advertising" motto.

With the introduction of radio and television, added to the already available mediums of newspapers, magazines, etc., no area of the country is immune from consumer product advertising. This industry also plays a dual role by keeping the viewers and readers aware of an industry's product and attempting to keep the manufacturing industry "somewhat" honest.

Increases in product liability insurance premiums have created financial problems for manufacturers. Firms not directly involved in production are caught in the middle. They must carry liability insurance as protection against possible litigation. Some firms, unable to meet the high cost of
insurance premiums, have either filed for bankruptcy or gone out of business.

Ralph Nader has been a pro-consumer advocate since he wrote *Unsafe at any Speed*. His various organizations have kept the public informed on a variety of consumer-oriented problems. They are constantly working with federal agencies and manufacturers to correct problems created by the manufacturing industry.
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CHAPTER III

THE CONSUMER PRODUCT SAFETY ACT OF 1972

Introduction

This chapter includes brief highlights of congressional reports, the Consumer Products Safety Act of 1972, a 1976 amendment, Consumer Product Safety Commission Improvement Act, and responsibilities of the Consumer Product Safety Commission. During the course of this research Ronald Reagan was elected president. Sweeping changes in the federal sector will have an impact on both the consumer and manufacturer. This researcher has therefore included a significant trends section.

The manufacturing industry in America advanced from the individual carriage maker, through giant corporations manufacturing automobiles and airplanes, to the high degree of technology used in space exploration. The need for product liability laws and consumer protection increased dramatically during this time.

The manufacturing industry, interested in mass production and expansion into other fields of endeavor, operated under its own production standards, known as state of the art (or followed regulations issued by federal, state and local governments where required). Manufacturers were relatively free of federal interference because the laws in America prohibited suppression of fair trade and free enterprise practices.
Massive reports of injury, illness and death, compiled by consumer-oriented groups, federal agencies and congressionally appointed committees, confirmed the need for federal action. These reports indicated a direct relationship between the manufacturing industry and the products they produced for consumer use.

Congress, on several previous occasions, had been forced to act because of tragedy. Once again consumer safety was a matter of public concern and Congress found itself in a familiar position.

Congressional Highlights

The National Commission on Product Safety was created in 1967 by a joint resolution of Congress. For nearly three years, this seven-member commission conducted nationwide hearings on the "surge of consumer-product-related injuries throughout the United States" (9, p. 364). Results indicated a product safety act was needed when the report of the Commission revealed:

Americans—20 million of them—are injured each year in the home as a result of incidents connected with consumer products. Of the total, 110,000 are permanently disabled and 20,000 are killed. A significant number could have been spared if more attention had been paid to hazard reduction. The annual cost to the Nation of product-related injuries may exceed $5.5 billion (9, p. 65).

The National Commission also estimated approximately 20 percent of the total injuries and deaths were preventable through mandatory safety standards. Underwriters Laboratory, a widely-known firm involved in electrical standards, however, felt that by combining mandatory safety standards and a consumer education program a greater reduction in total injuries
and deaths would result (2, p. 2; 9, p. 365).

The U. S. Public Health Service Report of 1967, compiled for Congress, estimated the injury rate from electric and mechanical products would be: power lawn mowers, 100,000; home workshop machinery, 125,000; heating devices, 125,000; and wringer washers, 100,000, each year (5, p. 31).

The National Commission further revealed a lack of federal supervision and stated:

Such limited Federal authority as does exist is scattered among many agencies. Jurisdiction over a single category of products may be shared by as many as four different departments or agencies. Moreover, where it exists Federal product safety regulation is burdened by unnecessary procedural obstacles, circumscribed investigative powers, inadequate and ill-fitting sanctions, bureaucratic lassitude, timid administration, bargain-basement budgets, distorted priorities and misdirected technical resources (9, p. 365).

During the preliminary processes toward enactment of the Consumer Product Safety Act, "the hope was expressed that the mere existence of the CPSC with its authority to issue mandatory standards, plus the increased information available to industry on the nature and frequency of product-related injuries, would provide an incentive and an opportunity to individual manufacturers and their industry associations to take voluntary steps to remove injury-causing features of their products, and thus avoid the necessity for Government-imposed standards" (2, p. 6).
The Consumer Product Safety Act of 1972
with the 1976 Consumer Product Safety
Commission Improvement Act Amendment

When the Consumer Product Safety Act was legislated by Congress, President Richard Nixon stated the new law "is the most significant consumer protection legislation" of the 92nd Congress (2, p. 1; 4, p. 364). The Act became law on October 27, 1972. In 1976, Congress strengthened the powers of the Commission and widened the range of consumer products under its control by enacting the Consumer Product Safety Commission Improvement Act.

Congress set forth four concepts within the 1972 Act:

1. to protect the public against unreasonable risks of injury associated with consumer products;
2. to assist consumers in evaluating the comparative safety of consumer products;
3. to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and
4. to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries (5, p. 398).

These concepts were the result of congressional findings that:

1. an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce;
2. complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately;
3. the public should be protected against unreasonable risks of injury associated with consumer products;
4. control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers;
5. existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate; and

6. regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this [Act] (5, p. 398).

Three elements of organization were specified: (a) establish a Consumer Product Safety Commission as a federal regulatory agency; (b) establish a Product Safety Advisory Council to assist the Commission, with fifteen members to be appointed by the Commission; and (c) transfer to the Consumer Product Safety Commission the: Flammable Fabrics Act; Federal Hazardous Substances Act; Poison Prevention Packaging Act and; the Refrigerator Safety Act (2, p. 1; pp. 364, 414).

The Act also specified that any organization developing a proposed safety standard is to offer all interested persons, including manufacturers, an opportunity to present their views (2, p. 6).

A reliable informant reported "although no safety standards currently exist under the CPSA, it is likely that standards enforcement will proceed along the lines already established under the transferred acts" (9, p. 414).

The Act was designed to protect consumers against unreasonable hazards found in many consumer products. Consumer provisions in the Act included: (a) the right to participate in formulating product safety standards and other rules from the initial to the final stage of development, and if technically qualified, assume primary responsibility for the development of a rule; (b) the power, through court order, to require the Commission to initiate rulemaking procedures after
1975; (c) the right to seek judicial review of any consumer product safety rule generated by the Commission; (d) the right to institute legal action to enforce a safety rule or order through injunction; and (e) the right to use the federal courts to seek relief from any injuries received when it was a known violation of product safety rules—and the $10,000 (minimum) amount of the claim is met (2, p. 12).

Class action suits were also authorized, however, these suits were not expected to become a primary concern (2, p. 15).

For the first time during the history of the federal product safety legislation, this Act provides almost total coverage of consumer products. It does not, however, include such products as food, automobiles, tobacco, cosmetics, planes, boats or pesticides. These consumer products are under the jurisdiction of other federal agencies (2, pp. 3-4). For a partial list of products under the Commissions' control, see Appendix C.

The Consumer Product Safety Commission

Organization

The Act authorized the Consumer Product Safety Commission to be established with five members to be appointed by the President for staggered seven-year terms. One of the members will be appointed as Chairman, and is to continue to serve in that capacity for the full period of his term. No Commission member may be employed by or hold any official position in a company producing or selling consumer products, or have any substantial financial interest in such a company, as stockholder, bondholder, supplier, or otherwise. No more than three of the five Commissioners may be affiliated with the same political party (2, p. 1).
To further insure the independence of the Commission, the 1976 amendment "provided that the appointment of any officer (other than a Commissioner) or employee of the Commission would not be subject, directly or indirectly, to review or approval by any officer or entity within the Executive Office of the President" (6, p. 19).

An Advisory Council was also established by the new Act to be composed of 15 members experienced in the field of product safety—five each from governmental bodies, including federal, state, and local governments; from consumer product industries, including at least one representative of small business; and from among consumer organizations, community organizations, and 'recognized consumer leaders.' The members of the Advisory Council are appointed by the Commission, and will meet at the call of the Commission, but not less than four times a year. The Council may propose consumer product safety rules for consideration by the Commission and may be consulted by the Commission on any action to be taken (2, p. 1).

With the confirmation of David Pittle as the "fifth Commissioner . . . the CPSC became fully operative" and on May 14, 1973 opened its doors to the public (9, 365-366) under the following organizational structure.

The Commission consists of thirteen sections and six bureaus. Each section is headed by a director. The Resource Utilization office handled the "financial management and personnel operations, contract and grant policies, data processing systems, and general logistical support." Field Coordination "directs the enforcement and compliance activities of the [Commission's] fourteen field offices." They also handle liaison with state, local and other federal agencies for product safety. The Standards Coordination and Appraisal office handles the "developing and managing standards and
The Office of Product Defect Identification was added in the 1976 Amendment (6, p. 23).


Source: Rothschild & Carrol, Consumer Protection, p. 368
labeling requirements." The office of Product Defect Identification is responsible for analyzing reports—with input by other sections of the Commission—to determine the type of hazard present. Products that are suspected of being imminent hazards are treated with greater speed in order to expedite public dissemination of information (9, p. 399).

The six bureaus have varied responsibilities.

Biomedical Science "develops and maintains programs which reduce the hazards of consumer injuries related to chemical products" (9, p. 367).

Compliance is the "enforcement arm of the Commission (9, p. 367).

Economic Analysis "provides advisory services on economic affairs. Its activities include the preparation of economic analyses relating to costs of injuries, the costs of preventing injury, and economic evaluation of the final impact of product safety standards (9, p. 367).

Engineering Science is responsible for the Commission's technical efforts "which develops and evaluates performance criteria, design specifications, and quality control standards for consumer products" (9, pp. 366-367).

Epidemiology "collects data on consumer product-related injuries through administration of an injury-data clearing-house and the National Electronic Injury Surveillance System (NEISS). This bureau is also responsible for monitoring the effectiveness of standards, as well as participating in determining Commission priorities for future regulatory activity" (9, p. 366).
Information and Education "has broad responsibilities for developing programs in consumer education, training and manpower development, product safety information, and publications and technical services" (9, p. 367).

In order to supplement the surveillance inspections conducted by the field offices, the Commission "adopted the Food and Drug Administration's Consumer Deputy Program" (9, p. 396). Using citizen volunteers, "the program is designed to extend Commission surveillance activities beyond the boundaries normally imposed by limited field resources" (9, p. 396). Field office personnel select volunteers and each participant receives "specific training related to the applicable hazard or standard involved. In general, volunteer activities utilize those inspectional criteria for determining compliance that are clearcut, objective, and capable of being carried out with a high degree of consistency" (9, pp. 396-397). Potential violations are "routinely followed-up by Area Directors and given precedence over normal inspectional activities" (9, p. 397).

The Commission "made an early commitment to conduct its business in the open to avoid all appearances of the coziness with industry that has typically characterized other federal regulatory agencies" (9, pp. 368-369). The Commission implemented a "'goldfish bowl' policy of procedural requirements for prior public notice and recordkeeping of Commission meetings through a Federal Register publication ... and the Public Calendar" (9, pp. 368-369).
Consumers voiced disapproval when information on public meetings became a problem. On the other hand, manufacturers claimed the open meetings were detrimental to the industry. It was their opinion that consumers lacked the expertise to solve safety problems. A study conducted by the Georgetown University Law Center, however, indicates "78% of the meetings announced in the Public Calendar during the first six months of 1974 were not properly recorded by the Secretary's Office, and 61% of the recorded meetings had not been previously announced in the Public Calendar as required by the regulations" (9, p. 369).

This criticism resulted in a change of policy by the Commission. The Public Calendar would be the primary instrument to advertise public meetings. The Federal Register would only be used for additional coverage or whenever federal requirements warranted its use. No change was made to accommodate the manufacturers request for closed meetings (9, p. 371).

Responsibilities of the Commission

Acting under the authority granted by Congress, the Commission has jurisdiction over more than 10,000 consumer products. Broadly defined by Congress, this authority includes any particle, or component part thereof, produced or distributed (a) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (2) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise. . . . (9, pp. 377-378).

Exceptions to this authority are promulgations of standards
which are the responsibility of other government agencies, such as the Occupational Safety and Health Act, Clean Air Act, Radiation Control for Health and Safety, the Highway Safety Act, and the Atomic Energy Act (9, p. 378).

As one authority noted "the heart of the Commission's regulatory authority is its section 7 rule making authority to promulgate mandatory consumer product safety standards" (9, p. 378). Any standard proposed by the Commission must be considered reasonably necessary to prevent or reduce an unreasonable risk of injury associated with a product (9, p. 378).

The Commission is authorized to conduct research, investigations and studies to improve product safety; test and develop test methods and testing devices; assist public and private organizations, technically and administratively; to develop methods for safety standards (5, pp. 80-81). In order to fulfill these requirements, the Commission issues grants and enters into contractual agreements with private sectors and federal agencies (5, pp. 80-81).

Data Retrieval and Output

To obtain technical information needed to operate, the Commission contracts with various federal, state, local and private agencies for various types of data. The Commission has a "statutory duty to utilize the facilities of the National Bureau of Standards (NBS) 'to the maximum extent practicable' in its research and technical studies" (9, p. 376).

In order to better serve the Commission, the 1976 Act authorized the NBS to establish a new office entitled the Programmatic Center for Consumer Product Safety. This office
plans and coordinates testing programs conducted by other branches of the NBS (6, p. 81).

The Commission has completed "Memoranda of Understanding" with other federal agencies to exchange product safety data (6, p. 80). Public investigative information may be obtained by the Commission "by ordering the submission of written reports and answers to questions and by issuing subpoenas. . . . Theoretically the Commission has total power to compel "production information from anyone, at anytime, for any purpose within its jurisdiction" (9, p. 393).

Hazardous information is routinely furnished the Commission through "defect notifications, informal notifications received from local consumer protection offices, insurance companies, independent testing laboratories, product service facilities and individual consumer complaints, and through periodic field inspections and investigations conducted by the CPSC itself" (9, p. 398). The U. S. Army and Air Force are required to submit defect data on consumer products sold in their post-exchange operations (9, pp. 402-403).

The Commission maintains the National Electronic Injury Surveillance System (NEISS) under the Epidemiology Bureau to develop national accidental injury data related to consumer safety. The system is the vital core of the Injury Information Clearinghouse operation of the Commission. The Clearinghouse maintains information for use by federal, state and local agencies, as well as a public reading room for consumers (5, pp. 82-84).

NEISS data-gathering is a daily process and information
is received from 119 hospitals and emergency rooms throughout the country. Selected hospital employees, trained as coders/transmitters, review and separate those cases involving product safety for transmission to NEISS. The Commission uses this data as a basis for initiating regulatory action (5, pp. 84-85). It is anticipated that the Commission will expand their 119 hospitals to include additional health facilities, physician’s offices, and Bureaus of Vital Statistics to examine consumer product safety problems and causes of death (5, p. 73).

NEISS is further aided by reports submitted by industry. Their "new products" reports are of particular interest in that they may present poison hazards. Poison data is consolidated and a bulletin is issued periodically. This bulletin contains information on the trends, analyses, as well as new poison treatments (5, p. 86).

Public disclosure of information is controlled by the Act. "All information reported to or otherwise obtained by the Commission or its representatives... that contain or relate to a trade secret or other matter referred to in... the United States Code, shall be considered confidential and shall not be disclosed, except to the officers or employees of the Commission" (5, p. 90). Provisions are made, however, that the Commission may release information to the public—if the safety and health of the public are endangered (6, p. 90). The Commission "shall communicate to each manufacturer of a consumer product, insofar as may be practicable, information as to any significant risk of injury with such product" (5, p. 82).
In the event the Commission "finds it has made public disclosure of information or misleading information adversely reflecting upon (a) the safety of any consumer product, or (b) the practices of any manufacturer, private labeler, distributor or retailer it shall publish a retraction" (5, p. 82).

At least thirteen television manufacturers felt the Commission had published "misleading information" that adversely reflected upon their businesses. "A preliminary injunction was issued against the Commission to prevent the public disclosure of television-related accident data that could unreasonably damage the manufacturers who provided information, while not providing the public with reliable information to determine the relative safety of various TV sets" (6, p. 27).

The Commission argued that "requirements did not apply when information was requested under the Freedom of Information Act" (6, p. 27). The court concluded, however, that the information "would harm the manufacturers, without benefit to the public, and that therefore the purposes of the act could not be effectuated by such release" (6, p. 27).

**Consumer Product Safety Standards**

No consumer product safety standards were established by the 1972 Act or the 1976 amendment. The standards established in the "transferred acts" remain in effect. Any standard "proposed by the Commission must be considered reasonably necessary to prevent or reduce an unreasonable risk of injury associated with a product (6, 142-150; 9, p. 378).

The 1972 Act specifies any organization developing a safety standard will offer all interested parties, including
manufacturers, to participate. Although "voluntary standards will not be adopted as a matter of Commission policy" (9, p. 382), it is apparent the first opportunity to develop standards will generally be provided to those organizations that have previously been involved in formulating industry standards (2, p. 6).

Industry domination in the standard development field "was one of the primary reasons for Congress' enactment of section 7 of the Act" (9, p. 386). Congress felt the mere presence of the Commission would force industry to voluntarily avoid government standards (2, p. 6). The Commission's response to consumers for standards has been mixed, however, requests from industry groups to adopt voluntary safety standards have been consistently denied and "this is a good indication that the Commission is committed to the section 7 approach to developing standards" (9, p. 390).

On the other hand, the 1972 Act "permits the Commission to publish an existing standard which it finds would adequately prevent or reduce the hazard associated with the "new" product, in lieu of accepting an offer for the development of a standard" (5, p. 114). Standards accepted by the Commission may have been issued by qualified agencies, organizations or institutions, as well as other federal agencies (5, p. 141). Standards that have been adopted by the Commission are under the Hazardous Product Act. They include bicycles, full or non-full size baby cribs and swimming pool slides (6, p. 37).

The procedures establishing a product safety standard are intricate and lengthy. Requirements must be submitted
"as to performance, composition, contents, design, construction, finish, or packaging of a consumer product" or the product must be "marked with or accompanied by clear and adequate warnings or instruction, or requirements respecting the form of warnings or instructions" (5, p. 99). Long months of research, the cooperation of manufacturers, groups involved in establishing industrial standards, consumer participation, and meetings with representatives of the Commission (5, p. 99). Because of the detailed factors involved, a descriptive presentation of the procedures will not be included in this study.

An excellent example of the problems involved in setting a Commission standard was presented by a former Commissioner (1973-1977). The Commission initiated action on July 27, 1974 to develop a safety standard for power lawn mowers. As of July 1980, the only requirement that had been established was "Danger—Keep Hands and Feet Away" (8, p. 36). The former Commissioner said "the contentious, wearying struggle in the last six years between the power mower industry and the Commission—joined by other interested parties—is fairly typical of the confrontations in which the government agency embroils itself when trying to establish safety standards" (8, p. 36). No further action is contemplated before 1982 and "the delay in resolving the mower issue is a sad commentary on the ineffectiveness of the procedure, but worse for the public is its ineffectiveness in fostering the safest products" (8, p. 36).
Manufacturers and the Commission

Manufacturers, private labelers and distributors of a consumer product are required to establish and maintain such records that the Commission may "by rule, reasonably demand for purposes of implementing the Act or determining compliance with its rules or orders. Retailers who do not engage in manufacture, importation, private labeling, or distribution are specifically exempted from this provision on the assumption that mandatory record keeping requirements could prove unduly burdensome for small businesses and could materially add to the cost of consumer products" (9, p. 397).

The Commission has developed three types of on-site inspection: routine, follow-up, and in-depth. Of the three, in-depth is considered the most important because it provides data on injury from numerous sources—other than manufacturers. In-depth inspections also provide information concerning product hazards, design characteristics and associated injury patterns (9, p. 395).

Designated employees or officers from the Commission "may enter any factory, warehouse or other establishment in which consumer products are manufactured or held and inspect any area relating to the safety of such products" (9, p. 394).

Since this authority extends to any conveyance used for transporting consumer products in commerce, it presumably allows for inspections of common carriers, contract carriers, and freight forwarders. Except for this application, such firms are otherwise exempted from the Act (9, p. 394).

To prevent inspection abuse, appropriate credentials and a written notice of inspection to the manufacturer from the Commission must be furnished. The inspection must be conducted
in a courteous manner and during reasonable hours. If the
firm refuses to permit an inspection, several options are
available: (a) field offices may contact management personnel
of the firm to reinstitute inspection; (b) refer the matter to
the Bureau of Compliance; (c) determine that the information
desired was not essential to determine the firm's compliance;
and (d) the inspection was not legitimate, and the Commission
had no authority to make an inspection (9, p. 394).

The Commission "has authority to ban a consumer product
from distribution in commerce upon finding the product repre-
sents an unreasonable risk of injury and that no feasible con-
sumer product safety standard under the CPSA would adequately
protect the public from the unreasonable risk of injury in-
volved" (9, p. 381). The manufacturing industry and retailers,
however, were urged through the 1972 Act to facilitate "the
economic recall and remedy of defective and nonconforming prod-
ucts through private agreements" (9, p. 397).

Although section 15 of the Act states that no administra-
tive remedy "may be ordered without affording interested
parties an opportunity to be heard first," the Commission de-
veloped "a system of defect analysis and correction designed
to foster voluntary compliance on the part of firms subject to
its jurisdiction" (9, p. 406). By avoiding administrative
delays in issuing orders and encouraging voluntary corrective
procedures, the Commission believes these plans will hasten
the elimination of a number of substantial hazards. This
philosophy prevented 141 cases from reaching the courts (9,
Under the guidelines of the 1972 Act, the Commission is empowered to "prescribe procedures requiring any manufacturer of a 'new consumer product' to furnish the Commission with notice and a description of such product before its distribution in commerce" (9, 390). New consumer products are defined as "any product incorporating a design, material, or form of energy exchange which has not previously been used substantially in consumer products . . . [and there] exists a lack of information adequate to determine the safety of the product" (9, p. 390). Although the Commission does not have the authority to prevent the introduction of a new product into the marketplace, the notification of new products enables the Commission to take immediate action against those which are imminently hazardous (9, p. 390).

**Imports and Exports**

An imported product shall be refused if the product "(a) fails to comply with an applicable consumer product safety rule; (b) is not certified or labeled in accordance with provisions of the Act; (c) is an immediate hazardous consumer product; (d) has a product defect which constitutes a substantial product hazard; or (e) is manufactured by a person who has failed to comply with the inspection and record keeping requirements of the Act" (5, p. 216).

The Commission shall be furnished samples of the product by the Secretary of the Treasury. "If such products must be refused admission, they shall be refused admission, unless they can be modified" (5, p. 216). If modification is possible, the Commission will grant the owner an opportunity to do so and
defer determination of admission (5, p. 216). If, however, the product cannot be modified, it will either be returned to the shipper or destroyed.

The Act does not "apply to any consumer product that is manufactured, sold or held for sale for export from the United States" (5, p. 277). Export of products, however, that are manufactured for sale, or sold for shipment, to any United States installation, i.e., military stores or diplomatic enclaves, are not considered exports and "must comply with any applicable safety rules" (5, p. 230).

**Enforcement by the Commission**

When enforcement compliance is needed and remedial action is undertaken by the Commission, manufacturers, distributors, and retailers of consumer goods may be required to issue public and private notices of substandard or defective products voluntarily or in compliance with administrative orders. Where orders for public notices may involve the purchase of advertising space or broadcasting time, private notice requirements may include warning letters to known customers and persons within the distribution chain. If notice by mail is ordered, only customers of whom the company has actual knowledge need be contacted (9, p. 407).

The 1972 Act contains enforcement measures intended to "eliminate three types of product hazards"; . . . imminent, substantial, and unreasonable risks of injury (9, p. 298). Imminent hazards can result in death, severe personal injury or serious illness. Substantial hazards exist because the product creates a risk of injury to the public" (9, p. 401-402). Commissioner David Pittle defined "'unreasonable risk' as one where a consumer understands by way of adequate warning or by way of public knowledge that a risk is associated with
the product and understands the probability of occurrence of an injury . . . [and] voluntarily accepts the risk to get the benefits of the product" (6, p. 37).

Legal action was taken in two "imminent hazard" cases: (a) the Commission sued an electric company because a "trouble lamp" was found to be dangerous to any consumer-user and (b) a manufacturer sued to prevent the Commission from declaring its product an "imminent hazard" (6, p. 46).

In the first case it took the Commission forty-two days to obtain samples of the "trouble lamp" and thereby incurred the displeasure of a congressman (9, p. 401). However, the court issued a permanent injunction against the manufacturer not to sell or store "trouble lights that, because of design and construction defects, could produce a serious electrical shock" (6, p. 46). The court "found that it was not necessary for the defendants to finance an advertising campaign to notify the public of the potential hazard, as requested by the Commission, because of the extensive publicity the matter had received both by the Commission and the voluntary efforts of the defendants" (6, p. 46).

The second case was dismissed because the court found that the plaintiff had not exhausted all of his remedies. No Commission hearing or final determination had been involved in the process prior to legal action being instituted (6, p. 46).

The Commission has investigated numerous hazardous products and issued manufacturer guidelines. It has also ordered the removal, when cognizant, of hazardous products from whole-
salers and retailers, i.e., toys with built-in mechanical hazards, plastic products that produce a toxic by-product when ignited, aerosol sprays that have adverse cardiovascular and pulmonary effects, household cleaning products, and paint containing lead (9, pp. 425-26).

The United States District Courts have jurisdiction to restrain any person from manufacturing for sale, distribution in commerce or importing in violation of product standards and rules that are under the control of the Commission. Legal action can be taken by the Commission—which can also represent itself in court, or by the Attorney General at the request of the Commission (6, p. 61).

The Transferred Acts

In March 1973 all regulatory functions, relating to the transferred acts, were transferred to the Commission. These transfers included property, personnel, records, commitments and obligations. It did not, however, include commitments for research activities of the Commerce Department's contract with the National Bureau of Standards on fire and flammability" (2, p. 85; 9, p. 434).

The Flammable Fabrics Act of 1953

The Flammable Act had been administered by the Federal Trade Commission, Department of Health, Education & Welfare, and the Commerce Department.

This Act was the result of public demand because of the "serious injuries and deaths caused by fires involving children's 'long rayon pile cowboy chaps and brushed rayon sweaters'
of flammability so great that the latter became known as 'torch' or 'exploding' sweaters" (5, p. 21). During a two month period, approximately thirty-five serious burn cases involving these two articles of wearing apparel stimulated public demand for national regulations (5, p. 22).

Provided in the Act was a mandatory standard that "provided a minimal level of protection which prevented only the sales of extremely flammable fabrics" (9, p. 417). In 1967, an amendment expanded the covered items to include furnishings, however, "highly flammable materials continued to be sold" (9, p. 417).

A senate report prepared by the Public Health Service in 1967 estimated "1 million people are burned in the home each year and 150,000 suffer injuries as a result of the ignition of clothing" (emphasis added) (5, p. 22).

The Census Bureau prepared a report in 1974 for the Consumer Product Safety Commission. By "extrapolating figures from a one week survey of households in 1974 [it was found] that over five million fires occurred in homes during the twelve months preceding the survey; fabrics were the first items to ignite in approximately 628,000 of these cases" (emphasis added) (9, p. 417).

Taking the seven year lapse between these two reports, and the fact that "fabrics" could also include upholstery and sold-by-the-yard garment materials into consideration the second report still reveals a gigantic increase in clothing burns.

The Public Health Service report also indicated "the
death toll from human burns is itself shocking—an estimated 2,000 to 3,000 each year" (5, p. 22). The reader should keep in mind these figures are high. Fire was the primary cause of death. In other words, when a burn victim dies from complications such as pneumonia or shock, burns become the secondary cause of death.

Flammability amendments "failed to protect consumers against fabric burns" (9, p. 418); the Department of Health, Education and Welfare lacked data on fabrics that should be regulated; the Department of Commerce moved at a snails pace in establishing standards; and the Federal Trade Commission, "for its part, was ineffectual in enforcing the standards largely because its voluntary compliance policy lacked teeth" (9, p. 418).

Standards issued prior to transfer to the Commission, included Clothing Textiles, Vinyl Plastic Film; Children's Sleepwear in sizes 0 to 14; and surface of carpets and rugs (6, p. 165).

The Commission releases information whenever the situation dictates. Although the Flammability Act itself, does not permit a consumer to take specific action, under the Commission rules, a consumer may use the violation of flammability standards to show manufacturer's negligence (9, 423).

In complying with the flammability standards a manufacturer must (a) label garments and fabrics to comply with the standards—labels do not need to be permanent, only conspicuous and legible; (b) when displaying both complying and non-complying goods, each display must bear a sign indicating the
difference; (c) include cleaning instructions to prevent loss of flame resistance; (d) permanently label garments with production number; (e) records must be maintained to allow the item to be traced to manufacturer, importer, retailer; (f) retain test results from sample; (g) not manufacture or offer for sale any garment or fabric that becomes flammable when worn (5, p. 22; 9, pp. 420-421).

The Hazardous Substances Act of 1970


Post-World War II manufacturers flooded the market with so many products containing chemical substances, e.g., toys, household products, etc., that Congress attempted to control the increasing number of injuries, illnesses and deaths. Congressional hearings had indicated inadequate product labeling would result in 200,000 injuries and 5,000 deaths each year in American households (5, p. 20).

Between 1960-1973, either Congress or the Consumer Commission established strict "national uniform requirements" in labeling flammables, toxics, etc.; banned some toys and articles intended for child-use; extended the ban to include children's articles which presented electrical, thermal or mechanical hazards; regulated the manufacture of full-size baby cribs; and banned such products as dolls, stuffed animals,
etc., having internal or external parts that cause lacerations or bruises; toy guns and caps that produce sound at or above the safe level of 138 decibels; bouncers or walkers intended to provide support that have exposed parts capable of causing amputation, fractures, etc. (9, pp. 426-427).

As late as August 1981, a reputable women's magazine reported that TRIS treated children's clothing, banned from sale in 1977, was still being sold in at least twelve states (13, p. 38). Banned and misbranded products "when introduced into or while in interstate commerce or while held for sale after shipment in interstate commerce" are subject to legal action in any District Court which has control of the area where the hazardous substance is found (5, p. 486). For more detailed information on hazardous products see Appendix D.

Violators may bring their products into compliance with the Hazardous Act, or at the discretion of the court any hazardous substance can be destroyed or sold and the proceeds paid to the Treasury Department. On the other hand, the owner "may post bond and obtain delivery of the goods for destruction," under the supervision of the Commission (5, p. 358).

Imported hazardous products must meet the same requirements of U. S. manufacturers, however, "there is no prohibition under the Hazardous Act against delivering into or receiving from interstate commerce a hazardous substance which is shipped or delivered for shipment for export to a foreign country," provided the packaging container is marked in accordance with the laws of the foreign country and the foreign purchaser (5, p. 360).
Inspection of manufacturer's premises may be made by Commission "authorized" employees, or through any health officer or employee of any state of political subdivision. If samples are obtained, a descriptive receipt must be furnished by the inspector to the appropriate manufacturing official and a copy of the analysis results must be provided the owner, operator or agent of the company.

Prior to reporting hazardous violations to a U. S. attorney "for criminal prosecution, the person against whom such proceedings is contemplated shall be given notice, and an opportunity to present his views, orally or in writing" (5, p. 363). Under the Consumer Act, procedures are instituted "after the person to be charged has received notice of non-compliance from the Commission" and no provisions are made for the presentation of views prior to the institution of litigation" (5, p. 263).

The Hazardous Act failed to provide for the "repair or replacement of banned hazardous substances. The Consumer Act, however, "may by regulation require the manufacturer, distributor or retailer to repurchase such product from the person to whom it was sold, and refund the purchase price, together with the reasonable and necessary expenses incurred in returning the product" (5, p. 366). These regulations would also include any substance "that has been banned by the Commission, whether or not it was banned at the time of sale" (5, p. 366).

"That more must be done," said a former Commissioner, "is obvious from the facts, the number of serious toy related accidents reported to the commission, for example, shows no
statistically significant change from 1976 to 1979. They average 127,000 per year, including about 60 deaths. To reduce the number of accidents from the use of consumer products, we need innovations that make them safer, new designs for electrical and mechanical products, new formulations for chemical products, and improved production and quality control techniques" (8, p. 36).

The Poison Prevention Packaging Act of 1970

Legislative action began in 1966 when members of Congress attempted to pass a bill that would make safety closures on medicine bottles mandatory. Failure to pass this bill was the driving force behind the "Conference on Prevention of Accidental Ingestion of Salicylate Products by Children" to stimulate voluntary methods on the part of industry to reduce the incidence of poisonings (9, p. 429). The conference was instrumental in reducing the "number of children's aspirin (1 1/4 grains) to 36 per bottle, ordinarily less than a lethal dose" (9, p. 429). Congress finally viewed the increasing accidental deaths from other-product ingestion, and industry's failure to set and maintain safety standards, as a substantial basis for federal intervention (9, p. 429).

The Poison Packaging Act was "designed to reduce the incidence of poisoning of children and is aimed specifically at protecting children under five years of age. This age group is particularly vulnerable because of an inability to read, natural curiosity, and the 'pica phenomenon,' namely, the tendency among young children to eat non-food items" (9, p. 428).
The main objective of the Poison Act is to protect children from accidental ingestion of, or exposure to, toxic or harmful substances by requiring safety closures and other safety packaging. Coverage of the Act is broad, applying to all household substances which are toxic or harmful. Household substances are defined in the Act to include any substance which is produced or distributed for sale, consumption, or use, or customarily stored by individuals in or about the household. This includes a hazardous substance as defined in the Federal Hazardous Substances Act; pesticides as defined in the Federal Insecticide, Fungicide and Rat Rodenticide Act; a food, drug, or cosmetic as those terms are defined in the Federal Food, Drug, and Cosmetic Act; and a substance intended for use as fuel when stored in a portable container (9, p. 429).

For additional products brought under the Poison Act in 1973 see Appendix E.

According to reliable sources at the Texas State Poison Center and the Poison Control Center of the Brady-Green Community Health Center (3, 4), there are no current figures on the exact number of poisonings that occur each year. It was estimated that 75-90 percent of accidental poisonings occur among children less than five years of age—and they are still increasing each year. This increase is attributed to (a) the provision of the Poison Act allows one-size products to be produced and sold in non-resistant containers, i.e., disinfectants, polishes, cleaners and cosmetics, (b) pharmacists sell prescription drugs to the elderly in non-resistant cap containers. They fail to realize that these persons may have grandchildren that may be endangered if they have access to medications, and (c) products not considered hazardous such as vitamins with iron, if taken in excess can be poisonous.
The Refrigerator Safety Act of 1956

Between 1946 and 1953 there were eighty-five known deaths recorded where children died from entrapment inside abandoned refrigerators. Trapped inside, a child dies within 10-15 minutes; those who survive frequently suffer severe and irreparable brain damage from the lack of oxygen. The thought of children perishing under these circumstances resulted in pressure on Congress to take legislative measures (5, p. 23).

Although the Act itself was passed and enacted into law on August 2, 1956, the one standard established under the Act did not take effect until October 30, 1958. This standard requires

that household refrigerators can be opened upon the application of 15 pounds of outward force on the leaning edge of the door, or by the use of a knob while the refrigerator is in a normal-use position. The standard also provides that this safety feature shall remain effective after significant openings and closings, food spillage, cleaning and defrosting (9, p. 434).

Manufacturers are required to produce household refrigerators that can be opened from the inside whenever a child leans against the edge of the door. Fortunately, the manufacturers have complied with this law. Although there is still a problem with refrigerators manufactured before the Act took effect, there have been no reported deaths due to entrapment (5, p. 23).

Impact Analysis

The greatest impact of the 1972 and 1976 consumer acts was felt by manufacturers producing consumer products. Additional personnel were required to handle the Commission-generated reports and inspection records. Production and
quality control methods in many plants were modified to acco-
modate retooling, particularly in the pre-formed plastics area.

A large percentage of the manufacturers established in-
house testing labs or utilized the services of private testing
facilities. Tests made prior to production lessened the pos-
sibility of defective products being produced and sole in the
marketplace. Pre-production evaluation and post-production
testing increased costs. These testing procedures, however,
also reduced the possibility of litigation.

Additional top-level attorneys had to be hired to handle
the increase in litigation—and the costs of defending these
suits in court escalated. On the other hand, these same at-
torneys worked to protect their employers' interests and image
when product recall required banning, repair or replacement.

Consumers have benefited to a limited degree from the
standards and regulations promulgated by the Commission. Re-
moval of dangerous and hazardous products from the retail out-
lets has decreased the possibility of harm to consumer-users.

Proper labeling on dangerous household products has made
the consumer aware of inherent dangers, i.e., large letters
reading "Danger if Swallowed," or "Flammable" alerts the con-
sumer who reads. Very few symbols have been devised to protect
the consumer-user who is unable to read. Lack of proper in-
structions and warning can result in a manufacturer being
held liable for negligence.

Manufacturers have also contributed to the consumer's
education through the use of toll-free telephone numbers.
When the consumer calls he is able to expedite service
problems, register complaints, etc. The manufacturer may also offer instructions on the proper care of the consumer's product.

The public is usually informed by the Commission or manufacturer through newspapers, radio, public service announcements on television, or correspondence to owners, when a product is to be recalled, presents a hazard, or may be dangerous.

A very important feature of the 1972 Act was the right of consumers to sue in federal court for damages resulting from defective products. This provision included employees who are injured on-the-job and receive compensation through their Workmen's Compensation protection—provided the injured employee's employer is not also the manufacturer.

Significant Trends

To what extent the Reagan administration will curtail the requirements of the Consumer Products Safety Act and the operations of the Consumer Product Safety Commission is open to speculation. Representative Henry Waxman (D. Ca.) and Senator Bob Packwood (R. Ore.) have already sponsored bills HR 2271 and S. 1151 "to reauthorize the Consumer Product Safety Commission as an independent federal agency with curtailed powers" (12, p. 16). Both the House and Senate have passed these proposals and they are presently on the floor for vote (12, p. 16).

According to an attorney who writes for Congress Watcher, "more than 30,000 Americans die each year in accidents involving consumer products, and another 33 million are injured" (1).
Unfortunately, much of [the Commissions] work may be brought to an end soon. The Reagan administration has decided to slash the Safety Commission's budget by more than 30 percent. This decision will hurt consumers since the CPSC saves lives and money. It already operates on a tight annual budget which covers less than two hours of the Pentagon's expenditures.

The administration is also looking to destroy the independence of the CPSC by transferring it to the Commerce Department. The Commerce Department is regarded as the agency that promotes business, not the one which regulates it. It would make a joke of the Safety Commission to bury it in the Commerce Department, which has no interest or expertise in, and in many cases is actually philosophically opposed to, its mission.

The major fights in full committee will be:

1. Transfer to the Commerce Department. The Reagan administration is engaging in a full-court press to transfer the CPSC to Commerce, with Vice-President Bush calling key members of the Committee to personally lobby them. This is the major issue for the CPSC; if it is exiled to Commerce, it might as well not exist.

2. Preemption of State Law by Industry Product Standards. An amendment was passed in subcommittee which would allow an industry standard for a product to overrule any state law on the same subject. In other words, if one state had a strict rule on the contents of home insulation, the insulation manufacturers could just get together and agree on their own standards, effectively vetoing the state rule. This outrageous provision is contrary to a state's right to set its own safety rules to protect its residents.

3. One-Year Authorization. The Reagan administration will push to reduce the CPSC's authorization to one year, allowing them to return and attack it again next spring.

4. Freedom of Information Restrictions. An amendment adopted in subcommittee would allow manufacturers to "certify" that information they were giving to the Commission would not generally be released in the normal course of business and therefore should be kept secret. This provision, which cripples the public's right to know about dangerous products, should be eliminated. The Freedom of Information Act already contains an adequate exemption for confidential commercial information (1, p. 4).

An article in Fortune magazine confirms the fact that positive action is being taken to deal with the Commission:
"In a recent letter to Senator Robert Kasten, who chairs a subcommittee overseeing the CPSC, [Budget Director David] Stockman charged that the commission had 'ad- ventured too far in some areas of the regulation' and cited its chronic-hazards program as one of these areas. Stockman proposed a draconian remedy. Given its druthers, he said, the Reagan administration would abolish the agency entirely. If Congress doesn't have the stomach for this ultimate solution, the budget director suggested that the five member body should be dismantled as an independent commission and relocated, under a single administrator, in one of the executive departments, such as Commerce. There its activities could be more closely monitored and directed by the White House. To quash even a hint of expansionist tendencies, the Office of Management and Budget already slapped the CPSC with a 27% reduction in its original 1982 budget of $45 million, entailing the loss of a quarter of its staff. The CPSC says this is the largest percent cut of any regulatory agency" (7, p. 127).

On August 13, 1981, an article in the San Antonio Express-News headlined "Era of Confrontation is Past." Nancy Steorts was President Reagan's choice to head the Consumer Product Safety Commission. She has been an industry consultant on consumer affairs and established an Office of Consumer Affairs at the Agriculture Department. During a Senate commerce subcommittee hearing Steorts stated "the era of confrontation and adversity is past. Today, we are in an era of cooperation between government, the consumer and the affected industry."

She later added: "Today, there is very definitely a new wave sweeping the country to slow down government, to decrease government regulations and to make government more responsive to its people. CPSC must focus only on those areas which truly pose an unreasonable risk of injury" (11, p. 3-D).

Steorts further plans to encourage "innovative industry-CPSC joint information-education programs, as part of a strong cooperative effort among business, consumers and the government" (11, p. 3-D).
A Consumer Product Safety Commissioner reported the personnel staff reached 900 during the Carter administration. This total must be reduced by more than 200 employees before the end of the 1981 fiscal year. In all probability more employees will be cut from the rolls during FY 82. At present, the 697 employees include part-time personnel. If additional employees are removed from the field offices, this will definitely mean a reduction in enforcement procedures and fewer rules will be established. Either way, there will be a reduction in the Commission's programs (10).

Summary

The 1972 Consumer Product Safety Act and the 1976 Consumer Product Safety Commission Improvement Act were the result of congressional response to the excessive number of injuries, illnesses and death that were occurring throughout the United States. Consumers were victims of dangerous and hazardous products—produced for their use by the consumer product manufacturing industry.

Congress evidently had reservations in passing the 1972 Act. They believed the consumer manufacturing industry would, if faced with a consumer protection agency empowered to issue safety standards, improve their production methods. The Act, however, became law in 1972; the Consumer Product Safety Commission and its advisory councils were established; and four acts, previously administered by other federal agencies, were transferred to the jurisdiction of the Commission.

The main objective of the entire Commission is to assure
the safety of consumers before they are harmed by dangerous
and hazardous products being manufactured for their use. The
Commission is composed of five commissioners. One is selected
to serve as the chairman; another is then designated to serve
as the vice-chairman. These commissioners oversee the opera-
tions of thirteen sections, six bureaus, and fourteen field
offices. Ten sections are charged with the administrative
functions; two handle the legal affairs; and one is responsi-
sible for the medical aspects of consumer safety. The six
bureaus are responsible for enforcement of procedure and
policy; collecting, evaluating and disseminating technical
data related to injuries, illnesses and deaths from consumer
products; determining the costs of injuries; the effective-
ness of safety rules or standards; and further the education
of the consumer in product safety. The fourteen field of-
ices perform on-site inspections to identify possible hazards
in products and assure consumer product manufacturers comply
with Commission guidelines. Volunteers, working under the
supervision of the field offices, survey the retail outlets
to determine if any products being offered for sale present
a danger to the purchaser-user.

Under provisions contained in the 1972 Act, the Commis-
sion is instructed to work closely with the National Bureau
of Standards (NBS). To better serve the Commission, NBS has
established the Programmatic Center for Consumer Product
Safety. This office acts as the liaison between the Commis-
sion and other NBS offices that are conducting and evaluating
tests.
Although the Commission has agreements with other state and federal agencies to supply information, other sources are available. Theoretically, the Commission has total power to compel both the public and consumer product manufacturing sectors to supply information concerning consumer product safety. This data may be derived through industry reports on new products, hospital and emergency room records that may indicate product-related injuries, poison control centers that receive information on accidental poisonings; and the community health centers. All types of consumer product-related information on injuries, illnesses and deaths are then analyzed by the National Electronic Information Surveillance System (NEISS) that is under the control of Epidemiology.

NEISS is the vital core of the Product Injury Information Clearinghouse operation of the Commission. The Clearinghouse maintains information that is used by federal, state and local agencies involved in consumer protection. A reading room is open daily for the public's use. Information of a confidential nature, derived from any source, is completely restricted to the Commission and is not available to any other federal, state or local agency.

Although the Commission is required to release consumer product information to the general public, it is also obligated to publicly retract any misleading information that may have been reported.

To assure participation in standard-setting activities, the Commission publishes informative data in the Public Calendar and the Federal Register. Standards proposed by the Commission must be considered reasonably necessary to prevent
or reduce unreasonable risks of injury associated with the product. The Commission must obtain the support, not only of the consumer product industry involved, but consumer and consumer-oriented organizations as well. To date, the Commission has met stiff resistance from the consumer product manufacturing industry.

Designated employees of the Commission conduct routine, follow-up, and indepth inspections of manufacturing plants. Manufacturers are not only supplied with a prior notice of inspection, they are also informed, through written communications, of any defects or rule infractions encountered during plant survey. Manufacturers must have all records, required by the Commission, available for review by the Commission representative. In the event it is necessary to ban products to protect the public from unnecessary risks of injury, the consumer product manufacturing industry and retailers are urged to reach a solution through agreements with the Commission.

The Secretary of the Treasury is responsible for supplying the Commission with samples of imported products in order to determine safety and acceptability within the United States. In the event a product fails to meet Commission standards, or cannot be modified to meet safety requirements, the product is either returned to the original shipper or destroyed.

Products manufactured in the United States for export to foreign countries only need to meet the specifications of the importing country or the manufacturer. This procedure, however, does not apply to products exported for sale in the United
States military stores of the diplomatic enclaves. These products must meet all requirements of the Commission for items sold in the states.

The Commission is empowered to eliminate imminent, substantial and unreasonable risks of injury in consumer products. Out of all the investigations conducted, only one "imminent hazard" case was decided by the courts. In this instance, the product was completely withdrawn from the marketplace.

The U. S. District Courts have jurisdiction to impose restraint on manufacturers, distributors or importers of products under control of the Commission. The Commission has the authority to represent itself in court, or request the assistance of the Department of Justice.

Each of the "transferred acts" was the result of congressional action in response to the public's demand for protection against hazardous products. These acts include standards for: fabrics, household furnishings, poisonous chemicals used in household products; electrical and mechanical hazards; labeling of poisonous products, child-proof packaging; and safety catches on refrigerators to prevent entrapment of children while playing.

With the exception of the Refrigerator Act, all of the other acts were amended by Congress because they failed to accomplish their original purpose. More products were brought under control because Congress had failed to look beyond the immediate problems that established the original acts.

The consumer manufacturing industry felt the impact of the 1972 Act in numerous ways: increased record keeping,
additional personnel; retooling of machinery to meet safety requirements; and additional pre- and post-testing products prior to placing them in the stream of commerce.

Consumers benefited when dangerous products were removed from the marketplace; better labeling on hazardous products; education through public service announcements; and direct toll-free telephone contact with manufacturing representatives.

The Reagan administration will have an effect on the consumers and industry. The budget for FY 1982 has been drastically reduced. This has caused a reduction of personnel and safety research programs. Tentative plans include destroying the Commission by transferring it to the Department of Commerce; pre-empting state laws through industry agreements; restricting the freedom of information that will deprive the public of essential information on dangerous products; further reducing personnel means reducing enforcement procedures; abolishing the Commission and appointing a director to supervise the administration of the 1972-1976 Acts, automatically bringing both acts under White House control.
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CHAPTER IV

LANDMARK DECISIONS THAT AFFECT INDUSTRY AND CONSUMER

Introduction

This chapter provides the background of product liability laws, presents cases where the opinions of supreme or appellate courts became landmark decisions, and discusses the impact of these landmark decisions on consumers and the manufacturing industry.

As America changed through progress, her laws were also revised. The manufacturing industry established state of the art standards in production. These standards were accepted so completely by the state legislators and the courts that no laws were established to protect the consumer. Furthermore, consumer product contracts and warranties established the principle that manufacturers were not to be held responsible for their own products.

Gradually, judges and jurors began to reject the state of the art defense. They also began to recognize the failure of the manufacturing industry to meet the safety needs of consumers. Manufacturers failed consumers because they refused to keep up with new technological advancement methods—it meant spending money to improve their methods of production and would temporarily reduce profits.

Lower court decisions in product liability cases, provided the ammunition for a revolution generated by supreme or appellate
court judges. This revolution established precedents, over-
turned previous landmark decisions and changed the laws for
product liability throughout the country.

Background

Product liability law had its beginning in 1842 with the
\textit{Winterbottom v. Wright} decision in England. Nathaniel Atkin-
son suffered injuries that lamed him for life when the wheels
of the coach he was driving broke. Atkinson sued Wright who
had a contract with the Post-master General to provide mail
coaches for conveying mailbags in a fit, proper, safe, and
secure condition. Atkinson's attorney argued that if the
coach maker was negligent when he installed the coach wheels
and this negligence caused an injury, then the coach maker
would be responsible for those injuries. Wright's attorney
argued that Wright was totally unconnected with Atkinson and
that only a party in contract with another can sue that party.
Wright was in contract with the Post-master General—but not
with Atkinson. Therefore Atkinson could not sue Wright (8,
p. 7).

The court ruled against Atkinson, saying,

There is no privity of contract between these parties; and if the plaintiff can sue, every passenger, or even any
person passing along the road, who was injured by the
upsetting of the coach might bring similar action. Un-
less we can find the operation of such contract as this
to the parties who enter into them, the most absurd and
outrageous consequences, to which I can see no limit
would ensue (8, p. 7).

This ruling created the "doctrine of privity of contact"
which required the injured party to be in direct contract with
the manufacturer before the manufacturer could be held liable
for injuries resulting from a negligently made product (8, p. 7).
The state and federal courts of the United States used this principle as a basis for product liability suits until 1916.

America entered the Industrial Age—state and federal courts added exceptions to non-liability cases when the purchasers did not have a contract with a manufacturer. The courts, by 1903, began to object to the manufacturer's freedom in state of the art cases and strongly felt manufacturers owed a responsibility to the consumer to exercise care in their production procedures, especially if their products were foreseeably or inherently dangerous (8, p. 8).

In addition, state court judges started to reject some of the state of the art pleas by implying that this type of argument only provided a partial defense. In their rejection, the judges provided an incentive for manufacturers to adopt safer production standards. Furthermore, the judges indicated the entire industrial complex might be negligent by failing to implement new technological innovations (13, pp. 946-957).

Landmark Decisions

Some of the landmark decisions are not directly related to the products under control of the Commission. The concept of the decisions, however, are indicative of any decision that may be rendered in a consumer-product case.

Landmark decisions were rendered by the highest courts in California, Minnesota, Nebraska, New Jersey, New York, and Pennsylvania. With the exception of Nebraska, all decisions were in favor of the consumer.

Landmark decisions set precedents. Precedents cannot be deviated from unless the legal rule has been established by
constitutional or statutory process. Deviations from precedent occur when the principle of law is (a) an obvious error (b) no longer applicable to changing conditions of life; (c) harmful to the community; or (d) inconsistent with constitutional provisions (1, pp. 522-525).

A decision by one state supreme court does not necessarily affect the decision of the supreme court of another state. The decision of one higher court, however, may be reviewed by another states' higher court and adopted if consistent with the public policy of that state, and is not contrary to the statute of that state (1, p. 537).

An excellent example of this policy was the 1976 decision of the Nebraska Supreme Court. The Nebraska court upheld a lower court decision in favor of a manufacturer and retailer in a product liability suit—completely contrary to the prevailing trend throughout the nation. "The case was a personal injury suit against Caterpillar Tractor Co., Johnson Manufacturing Co., as manufacturers of the tractor/scaper under the Caterpillar name and Lincoln Equipment Co., as the supplier" (12, p. 61).

James F. Waegli "was seriously injured when a Caterpillar tractor rolled back on him from its parked position, crushing his leg against another piece of equipment" (12, p. 61). Waegli was left with a 30 percent permanent disability. The tractor was not equipped with a parking brake when purchased, however, one month later "industry standards had been amended to make a 'parking system' mandatory on these machines" (12, p. 61).
Although a strong defense was presented, the Nebraska Supreme Court decided 
"(a) there is no duty to warn of a known danger; and (2) where the existence of a defect in a product is known prior to an accident or injury, no basis for recovery under the doctrine of strict liability in tort [a manufacturer is held strictly liable when it is determined that a defect in his product caused an injury] exists" (12, p. 61). Nebraska had relied on its state of the art law.

State supreme and appellate court judges have spearheaded a legal revolution. Beginning in California, other states soon followed the new movement by overruling old decisions no longer applicable to this age of industrialization. Instead, "the courts borrowed a much tougher standard 'strict liability' from earlier cases involving such products as dynamite, in effect, strict liability puts the product itself, including its packaging and promotion on trial" (4, p. 72).

Another revolution is underway by state legislators to "curb" many court decisions. While state laws do not reject strict liability, they do however, place limits on liberalized procedures and open up a range of defenses that companies may raise in court when faced with product liability claims (4, p. 74). The judges of both the lower and higher courts will have to make new decisions whenever these changes are challenged in product liability litigation.

The following landmark decisions have played an important role in protecting consumers involved in product liability suits. After reading the cases is will be impossible to disagree with a distinguished law professor (16) who, in 1973,
reduced approximately sixty-five years of product liability
litigation to three sentences:

... In the area of the tort liability of a manufacturer
or other supplier of a chattel for injury or damage caused
by the chattel, strict liability in tort has swept the
field in recent years. Privity of contract has disapp-
peared as a requirement. Negligence liability has sur-
vived but is now only treated as a secondary line of
attack to supplement the principal of theory of strict
liability and to fill in potential gaps or deficiencies
(p. 825).

MacPherson v. Buick Motor Co., Court of Appeals of
New York, March 14, 1916, 111 NE 1050, 1916

Prior to the decision in this case, manufacturers had
practically achieved immunity from any responsibility for in-
juries, illnesses or deaths resulting from their products.
The absence of "privity" (contract between manufacturer and
purchaser) usually blocked any award for damages to the
plaintiff (8, p. 9).

MacPherson was thrown from his car and injured when de-
fective wooden spokes in a wheel of his new Buick collapsed.
(10).

Buick argued it did not have a contract with MacPherson
because he had purchased the car from a dealer, therefore
Buick was not responsible (10).

The court disagreed when Buick testified "the wheel was
purchased [from] a reputable manufacturer of automobile wheels
and they had relied upon the wheel manufacturer to make all
necessary tests as to the strength of the material therein
and made no such test itself" (10).

The judge based the case on negligence. He did not, how-
ever, fail to take the "inherently or imminently dangerous"
factors into consideration:

"... If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully..." (8, p. 9).

Analysis

The New York Court of Appeals rejected the decision of the English court in the Winterbottom v. Wright case as well as the verdicts rendered by the lower courts of New York where the MacPherson case was originally heard. This decision was eventually accepted by all American courts. The MacPherson case also provided the basis for expanding future landmark decisions in America "because manufacturers may be held liable for negligence in mislabeling, or failing to warn, for negligent installation, or for negligence in producing an unsafe or defective design" (8, p. 9).

When the judge ruled "Buick was responsible for the defects that could be attributed to negligence, regardless of how many middlemen and dealers stood between Buick and the ultimate buyer, regardless of the narrow confines of contract privity" (11, p. 147), the consumer-user was recognized as an active participant who deserved protection.

Privity of contract would become obsolete in 1960 when Henningsen & Henningsen completed its demise (11, p. 147).
Henningsen & Henningsen v. Bloomfield Motors, Inc., and Chrysler Corporation, Supreme Court of New Jersey, December 7, 1959
Decided May 1960, 151A 2d 69, 1959

The New Jersey Supreme Court decision in 1960 "did for warranty what MacPherson had done [in 1916] for negligence in the area of product liability" (8, p. 11).

Ten days and 468 miles after purchasing a new car, Mrs. Henningsen heard a loud noise while driving. The steering wheel spun from her hands. She was injured when she lost control of her car and crashed into a brick wall. The "front of the car was so badly damaged that it was impossible to determine if any of the parts of the steering wheel mechanism or workmanship or assembly were defective or improper prior to the accident" (7, p. 75).

The lower court of New Jersey could not determine "negligence" on the part of Henningsen or Chrysler. The case was tried solely on the warranty factor prior to the case being appealed to the New Jersey Supreme Court (7, p. 75).

The warranty issued by Chrysler was a major concern in the final decision:

The manufacturer warrants each new motor vehicle (including original equipment placed thereon by the manufacturer except tires), chassis or parts manufactured by it to be free from defects in material or workmanship under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser or before such vehicle has been driven 4,000 miles, whichever event shall first occur, be returned to it with transportation charges prepaid and which its examination shall disclose to its satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties expressed or implied, and all other obligations or liabilities on its part, and it neither assumes nor authorizes any other person to assume for it any other
liability in connection with the sale of its vehicles
(7, p. 74).

When the decision was rendered the judge stated:

Where purchase order for new automobile contained . . . an express warranty by which manufacturer warranted vehicle free from defects in material or workmanship and warranty further stated that it was expressly in lieu of all other warranties, express or implied, and such warranty was the uniform warranty of the Automobile Manufacturers Association to which all major automobile manufacturers belong, under circumstances, manufacturer's attempted disclaimer of an implied warranty of merchantability and of the obligations arising therefrom was so inimical to public good as to compel an adjudication of its invalidity (7, p. 71).

. . . it is difficult to imagine a greater burden on the consumer, or less satisfactory remedy. Aside from imposing on the buyer the trouble of removing and shipping the part, the maker has sought to retain the uncontrolled discretion to decide the issue of defectiveness. Some courts have removed much of the force of that reservation by declaring that the purchaser is not bound by the manufacturer's decision (7, pp. 78-79).

Analysis

The final decision of the court "really turned on whether the disclaimer was the only warranty applying" (11, p. 147). The court voided the disclaimer and "held manufacturers and dealers were obligated (under an implied warranty of merchantability) to market reasonably safe cars" (11, p. 147). Manufacturers are no longer immune to being sued because of their disclaimers.


Court decisions were creating changes in the product liability suits and "perhaps the most radical change . . . concerns negligence, as courts move rapidly toward . . . strict liability in tort—under which an injured plaintiff can
recover [damages] whether or not the manufacturer is to blame" (11, p. 147).

Greenman sued "the retailer and the manufacturer of a Shopsmith, a combination power tool that could be used as a saw, drill, and wood lathe. He saw a Shopsmith demonstrated by the retailer and studied a brochure prepared by the manufacturer" in 1955 and decided to purchase it (6, p. 898).

In 1957 Greenman "bought the necessary attachments to use the Shopsmith as a lathe for turning a large piece of wood he wished to make into a chalice. After he had worked on the piece of wood several times without difficulty, it suddenly flew out of the machine and struck him on the forehead" (6, p. 898).

Approximately "ten and a half months later, he gave the retailer and manufacturer written notice of claimed breaches of warranties and filed a complaint against them alleging such breaches and negligence" (6, p. 898).

Greenman produced expert witnesses who testified that the set screws were inadequate and more positive methods were available within the manufacturing field to hold the machine together (6, p. 898).

Because advertising was an important factor in selling a manufacturer's product, it was reasonable to assume in this case that "statements in the manufacturer's brochure were untrue, that they constituted warranties and that plaintiff's injuries were caused by their breach" (6, p. 899).

Yuba contended plaintiff "did not give it notice of breach of warranty within a reasonable time and . . . there-
fore his cause of action for breach of warranty is barred" (6, p. 899).

The court ruled "a manufacturer is strictly liable in tort when an article he places on market, knowing that it is to be used without inspection for defects, proves to have a defect that caused injury to a human being (6, p. 898). The court added, "to establish manufacturer's liability for defective power tool, it is sufficient that [Greenman] prove that he was injured while using tool in a way it was intended to be used as a result of a defect in design and manufacture of which [Greenman] was not aware that made the tool unsafe for its intended use, and plaintiff is not required to establish an express warranty (6, p. 899).

Analysis

Prior to this decision, the consumer-user of a product had to prove their injury resulted from a product defect due to a manufacturer's negligence.

The California Supreme Court "stresses that Yuba's apparent breach of warranty and negligence were basically irrelevant" ... and "Yuba would still be liable" (11, p. 148). The application of strict liability in product liability law greatly reduced the consumer's burden.


"Intended use" as applied in the Greenman case is rejected here. A new cause of action in product liability "negligence in design" is settled by the Minnesota court.
Larsen was severely injured in a head-on collision that caused "a severe rearward thrust of the steering mechanism" into Larsen's head (9, p. 497).

Larsen "does not contend that the design caused the accident but that because of the design he received injuries he would not have otherwise received, or in the alternative, his injuries would not have been as severe. The rearward displacement of the steering shaft on the left frontal impact was much greater on the Corvair than it would be in other cars that were designed to protect against such rearward displacement" (9, p. 497).

Larsen based his suit on three factors: "(1) negligence in design of the steering assembly; (2) negligent failure to warn of the alleged latent or inherently dangerous condition to the user of the steering assembly placement; and (3) breach of express and implied warranties of merchantability of the vehicle's intended use (9, p. 497).

General Motors contends it "has no duty whatsoever to design and manufacture a vehicle * * * which is otherwise 'safe' or 'safer' to occupy during collision impacts . . . and since there is no duty there can be no actionable negligence on its part to either design a safe or more safe car or to warn of any inherent or latent defects in design that might make its cars less safe than some other cars manufacture either by it or by other manufacturers" (9, p. 497).

In addition, "General Motors argued that the duty of care in design must be considered in its application to all products" (emphasis added) (9, p. 504).
The court agreed and stated "we think the duty of the use of reasonable care in design to protect against foreseeable injury to the user of a product and perhaps others injured as an incident of that use should be and is equally applicable to all manufacturers with the customary limitations now applied to protect the manufacturer in case of an unintended and unforeseeable use. The courts have imposed this duty, perhaps more readily against other manufacturers than against the automotive industry" (9, p. 504).

In response to Larsen's first charge, the court stated: "we think the 'intended use' construction urged by General Motors is much too narrow and unrealistic. Where the manufacturer's negligence in design causes an unreasonable risk to be imposed upon the user of its products, the manufacturer should be liable for the injury caused by its failure to exercise reasonable care in the design. These injuries are readily foreseeable as an incident to the normal and expected use of an automobile" (9, p. 503).

In rejecting the intended use doctrine, the court felt "where the injuries or enhanced injuries are due to the manufacturer's failure to use reasonable care to avoid subjecting the user of its products to an unreasonable risk of injury, general negligence principles should be applicable. The sole function of an automobile is not just to provide a means of transportation or as safe as is reasonably possible under the present state of the art" (9, p. 503).

In response to Larsen's second charge "failure to warn" the court stated "where the dangerous condition is latent it should be disclosed to the user, and non-disclosure should
subject the maker or supplier to liability for creating an unreasonable risk" (9, p. 505).

On Larsen's third claim the court concluded "under the law the manufacturer has a duty to inspect and to test for designs that would cause an unreasonable risk of foreseeable injury" (9, p. 505).

Analysis

Starting with MacPherson in 1916, "the courts have consistently held a manufacturer liable for negligent construction of an automobile" (9, p. 500). Minnesota's Court of Appeals reported it did not expect General Motors, under the present state of the art, to produce an "accident proof" or "fool-proof" vehicle. The court did say, however, the manufacturer has a duty "to avoid subjecting the user to an unreasonable risk of injury in the event of collision" (9, p. 502). The fact that accidents occur was considered "readily foreseeable" and "statistically inevitable" by the court (9, p. 502).

Although the court raised the point, it did not act upon "not subjecting the manufacturer for the entire damage" (9, p. 503) because General Motors felt it would be too difficult to assess. This point was raised in view of the fact that Larsen did not claim the design caused the accident. The court, however, did not foresee "insurmountable" problems in applying "comparative negligence" as it had been used in land condemnation proceedings for many years. These proceedings required juries to assess the land value before and after condemnation; then assess a special benefit accruing to the
remaining property condemnee (9, pp. 503-504).

Ironically, General Motors was also the defendant in the Daly case that introduced "comparative fault" in California. This case is discussed later in the landmark decisions.

Negligence in design was the basis for this case, however, it can also apply to "negligence in design to provide safety devices" as the Bexiga case reveals.


This case was based on "negligence, strict liability in tort and breach of warranty of fitness of purpose" (3, p. 282). The court made it clear that manufacturers cannot transfer their responsibility to a purchaser—in this case, installing a safety device.

Bexiga, Sr., sued on behalf of his minor son who lost his fingers—resulting in his left hand being deformed. The Bexiga's did "not contend that the accident resulted from defective materials, workmanship or inspection" (3, p. 282).

Bexiga, Jr., was employed by Regina Press that had purchased the machine from Havir. "The machine which caused the injuries was a 10-ton punch press manufactured by Havir in 1961... With the exception of a guard over the flywheel there were no safety devices of any kind on the machine when it was shipped" (31, p. 282).

The Bexigas' main "theory was that the punch press was so dangerous in design that the manufacturer was under a duty to equip it with some form of safety device to protect the user while the machine was being operated" (3, p. 283).
A mechanical engineer testified as the Bexigas' expert witness and he stated "the punch press amounted to a 'booby trap' because there were no safety devices in its basic design and none were installed prior to the accident. He added that the accident would probably never have occurred had the machine been properly designed for safety" (3, p. 283). Furthermore, according to the expert witness, "in accordance with the custom of the trade, presses like the one in question were not equipped with safety devices by the manufacturer. [They] were to be installed by the ultimate purchaser" (3, p. 283). On the other hand, safety devices were installed on larger presses by the manufacturer (3, p. 283).

Additionally, evidence was presented that safety devices "were known to the industry at the time [of the accident] and [were] available from companies specializing in safety equipment" (3, p. 283).

A service manual shipped with the machine "made no mention of safety devices in the operation of the machinery with the exception . . . of the guard on the flywheel which was unrelated to the accident" (3, p. 283).

Havir contended Bexiga, Jr., had been contributorily negligent in operating the punch press (3, p. 283).

The court overruled Havir on their claim of contributory negligence. The court also upheld the opinion of the lower court that a "manufacturer is subject to liability to others by his failure to exercise reasonable care in the adoption of a safe plan or design" (3, p. 284). Havir was found to be negligent and strictly liable for the injury (3, p. 284).
Furthermore, according to the court "where a manufacturer places into the channels of trade a finished product which can be put to use and which should be provided with safety devices because without such it creates an unreasonable risk of harm, and where such safety devices can feasibly be installed by the manufacturer, the fact that he expects that someone else will install such devices should not immunize him. The public interest in assuring that safety devices are installed demands more from the manufacturer than to permit him to leave such a critical phase of his manufacturing process to the haphazard conduct of the ultimate purchaser" (3, p. 285).

The court felt "the only way to be certain that such devices will be installed on all machines—which clearly the public interest requires—is to place the duty on the manufacturer where it is feasible for him to do so" (3, p. 285).

Analysis

The press was manufactured by Havir and sold in 1961 to Bexiga's employer. The employer failed to install safety devices to protect its employees. When Bexiga was injured in June 1966, a judicial statute existed that required Bexiga's employer to install safety equipment. This statute, however, was repealed, after the date of sale to Bexiga's employer. A new statute became effective in September 1966 that held manufacturers responsible for installing all safety equipment. (3, 286). Havir had based its defense on the law that was in effect at the "time of sale."

The New Jersey Supreme Court advanced the cause of
product safety. The manufacturing industry in the State of New Jersey, a highly industrialized area, were forced to assume responsibility for installing safety devices on all machinery requiring such equipment.


Mrs. Berkebile sued "for a wrongful death of owner" (2) when her husband was killed when his helicopter crashed. This multifaceted case incorporates significant issues in the area of product liability.

Brantly manufactured "the small, two-person" helicopter. Addressing itself to the general aviation market [Brantly's] advertising described the helicopter as 'safe, dependable,' not 'tricky to operate,' and one that 'beginners and professional pilots alike agree ... is easy to fly.'

During its design stage, Brantly "had experienced some difficulties in its rotor blade and autorotation" stage (2, p. 897). Some modifications were made prior to its distribution (2, p. 897).

In January 1962, Berkebile had purchased the helicopter from Brantly's distributor. "Berkebile flew alone on July 9, and while in climbing flight the seven-foot outboard section of one of the three main rotor blades separated. The helicopter crashed on a wooded hillside" (2, p. 897). Mrs. Berkebile's claim stated: (1) the design of the rotor system of the helicopter was defective because the average pilot had insufficient time to place the helicopter in autorotation in an emergency power failure in climbing
flight; (2) the rotor blade was defectively manufactured and designed; (3) [Brantly] rendered the helicopter defective as a result of the inadequate warnings regarding the possible risks and inherent limitations of one of the systems of the helicopter; and (4) [Brantly] misrepresented the safety of the helicopter in its advertising brochures" (2, p. 897).

Brantly denied "the existence of any defective condition in its product [and] theorized that the helicopter's rotor blade had fractured due to an abnormal use brought about by power failure resulting from fuel exhaustion, followed by a failure on [Berkebile's] part to push down the collective pitch in time to go into autorotation and to effect a proper emergency landing" (2, pp. 897-898).

The court in making its decision stated "the increasing complexity of the manufacturing and distributional process placed upon the injured plaintiff a nearly impossible burden of proving negligence where, for policy reasons, it was felt that a seller should be responsible for injuries caused by defects in his product" (2, p. 897).

Furthermore, "our courts have determined that a manufacturer by marketing and advertising his product impliedly represents that it is safe for its intended use" (2, p. 897).

Therefore, "we have decided that no current societal interest is served by permitting the manufacturer to place a defective article in the stream of commerce and then to avoid responsibility for damages caused by the defect" (2, pp. 897-898).

In substance, "only two elements of requisite proof
are required in product liability] (1) the need to prove that
the product was defective and (2) the need to prove that the
defect was a proximate cause of the plaintiff's injuries (2, p. 898).

Defects in a product are not limited to design and manu-
ufacture and the court stated the seller must "(1) provide with
the product every element necessary to make it safe for use.
One such element may be warnings or instructions concern-
ing use of the product; and (2) give such warning and instruc-
tions as are required to inform the user or consumer of the
possibile risks and inherent limitations of his product" (2, pp. 897-898).

In addition, "if the product is defective absent such
warnings, and the defect is a proximate cause of the plain-
tiff's injury, the seller is strictly liable without proof of
negligence" . . . . (2, p. 898). In the instant case, the
warnings of the dangers and instructions for flying the B-2
are contained in the Rotocraft Flight Manual and in the cock-
pit placard. There is no specific warning as to the time
needed to get into autorotation, and there is no direction or
warning with respect to 'Engine Failure in Climbing Flight'"
(2, p. 698).

Finally, "it is by now settled that a product which is
perfectly made may nonetheless be 'unreasonably dangerous' if
adequate warnings of the dangers involved in the use of the
product are required and are not given by the seller" (2, p.
898).
Analysis

A consumer-user can prove that a well made product becomes defective if operating manuals do not include adequate warnings and operating instructions. In addition, if consumers are led, through the manufacturer's advertising, to purchase his product, the manufacturer will be held responsible for misleading their purchasers.

Defective conditions are no longer limited to design and manufacturer examination. Other factors, such as advertising, instructions and warnings must be analyzed to protect the consumer-user.


According to a reliable source (14) strict liability and comparative fault were judicially created in California, and had never been applied in the same case prior to Daly"(p. 937).

Kirk Daly was killed when he "collided with and damaged 50 feet of metal divider fence. The car spun counterclockwise, the driver's door was thrown open, and Daly was forcibly ejected from the car" (5, p. 1164).

The links in Opel's manufacturing and distribution chain were named in the complaint, i.e., General Motors Corp., Boulevard Buick, Underwiter's Auto Leasing, and Alco Leasing Company.

Mrs. Daly sued under the doctrine of strict liability for damages "allegedly caused by a defective product, namely, an improperly designed door latch claimed to have been activated by the impact" (5, p. 1164).
Furthermore, "it was asserted that, but for the faulty latch, decedent would have been restrained in the vehicle and, although perhaps injured would not have been killed" (5, p. 1164).

Therefore, "the case involves a so-called 'second collision' in which the 'defect' did not contribute to the original impact, but only to the 'enhancement' of injury" (5, p. 1164).

The principal witness for Daly testified that the "Opel's door was caused to open when the latch button on the exterior handle of the driver's door was forcibly depressed by some protruding portion of the divider fence . . . and constituted a design 'defect' which caused injuries greatly in excess of those which Daly would otherwise have sustained" (5, p. 1165).

Additional evidence showed that other vehicular door latches designed and "used in production models of the same and prior years afforded substantially greater protection" (5, p. 1164).

General Motors "countered with their opinions that the force of the impact was sufficiently strong that it would have caused the door to open resulting in Daly's death even if the Opel had been equipped with door latches of the alternative designs suggested by [Daly's] witness" (5, p. 1165).

General Motors also introduced evidence that indicated:

"(1) the Opel was equipped with a seat belt-shoulder harness system, and a door lock, either of which if used, it was contended, would have prevented Daly's ejection from the vehicle; (2) Daly used neither the harness system nor the lock; (3) the
1970 Opel owner's manual contained warnings that seat belts should be worn and doors locked when the car was in motion for 'accident security'; and (4) Daly was intoxicated at the time of collision, which evidence the jury [in the lower court] was advised was admitted for the limited purpose of determining whether the decedent had used the vehicle's safety equipment" (5, p. 1165).

In reaching its decision, the court explained: "Negligence as it is commonly understood is conduct which creates an undue risk of harm to others. Contributory negligence is conduct which involves an undue risk of harm to the actor [user] himself. Negligence requires a duty, an obligation of conduct to another person. Contributory negligence involves no duty" (5, p. 1168).

By adopting "comparative fault" the "plaintiffs will continue to be relieved of proving that the manufacturer or distributor was negligent in the production, design, or dissemination of the article in question. Defendants liability for injuries caused by a defective product remain strict [liability]. The principle of protecting the defenseless is likewise preserved, for the plaintiff's recovery will be reduced only to the extent that his own lack of reasonable care contributed to his injury" (5, p. 1168).

The court continued "however, we do not permit plaintiff's own conduct relative to the product to escape unexamined, and as to that share of plaintiff's damages which flows from his own fault we discern no reason of policy why it should . . . be borne by others" (5, p. 1169).
Furthermore, "the application of comparative principles to strict liability [treats] the defenses to both negligence and strict product liability actions. In each instance the defense, if established, will reduce but not bar plaintiff's claim" (5, p. 1170).

Finally, "regardless of the identity of a particular defendant or of his position in the commercial chain the basis for his liability remains that he has marketed or distributed a defective product" (5, p. 1170).

Analysis

Both Daly and General Motors contributed to the accident. Daly was drunk, but his condition did not enter into the decision of the court—he had, however, failed to use his safety belt and door lock. General Motors installed a defective door latch that would have failed under similar circumstances—whether the door lock was used or not. Therefore, Daly and General Motors portion of blame would be assessed. The monetary value chargeable to Daly would be deducted from the General Motor's assessment. The balance would be awarded to Mrs. Daly and the surviving children.

Impact Analysis

Landmark decisions impact first on the entire consumer product manufacturing industry, operating within the state in which the decision was rendered. The alert manufacturer will therefore modify production methods to prevent litigation for comparable causes.

The decision of one supreme court is not binding on the
remaining forty-nine states. The remaining states, through judicial actions or legislative procedures may adopt the landmark decision in its entirety, or partially. For example, the MacPherson and Henningsen decision were eventually integrated within state laws and adopted by all courts in the United States. On the other hand, the Minnesota court in the Larsen case rejected "intended use" as it was applied by the California court in the Greenman case. These decision have an impact on other courts and manufactures in the applicable states.

Increases in product liability costs are passed on to the consumer, who in turn pays a higher price for materials and products.

**Summary**

The supreme and appellate court decision examined in this chapter show the progression of product liability litigation. The doctrine of privity (contract between manufacturer and purchaser) proposed in the Winterbottom v. Wright case was first rejected in 1916 by the New York Court of Appeals in the MacPherson case. The decision emphasizes a contract between a manufacturer and a purchaser is no longer required. This decision was gradually adopted by all other courts in the United States.

The contractual powers and advertising claims used by manufacturers permitted inequities in their agreements. By voiding the contract and holding manufacturers responsible for consumer products, the courts removed their immunity from litigation.
Prior to 1962, a consumer who was injured by a product was required to submit evidence that a possible defect, resulted from negligence on the part of the manufacturer, and caused his injury. In 1962, the California court rejected negligence and introduced the doctrine of strict liability in tort where an injured plaintiff was able to recover damages whether or not the manufacturer was to blame.

The Minnesota court in 1968 rejected "intended use" as it was applied in the Greenman case and introduced the "negligence in design" doctrine. The court also proposed the first possibility of "comparative fault" that would not be fully decided until 1978 in the Daly case. Furthermore, the court stressed the importance that manufacturers had a duty to test and inspect their products to prevent unreasonable risks of foreseeable injuries and indicated negligence in design also applied to other areas of production.

One very important decision affected the manufacturers who produced machinery requiring safety devices. Some manufacturers had been in the habit of transferring the safety device installation responsibility to the purchasers. Manufacturers found themselves in an uncomfortable position when the courts determined they were responsible for the entire product, and could not shift any responsibility for installation to their purchasers.

By 1978, the concept of product liability litigation reached the stage of "strict liability" and "comparative fault." When both plaintiff and defendant contribute to some degree toward injury, illness or death, the court now weighs
the range of guilt for both parties. Based on this evaluation the courts assess the monetary value chargeable to the plaintiff and deduct this amount from the total award granted by the court to the plaintiff.

It was shown by the Nebraska decision that some states will not accept the consumer-protection viewpoint adopted by a majority of the courts. They still rely on the state of the art practiced by manufacturers in their states.

From a small beginning, advertising played a role in the sale of consumer goods. Advertisements could indicate implied warranties and the courts held the manufacturers responsible for their statements. In 1978, advertising was considered a vital factor in the Daly case. The court decided defective products are no longer limited to a manufacturer's design and inspection. Defects are also found in advertising, instructions and warnings. The advertisements must be worded in such a manner that the manufacturer is not misleading his products capabilities and deceiving the purchasers.
CHAPTER BIBLIOGRAPHY


CHAPTER V

STATE LAWS AND PRODUCT LIABILITY

Introduction

Discussions in this chapter include the state of the law, enacting state laws, supreme and appellate courts impact on the states, Consumer Product Safety Act impact on the states, and selected state laws.

Laws passed by Congress or judicially enacted by state supreme or appellate courts automatically establish state laws. It is when the states are forced, by reasons of economic change, to enact laws independent of the Congress and state courts that problems arise. Product liability litigation became a major problem in the early sixties. It was not until the late seventies that state legislatures began to pass laws that were directly related to this problem.

A definite trend is apparent in these new laws that shows a greater burden is being placed on consumers to substantiate their claims for damages from defective products. Effective lobbying by industrial groups in the state capitals has decreased responsibilities of the manufacturer who may become involved in product liability litigation.

State of the Law

It is important to understand how laws were defined by the courts and states prior to consumer-oriented legislation.
For example, manufacturers limited their "legal liability [by] using a sales agreement containing disclaimers and narrow express warranties" (10, p. 146). Purchasers were assured in the "express warranty that the [product] was free of defects" (10, p. 146). These warranties were binding on the purchaser and limited the manufacturer to only replacing defective items. The manufacturers would not have been required by the state courts to pay for any injuries resulting from defective parts (10, p. 146).

On the other hand, when an injured party sued a manufacturer by claiming "regardless of the express warranty," the manufacturer was bound by an implied warranty that his product was reasonably fit and that the product which can cause an injury is not fit. The decision was "the manufacturer had broken a provision of the contract and would have to compensate the plaintiff" (10, p. 146). In rebuttal, the manufacturer claimed that there was no privity (direct contractual relationship) between the company and the plaintiff—and the court would have agreed" (10, p. 146). Because privity was absent the plaintiff was forced to sue the retailer who sold him the product; the retailer was forced to sue the manufacturer to recover his loss (10, p. 147).

The plaintiff has one more course of action—personal injury. The plaintiff claimed "regardless of whether there was any contract between them the manufacturer had a duty to prospective users of his [product] to design and produce safe [products] and that he had failed to take reasonable care in fulfilling that obligations. In other words, he would have
argued that the manufacturer had been negligent" (10, p. 146). Proving negligence was difficult for the plaintiff. The manufacturer only needed to produce evidence that his product had "been designed and manufactured with reasonable care" (10, p. 146). He would then be held blameless, as far as the courts were concerned, even if the product was actually unsafe (10, p. 146). These defenses, however weak, are still dominant in state and judicial product liability laws (10, p. 147).

Enacting State Laws

The enactment of comprehensive product liability laws by the states has been extremely slow. "One unfortunate prospect of the continuance of state regulations as a major source of protection for the consumer is the continued economic conservatism—and therefore inadequacy from the consumer's standpoint of state law" (13, p. 468). Two elements are responsible for the current situation. The power of the lobbyist and the less powerful consumer groups on the state level.

First, "the legislator's closest ties are to his party, interest groups, his district, and his governor—in that order." Second, "the old 'social lobby method' (wining and dining key legislators) also has been replaced by direct political action, in the form of influencing party platforms, supporting certain candidates, and printing and sending campaign literature. Good lobbyist follow a bill affecting their interests from its introduction (often pressuring legislators to introduce certain bills in the first place) through Committee, right up to the final vote" (13, p. 468).

The consumer groups, on the state level, are not well
organized or represented during the hearings on consumer bills (13, p. 468).

From these factors it is obvious "that business groups, rather than consumer groups are the most powerful lobbies in virtually every state capital" (13, p. 469). In addition, out of 100 "potentially influential" organizations in America, three of the top ten [included] the Chamber of Commerce, Congress of Industrial Organizations, and the National Association of Manufacturers—all business groups" (13, p. 469). Therefore, "state laws reflect the conservative economic policies of business pressure and lobby groups. . . . The Uniform Commercial Code serves as an appropriate example of this process" (13, p. 469).

**The Uniform Commercial Code**

The American Bar Association, organized in 1878, set a goal to "obtain the passage of uniform state laws in the various states to eliminate contradictory laws, not only on matters of commercial law but in other areas as well" (3, p. 15). In 1945, "the American Law Institute and the National Conference of Commissioners on Uniform State Laws combined forces to create a new Uniform Commercial Code" (UCC), (3, p. 16). The new UCC, after several revisions, was completed and by 1972 it had become law in every state—except Louisiana (3, p. 16).

The Uniform Commercial Code "should not be characterized as consumer legislation. Its principle impact has been in the area of commercial transactions in which all parties are businessmen or have commercial experience. . . . The entire part of the Secured Transaction Article dealing with consumer goods
was eliminated [and] several state legislatures [California was one] under the strong influence of business and banking lobbies eliminated even more provisions intended for the protection of consumers" (13, pp. 472-473).

The UCC, however, is vitally important "in the legal regulation of consumer transactions, even if its role is negative in the sense that it affords greater protection of the merchant than of the consumer" (13, p. 473).

Only twenty-seven states have passed product liability laws and a majority of these were passed in the late seventies (5, Appendix H).

Supreme and Appellate Court's Impact on State Laws

State laws develop judicially or legislatively, however, they are not uniform among the states. For example, Waegli (Nebraska landmark decision) lost his case to the state of the art concept accepted in his state. On the other hand, Bexiga (New Jersey landmark decision) won his case because the court rejected the state of the art and held the manufacturer strictly liable for the injuries to Bexiga.

Supreme and appellate court decisions apply only to the laws of the state where the decision was rendered. (1, p. 537). Sister states, however, are free to integrate these decisions either through judicial action or legislative process. For example, New Jersey and New York courts rendered decisions in the MacPherson and Henningsen cases that have been accepted by all the courts throughout the United States.

In addition, landmark decisions impact on the product manufacturers within the state. Whenever these decisions are
accepted by sister states, the impact spreads even further.


The 1972 Consumer Product Safety Act contains provisions for state compliance whenever "a consumer product safety standard . . . is in effect and applies to a risk of injury associated with a consumer product" . . . [unless a state-proposed safety standard] (a) imposes a higher level of performance than the federal standard; (b) is required by compelling local conditions; and (c) does not unduly burden interstate commerce" (7, p. 29). In addition, the state is also prohibited "from establishing or continuing in effect any provisions of a safety standard or regulation which prescribed any requirements as to the performance, composition, contents, design, finish, construction, packaging or labeling of a consumer product which is designed to deal with the same risk of injury . . . unless the standard or regulation of such state or local authority is identical to the requirements of the federal standards" (7, pp. 281-292).

On the other hand, states may establish standards on a product not covered by the Commission standard, i.e., if the Commission standard covered only the blade of a lawnmower, any state may establish requirements covering "objects hurled by the mower" or "childproof gas caps" (7, p. 292).

Workmen's Compensation

State compensation laws restricted the injured party to awards by the Workmen's Compensation Commission. This restriction was automatically eliminated when the 1972 Consumer
Product Safety Act became law and injured parties could sue in federal courts to recover damages. Therefore the employee who is injured on his job may sue the manufacturer unless the manufacturer is also the employer.

An article in Dun's Review stated "despite all the hullabaloo about consumer protection, it is the industrial worker who is most likely to sue for personal injury" (9, p. 50).

This is largely because of the rules governing workmen's compensation. Under the laws of the various states, an injured worker who wants recompense beyond the regular workmen's compensation schedule for an on-the-job accident cannot sue his own company, even though it may be responsible for the accident. Instead, he sues the company who made the machine on which he was injured. Moreover, there is, in effect, no statute of limitations on such suits (9, p. 50).

A reliable legal source indicates that a proposal is under consideration which "would allow the manufacturer of a product to shift part or all of its liability to the negligent employer, apportioning damages according to relative fault [because] a substantial number of workplace product liability cases are caused by employer negligence, and permit a manufacturer to bring a contribution claim against negligent employers" (13, p. 1060).

State compensation laws lack uniformity and "the system is no longer seen as the sole provider of recovery . . . . Employees have the opportunity to augment worker's compensation benefits with damages recovered through a product liability suit" (8, p. 3). Plans are currently underway, however, to change these benefits. Some suggestions for reform include: "shifting and allocating the costs of job-related accidents related to: (1) contribution and indemnity as applied in the workplace; (2) prohibition or modification of subrogation by
workmen's compensation carriers; (3) legitimization of 'hold harmless' clauses; and (4) making worker's compensation the sole source of recovery" (8, p. 3).

Selected State Laws

Advertising

Statutes relating to deceptive advertising exist in various forms in fifty states. Problems with advertising arose long before product liability became a major concern. Wisconsin's statute is representative of the advertising laws and covers a wide area that includes firms, corporations, real estate, merchandise, etc. No one "shall make, publish, disseminate, circulate, or place before the public, in this state in a newspaper, magazine or other publication . . . radio or television station [etc.] . . . which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading" (13, p. 894).

Because the field of advertising covers practically every phase of the selling and buying process practiced in the United States and is covered by state laws, no additional statutes were required to cover advertising for consumer products. On the other hand, California has gone one step further and says "no person shall state in an advertisement of his goods, that he is a producer, manufacturer, processor, wholesaler, or importer, or that he owns or controls a factory or other source of supply of goods, when such is not the fact, and no person shall in any other manner misrepresent the character, extent, volume or type of his business" (13, p. 895).
Affirmative Defenses for Manufacturers

The legal revolution to protect the consumer started by the supreme court judges has sparked a counter-revolution within state legislatures. A drive to halt a no-fault economy has been intensified by industry and insurance lobbyists.

A National Conference of State Legislatures publication indicated "product liability legislation was introduced in virtually all state legislatures in 1977. The state-by-state nationwide drive for new legislation initiated by affected interest groups accounts for the similarity of many of these proposals, with perhaps the simplest and most common proposal being a statute of limitation [or repose] on product liability exposure" (8, p. 10).

One important fact should not be overlooked as the states rush to enact laws on limitation or repose. Product liability litigation may be drastically reduced in the Workmen's Compensation area because "there is, in effect, no statute of limitations on such suits" (9, p. 50).

Until 1977, "state legislators have deferred to state courts, which have developed the law on a case-by-case basis" (4, p. 74). The policy of deferring to the state courts has changed. More than one-half of the states are either proposing or enacting "laws to curb many recent court decisions. The laws do not reject strict liability, but they do place limits on liberalized procedures and open up a range of defenses that companies may raise in court when hit with a product liability claim" (4, p. 74).
Twenty-seven states, by the end of 1981, passed laws that provided various forms of defenses for manufacturers involved in product liability litigation (see Appendix D). Kansas enacted its first product liability law (see Appendix D) and Louisiana authorized an indepth study of the enormous increases in liability insurance premiums, limitations, alterations, etc (5, Appendix H).

Wisconsin has new bills pending to assist the industries most seriously affected by product liability, i.e., sporting goods, pharmaceuticals, paints and automotive parts (8, p. 3). The "time element is a factor in product liability that is a continual worry to producers and insurers. With the passage of time, accumulated age as well as owner abuse and misuse take their toll on products. Manufacturers are sometimes held liable for defects that in some cases do not appear until long after the product was first marketed and which may have subsequently passed through several hands" (8, p. 3).

The Kentucky courts in 1978 (1) reversed a decision granted the plaintiff and "dismissed a suit against an automobile manufacturer where the car in question was five years old and had undergone substantial servicing and modification by the dealer" [and 2] the Supreme Court held "that a design defect creating an unreasonable danger may be obviated by an adequate warning" (similar to the Waegli case decided in Nebraska) (2, p. 695).

During this same year the Kentucky legislature provided manufacturers with additional defenses that are more rigid in their wording than other state laws (5, Appendix H), see Appendix D.
Eighteen laws passed by various states between 1977 and 1981 were examined to verify significant trends toward affirmative defenses provided manufacturers who may be involved in product liability litigation (see Appendix D). Results indicated "comparative fault" in strict liability, first introduced by California in the Daly case, has now been accepted by Idaho, Michigan, Nebraska, and Texas (5, Appendix H; 11, p. 12, 42).

Affirmative defenses, in the order of priority are
(1) limitations or repose; (2) alterations and modifications;
(3) warning and instructions; (4) state of the art; (5) useful life; (6) wholesalers and retailers. With the exception of Kentucky, the wording of the eighteen statutes were almost interchangeable, therefore the laws of several states will provide examples applicable to all states.

**Limitation or Repose Statutes**

Section 2. (1) All product liability actions shall be commenced within four years next after the date on which the death, injury, or damage complained of occurs.

(2) Notwithstanding subsection (1) of this section or any other statutory provision to the contrary, any product liability action, except one governed by section 2-725, Uniform Commercial Code, shall be commenced within ten years after the date when the product which allegedly caused the personal injury, death, or damage was first sold or leased for use or consumption.

(3) The limitations contained in subsection (1) or (2) of this section shall not be applicable to indemnity or contribution actions brought by a manufacturer or seller of a product against a person who is or may be liable to such manufacturer or seller for all or any portion of any judgment rendered against a manufacturer or seller.

(4) Notwithstanding the provisions of subsections (1) and (2) of this section, any cause of action or claim which any person may have on the effective date of this act may be brought not later than two years following such date. (5, Nebraska, Appendix H).

The time varies between states with 10 years being the majority.
Alteration or Modification of the Product

(a) No manufacturer or seller of a product shall be held liable in any product liability action where a proximate cause of the personal injury, death or damage to property was either an alteration or modification of the product by a party other than the manufacturer or seller, which alteration or modification occurred after the product left the control of such manufacturer or such seller unless:

(1) the alteration or modification was in accordance with the instructions or specifications of such manufacturer or such seller; or

(2) the alteration or modification was made with the express consent of such manufacturer or such seller.

(b) For the purposes of this section, alteration or modification includes changes in the design, formula, function, or use of the product from that originally designed, tested, or intended by the manufacturer. It includes failure to observe routine care and maintenance, but does not include ordinary wear and tear (5, North Carolina, Appendix H).

Warning and Instructions

It shall be admissible as evidence in a products liability action that before the event of death or injury to person or property pamphlets, booklets, labels or other written warnings were provided which gave notice to foreseeable users of the material risk of injury, death, or damage connected with the foreseeable use of the product or provided instructions as to the foreseeable uses, applications, or limitations of the product which the defendant knew or should have known (5, Michigan, Appendix H).

State of the Art

Whenever the physical harm is caused by the plan or design of the product, it is a defense that the methods, standards, or techniques of designing and manufacturing the product were prepared and applied in conformity with the generally recognized state of the art at the time the product was designed or manufactured (5, Indiana, Appendix H).

There is a rebuttable presumption that a product is free from any defect or defective condition where the alleged defect in the plans or designs for the product or the methods and techniques of manufacturing, inspecting, and testing the product were in conformity with government standards established for that industry which were in existence at the time the plans or designs for the product or the methods and techniques of manufacturing, inspecting, and testing the product were adopted (5, North Dakota, Appendix H).
Useful Life of Product

The useful life of a product is not necessarily the life inherent in the product, but is the period during which with reasonable safety the product should be useful to the user. This period shall be determined by reference to the experience of users of similar products, taking into account present conditions and past developments, including but not limited to (1) wear and tear or deterioration from natural causes, (2) the progress of the art, economic changes, inventions and developments within the industry, (3) the climatic and other local conditions peculiar to the user, (4) the policy of the user and similar users as to repairs, renewals and replacements, (5) the useful life as stated by the designer, manufacturer, distributor, or seller of the product in brochures or pamphlets furnished with the product or in a notice attached to the product, and (6) any modification of the product by the user (5, Minnesota, Appendix H).

Wholesalers and Retailers

A product seller acting primarily as a wholesaler, distributor, or retailer of a product may be a 'manufacturer' but only to the extent that it designs, produces, makes, fabricates, constructs, or remanufacturers the product for its sale. A product seller who performs minor assembly of a product in accordance with the instructions of the manufacturer shall not be deemed a manufacturer. A product seller that did not participate in the design of a product and that constructed the product in accordance with the design specifications of the claimant or another product seller shall not be deemed a manufacturer for the purposes of section 4 (1) (a) of this amendatory act.

Section 4 (1) A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.

Section 4 (1a) A product is not reasonably safe as designed, if, at the time of manufacture, the likelihood that the product would cause the claimant's harm or similar harms, and the seriousness of those harms, outweighed the burden on the manufacturer to design a product that would have prevented those harms and the adverse effect that an alternative design that was practical and feasible would have on the usefulness of the product (5, Washington, Appendix H).
Summary

This chapter examined the issue of product liability from the state viewpoint. It was determined that states are bound by national laws enacted by Congress; judicial decisions are accepted by the state in which the verdict is rendered on a case-by-case basis; and the states are slow in passing laws on important matters. Nearly seventeen years elapsed before the states started to take action on the product liability problems faced by consumers and manufacturers.

The Chamber of Commerce, Congress of Industrial Organizations and the National Association of Manufacturers—all business groups—worked together to complete a new Uniform Commercial Code. This code was meant to eliminate the contradictory state laws. Its regulations are pro-industry and the consumer has been relegated to a nonentity. By 1972, forty-nine states had integrated the code into their state laws.

State laws which develop through landmark decisions are not uniform. Only manufacturers within the state where the landmark decisions is rendered are affected. On the other hand, manufacturing industries in four sister states have been affected because their states have adopted the "comparative fault" in strict liability doctrine established in the Daly case by California.

The legal revolution to protect consumers, established by supreme court justices, has sparked a counter-revolution within state legislatures. New state laws are intended to provide additional defenses for manufacturers who may become involved in product liability litigation. In addition, these new state
laws are to curb the decisions rendered by the state supreme and appellate courts.

Legislatures are strongly influenced by the powerful lobbyist groups—three of these groups were instrumental in completing the Uniform Commercial Code. These lobbyists frequently initiate self-interest bills and pressure legislators to introduce them at hearings. They also follow other bills of interest to the industrial community to the final vote.

The consumer lobbyist on the state level lack organization and representation at the hearings. It is quite apparent that the power of the industrial lobbyists over the state legislators subvert the consumer interest.

The only impact that the states felt from the passage of the Consumer Product Safety Act of 1972 was to amend their Hazardous Substances acts to integrate four standards issued by the Consumer Product Safety Commission. The other standards included in the four "transferred acts" had already been established by the states prior to the passage of the 1972 act.

The states are permitted to enact laws that provide higher standards than those issued by the Commission. They are, however, permitted to set higher standards or set standards that have not been issued by the Commission.

Each state has a Workmen's Compensation law. With the passage of the 1972 act, injured employees of manufacturers were given the right to sue in federal court to recover damages resulting from a manufacturers defective product—provided the manufacturer was not the plaintiff's employer. Plans are currently underway to curb this extra benefit and to return the Workmen's Compensation Law to a "sole source" for injury awards.
CHAPTER BIBLIOGRAPHY


CHAPTER VI

CONCLUSIONS AND RECOMMENDATIONS

Conclusions

Consumer product manufacturer's liability is directly related to marketing. Because the available marketing literature is limited in this aspect, this study researched the development of consumer product manufacturer's liability between 1890 and 1981.

Numerous federal laws were enacted by Congress as a result of public demand that increased a manufacturer's liability. State laws that imposed safety standards that would reduce the liability of manufacturers were practically non-existent until the late 1970s.

Some state supreme and appellate courts have rejected previous decisions that provided almost total immunity to the manufacturers involved in consumer-oriented litigation.

Federal Product-Safety Legislation

Consumer injuries, directly related to defective consumer products, were not limited to one area—this was a nationwide problem. It has been the primary cause of consumer-oriented safety laws enacted by Congress. This legislative body has been disinterested and evasive whenever consumer safety laws were proposed.

Public demand, exposure through publications and the
power of five presidents were required to persuade an always reluctant Congress to curtail the unethical practices of consumer products manufacturers and increase the safety of the consumer. Although numerous consumer-oriented laws were passed, the most comprehensive pieces of legislation were the Consumer Product Safety Act of 1972 and its 1976 amendment, the Consumer Product Safety Commission Improvement Act. The 1972 act established a commission and provided commission-control over approximately 10,000 consumer products.

Only eight safety standards have been promulgated either by Congress or the Commission when thousands of products can and do cause injury or death, particularly to children.

Although the 1972 and 1976 acts gave consumers a feeling of security, the federal legislators evaded their real responsibility to the public. The Commission was prohibited from establishing safety standards unless they met the approval of manufacturers and interested consumer groups. The Commission was ordered to enter into private agreements with manufacturers to allow the manufacturer time to modify a hazardous product and to handle any recalls for alterations from consumers. It is easy to understand why the Commission, burdened with restrictions, has taken only one manufacturer to court to insure public safety.

When the Commission and manufacturers fail to reach an amicable agreement, or an injured consumer sues to collect damage awards for his injuries resulting from defective consumer products, it is the responsibility of the federal and state courts to render a decision that will enforce the law.
Until 1980, consumer-oriented laws, regardless of their weakness, recognized the consumer's right to purchase products that, although not perfect, would nevertheless be comparatively safe to own or operate. By the end of 1981 the Reagan administration had reduced the funds, personnel and research programs of the Consumer Product Safety Commission. Current plans propose transferring the Commission to another federal agency, bringing the Commission under White House control or abolishing the Commission. If any of these proposals are finalized, the consumer will lose his right to be informed, his right to be heard, his right to safety, and his right to choose. The old caveat "Let the Buyer Beware" will return and the gains that have been made since 1890 will have been subjugated to the manufacturer and the powerful lobbyist.

Activity in the States

When Congress enacted national consumer product safety laws, fifty states integrated these laws into their state statutes. Instead of acting on behalf of the consumers as a legislative body, the general policy of the legislators has been "let the state courts establish safety laws." As a result, numerous safety laws have been established by state courts on a case by case basis. In addition, these legislative bodies have been more than willing to accept industry standards that allegedly provided safe products for consumer use.

When the state supreme and appellate courts, dissatisfied with industry standards, held manufacturers strictly responsible for their defective products, the state legislators were
aroused from their complacency by the powerful manufacturer's lobbyist. These lobbyist started a nationwide movement to force through laws that will provide manufacturers with additional affirmative defenses and curtail the rights of consumers.

At least twenty-seven states have responded with new or amended laws. One significant factor is apparent in the majority of the product liability laws. The consumer will have to provide the courts with overwhelming evidence. This evidence will have to include records on proper care and maintenance to substantiate his claim for injuries resulting from a defective product.

The primary reason for enacting the new laws was to provide manufacturers with immunity from responsibility for their defective products. A consumer cannot sue a manufacturer for an injury resulting from a defective product which was manufactured or sold ten years prior to the date of injury. In addition, the consumer must file a claim for damages within two years of injury, or when the injury resulting from a defective product became known. Furthermore, a consumer cannot recover damages if either he or the dealer from whom he purchased his product made any alterations without the express consent and instruction of the manufacturer.

Alterations or modifications are certainly going to create additional problems for the courts, particularly when one considers the vast number of consumer products that are manufactured as "interchangeable parts." The first line of defense for the manufacturers will probably be that an interchangeable part constitutes an alteration or modification.
Another important factor that the courts must decide is does the right of the manufacturer who insists on his own parts being used as replacements constitute restriction of free-trade?

**Landmark Decisions**

Only a close examination of landmark decisions in consumer product liability cases can reveal the significant changes that have taken place within the state judicial system. The judges who preside over the state high courts have been responsible for expanding the consumer product safety laws within their respective states. They have completely rejected many of the industrial standards relating to design, production and advertising methods used by manufacturers to produce and market their consumer products.

A majority of the cases examined in this research reflect the ability of the judges to make the manufacturers aware of their responsibility to the consuming public. Although these decisions indicated a pro-consumer trend, they were not anti-industry. It is apparent that the courts were not intentionally increasing the manufacturers liability, quite the opposite. The courts were emphasizing the fact that manufacturers were capable of producing safer products and were expected to do so. Better manufacturing methods serve two purposes, a decrease in human injury and death and lower product liability insurance costs.

One of the most recent landmark decisions specifically decreased the manufacturer's liability. The court determined from the evidence presented that the manufacturer and the
plaintiff's husband were responsible for his fatal accident. This case established the comparative fault doctrine that has been accepted judicially or legislatively in several sister states. This acceptance indicates that other courts and state legislatures will consider this doctrine as an additional method of reducing not only a manufacturer's liability, but his insurance premiums as well.

Insurance companies have failed to maintain separate liability records that would reveal the cost of liability premiums as well as the price of litigation. Therefore, it is impossible to determine the economic impact of the landmark decisions on the manufacturers. Based on the increase of product liability insurance, it would not be unrealistic to state that manufacturers have paid a tremendous price for their failure to provide safer consumer products.

Manufacturers have only themselves to blame for the increase in product liability litigation. They have shown a complete disregard for public safety when they failed to take advantage of technological advances available to them at the time their products were in the pre-production stages. When manufacturers cannot agree among themselves on safety standards it is not surprising that a consumer injury leads to litigation.

The courts have recognized the rights of consumers and, in doing so, have been instrumental in consumers receiving substantial awards for their injuries. It is impossible to determine if the thousands of dollars the consumer receives is an adequate substitute for permanent disability or the loss of life that could have been prevented in many instances.
Ultimately, it is the consumer who also absorbs the cost of product liability insurance and litigation through increased product costs.

**Preventive Measures Available to Manufacturers**

Manufacturers can reduce their liability and increase the safety of their products in numerous ways. Designing is the first area of concern that must be evaluated to reduce the possibility of marketing a defective product. This evaluation must include the foreseeable use, dangers that might arise through misuse, or unintended use, once his product is in the hands of the consumer. Manufacturers must determine that all component parts purchased from other sources are free of all possible and foreseeable defects.

In addition, the manufacturer must establish and strictly enforce quality control production procedures, not only during his manufacturing process, but in the final installation of all component parts of the completed product.

Furthermore, he must review his advertising, brochures, and instruction manuals in order to eliminate any possible misrepresentation or misleading information.

When a product may present a danger to the user, the manufacturer must provide adequate warnings of any harm that could result from misuse. Safety devices to protect the ultimate user should be installed prior to shipment.

Hazardous household products should be labeled with large and brightly colored symbols to warn the consumer who cannot read that the product is dangerous.
The comparative fault doctrine is one method of reducing a manufacturer's liability when his product has been improperly used and results in injuries to the consumer-user. Proper and adequate warnings may completely absolve the manufacturer of all liability. Because all fifty states have not passed comprehensive product liability laws, it is impossible to determine whether comparative fault or absolute exoneration from liability will be the significant trend in the future.

Recommendations

1. This study should be updated and expanded five years after the Reagan administration leaves office, to determine the status of consumer product liability.

2. Television advertising should display products such as home workshops, saws, etc., being properly used, including all clothing, glasses, gloves, etc., and educate the public through example.

3. Information concerning dangerous and hazardous products should continue to be provided by the Commission through public service announcements on television, and other media such as radio and newspapers.

4. Develop a uniform system of symbols that are readily understood by the consumer who cannot read. Explaining the meaning of the symbols could be done through public service announcements on television and radio.

5. Manufacturers or retailers who illegally sell a banned product should be penalized by the Commission.
6. Because injuries, particularly to children, continue to increase, the Commission should strictly enforce the standards that have been established.
APPENDIX A

CONSUMER-ORIENTED LEGISLATION: 1927-1941

1927  **Federal Caustic Poison Act**—"regulated 12 named chemical substances, including concentrated lye and caustic alkalies, by establishing labeling requirements. Many lives were saved, but the specificity of the act prevented it from reaching many of the poisons usually found in the home" (1, p. 20).

1930  **State Unfair Trade Practices Act**—prohibited selling products below cost. In other words, undercutting the competition to gain sales (6, p. 28).

1930  **State Resale Price Maintenance Acts**—established fair-trade laws where manufacturer was permitted to set retail prices on their products (6, p. 28).

1933  **Securities Act**—provided investors protection against deceptions on corporate securities (4, p. 647).

1936  **Robinson-Patman Act**—amended the Clayton Act of 1914 "by strengthening the prohibition of price discrimination [and] regulated price discounts and allowances" (6, p. 28).

1937  **Miller-Tydings Act**—amended the Sherman Act of 1890 and permitted manufacturers to set retail prices in interstate commerce without violating the Sherman Act (6, p. 28).

1938  **Pure Food, Drug and Cosmetic Act**—amended the **Pure Food and Drug Act of 1906**. This act was considered weak because it did not specify (a) legal standards for goods; (b) restrictions on poisons in drugs; (c) that **drugs** included cosmetics and devices used for therapeutic purposes; and (d) remedies for fraudulent statements on packaging (3, p. 185).

During 1936-1937 more than 100 people had died from the misuse of Elixir Sulfanilamide—a new sulfa wonder drug. Stronger penalties for forgery of labels and attempts to prevent dangerous drugs from reaching the market were imposed (2, p. 15; 3, p. 85; 5, p. 14).

The deaths resulted in publicity by the press, and the additional force of the women's groups awakened the manufacturers and advertising-medium to the importance of the force of organized consumers (2, p. 15; 3, p. 85; 5, p. 14).

1941  **Wool Product Labeling Act**—required manufacturers to state the exact contents of the article (6, p. 28).
BIBLIOGRAPHY


APPENDIX B

CONSUMER ORIENTED LEGISLATION: 1946-1976

1946 Lanham Trademark Act—regulates trademarks on various consumer products, i.e., products being manufactured by one company and sold under the retailer name such as sewing machines sold under "Sears" trademark.

1950 Cellar-Kefauver Antimerger Act—amends the Clayton Act of 1914. Prevents corporate mergers where the effect may be to substantially lessen competition.

1952 Fur Product Labeling Act—requires the manufacturer to state exactly what the product is made from.


1953 Flammable Fabrics Act—designed to control products manufactured from any material that presents excessively high levels of flammability from entering interstate commerce.

1956 Refrigerator Safety Act—designed to prevent accidental entrapment of children through pressure-sensitive locks.

1960 Federal Hazardous Substances Act—amends the Caustic Poison Act of 1927. Requires stringent labeling requirements on products found to be hazardous.

1962 Pure Food, Drug and Cosmetics Act—amends the Pure Food, Drug and Cosmetics act of 1938. Requires annual inspection of plants and prohibits drugs from being marketed without the approval of the Food and Drug Administration.

1966 Fair Packaging and Labeling Act—requires manufacturers to state what package contains, who made it, and how much it contains.


1967 Flammable Fabrics Act—amends the 1953 Flammable Fabrics Act to include standards for clothing and household products.

1967 National Commission on Product Safety—establishes a commission to determine the reasons for dangerous products, the effectiveness of regulatory laws and recommends additional protective measures.

1967 Wholesome Meat Act—amends the Meat Inspection Act of 1907. Provides federal assistance to the states in establishing interstate inspection systems and raises the quality standards for imported meats.

1968 Automobile Insurance Study—authorizes study of existing compensation system, including recommendations for improvement.

1968 Consumer Credit Protection Act—Concerns truth in lending policies. Requires full disclosure of terms and conditions of finance charges in credit transactions; created the National Commission on Consumer Finance to study and make recommendations for further regulations in the consumer finance industry.
1968 **Interstate Land Sales Full Disclosure Act**—provides safeguards against unscrupulous practices in interstate land sales.

1968 **Radiation Control for Health and Safety Act**—provides mandatory control standards and recall for faulty electronic products. In addition, provisions are made for research on biological effects of radiation, development of advisory standards for accrediting schools for medical x-ray technicians, and establishing model state laws for licensing technicians.

1968 **Wholesome Poultry Products Act**—increased safeguards against impure poultry and poultry products.

1969 **Child Protection and Toy Safety Act**—amended the Hazardous Substances Act of 1960 to ban any toy or other article intended to be used by children that presented mechanical, electrical or thermal hazards.

1970 **Federal Deposit Insurance Act**—amends the original act to prohibit issuing unsolicited credit cards; limits consumer liability in case of loss or theft to $50.00, regulates credit bureaus and gives consumers access to their files.

1970 **Poison Prevention Packaging Act**—authorizes establishment of standards for child-resistant packaging, especially those related to medication and poisons.

1971 **Fair Credit Report Act**—regulates the reporting and use of credit information and sets $50.00 limit when credit cards are lost or stolen.
1972  **Consumer Product Safety Act**—established the Consumer Product Safety Commission and transferred four Acts controlled by other federal agencies to the Commission. Established to regulate dangerous and hazardous products.


1975  **Consumer Product Warranty Act**—sets forth what is to be included in a warranty written for consumer products.

BIBLIOGRAPHY


Note: The information relating to federal legislation was not taken from any single source. It is, however, an integration of ideas contained in the publications of Kimble, Spillman and Stanton.
APPENDIX C

HAZARDOUS PRODUCTS CONTROLLED BY THE COMMISSION

Hazardous products are defined as (a) toxics; (b) corrosives; (c) irritant—if it causes substantial personal injury during use; (d) flammable—other than solids or contents of pressurized cans—if it has a flash point above 80° but not above 150°; (e) electrical equipment, that when normally used, could cause shock; (f) mechanical—if it presents an unreasonable risk of personal injury because of design or manufacture; and (g) thermal article, if it causes an unreasonable risk of injury or illness by heat due to design or manufacture. The heat may be produced as a part or surface of the entire article.

Many of these articles come under the Hazardous Substances Act requirements and must be labeled as to (a) name and address of manufacturer, packer, seller or distributor; (b) common, usual, chemical, or generic name; (c) in large letters, and where applicable, warning such as danger, caution, combustible, flammable, poison, keep out of reach of children, must be displayed; and (d) instructions on first aid treatment, handling or storage. Any hazardous product which fails to meet these requirements if considered a "misbranded hazardous substance.

Any banned or misbranded product, introduced into interstate commerce or awaiting sale after shipment has been completed, is subject to restraint by any District Court that has control of the area in which the product is banned.
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<td>9</td>
<td>0910 *</td>
<td>Liquid Fuels, Kindling, Illuminating (Inc. Gasoline, Kerosene, Lighter Fluid, Charcoal Starter, etc.)</td>
<td>267,150</td>
</tr>
<tr>
<td>10</td>
<td>1815 *</td>
<td>Architectural Glass</td>
<td>267,100</td>
</tr>
<tr>
<td>11</td>
<td>1401 *</td>
<td>Power Lawnmowers</td>
<td>264,410</td>
</tr>
<tr>
<td>12</td>
<td>1204</td>
<td>Baseball, Activity, Related Equipment and Apparel</td>
<td>262,310</td>
</tr>
<tr>
<td>13</td>
<td>1819</td>
<td>Nails, Carpet Tacks and Screws, Thumbtacks</td>
<td>257,850</td>
</tr>
<tr>
<td>14</td>
<td>0611</td>
<td>Bathtub and Shower Structures, Other Than Doors and Panels (Inc. Tub, Walls, Handrails, etc.)</td>
<td>187,800</td>
</tr>
<tr>
<td>15</td>
<td>0313 *</td>
<td>Space Heaters and Heating Stoves</td>
<td>182,720</td>
</tr>
<tr>
<td>16</td>
<td>1231</td>
<td>Swimming Pools and Associated Equipment, Not Inc. Above Ground Pools</td>
<td>173,770</td>
</tr>
<tr>
<td>Rank</td>
<td>Product Number</td>
<td>Product Description 1</td>
<td>AFSI 3</td>
</tr>
<tr>
<td>------</td>
<td>----------------</td>
<td>-----------------------</td>
<td>--------</td>
</tr>
<tr>
<td>17</td>
<td>0201 *</td>
<td>Cooking Ranges, Ovens and Equipment</td>
<td>161,180</td>
</tr>
<tr>
<td>18</td>
<td>1205</td>
<td>Basketball, Activity, Related Equipment and Apparel</td>
<td>158,770</td>
</tr>
<tr>
<td>19</td>
<td>0644 *</td>
<td>Non-Upholstered Chairs</td>
<td>151,380</td>
</tr>
<tr>
<td>20</td>
<td>0604 *</td>
<td>Storage Furniture (Inc. Chests, Buffets, Bookshelves, etc.)</td>
<td>143,610</td>
</tr>
<tr>
<td>21</td>
<td>0407</td>
<td>Cutlery, Unpowered (&quot;Kitchen Knives&quot;)</td>
<td>139,730</td>
</tr>
<tr>
<td>22</td>
<td>1614 *</td>
<td>Clothing (Inc. Day and Night Wear)</td>
<td>128,080</td>
</tr>
<tr>
<td>23</td>
<td>0907 *</td>
<td>Paints and Solvents</td>
<td>128,560</td>
</tr>
<tr>
<td>24</td>
<td>0906 *</td>
<td>Household Chemical Products Other Than Caustics, Paints, Waxes</td>
<td>122,920</td>
</tr>
<tr>
<td>25</td>
<td>1630</td>
<td>Coins and Toy Money, Paper Money</td>
<td>122,780</td>
</tr>
<tr>
<td>26</td>
<td>1807</td>
<td>Floors and Flooring Materials</td>
<td>120,230</td>
</tr>
<tr>
<td>27</td>
<td>1106 *</td>
<td>Glass Bottles and Jars</td>
<td>119,550</td>
</tr>
<tr>
<td>28</td>
<td>0102</td>
<td>Washing Machines with Wringers</td>
<td>119,010</td>
</tr>
<tr>
<td>29</td>
<td>1704</td>
<td>Matches</td>
<td>106,340</td>
</tr>
<tr>
<td>30</td>
<td>0618 *</td>
<td>Ladders and Step Stools</td>
<td>100,310</td>
</tr>
<tr>
<td>31</td>
<td>1609 *</td>
<td>Sun Lamps and Heat Lamps</td>
<td>98,240</td>
</tr>
<tr>
<td>32</td>
<td>0801 *</td>
<td>Home Workshop Saws (Electric)</td>
<td>89,530</td>
</tr>
<tr>
<td>33</td>
<td>1834</td>
<td>Fences, Not Electric, Outdoor, All Types (Inc. Posts)</td>
<td>87,510</td>
</tr>
<tr>
<td>34</td>
<td>1626</td>
<td>Pens, Pencils and Other Desk Supplies</td>
<td>79,370</td>
</tr>
<tr>
<td>35</td>
<td>0918</td>
<td>Pins and Needles</td>
<td>78,530</td>
</tr>
<tr>
<td>36</td>
<td>1103 *</td>
<td>Cans (Inc. Self-Openers and Resealable Closures)</td>
<td>70,020</td>
</tr>
<tr>
<td>37</td>
<td>0602 *</td>
<td>Upholstered Furniture</td>
<td>68,490</td>
</tr>
<tr>
<td>38</td>
<td>0311 *</td>
<td>Furnaces and Floor Furnaces</td>
<td>67,520</td>
</tr>
<tr>
<td>39</td>
<td>0113 *</td>
<td>Water Heaters</td>
<td>67,250</td>
</tr>
<tr>
<td>40</td>
<td>1817</td>
<td>Porches, Balconies, Floor Openings and Open-Sided Rooms</td>
<td>67,150</td>
</tr>
<tr>
<td>41</td>
<td>1504 *</td>
<td>Baby Cribs, Gates and Playpens</td>
<td>62,920</td>
</tr>
<tr>
<td>42</td>
<td>1303 *</td>
<td>Skates, Scooters and Skateboards</td>
<td>60,140</td>
</tr>
<tr>
<td>43</td>
<td>0406</td>
<td>Pots and Pans (Inc. Lids)</td>
<td>57,000</td>
</tr>
<tr>
<td>44</td>
<td>1210</td>
<td>Fishing Equipment (Poles, Lines, Lures, Hooks, Fishing Knives, Scales, Nets, Tackle Box, etc.)</td>
<td>53,200</td>
</tr>
<tr>
<td>45</td>
<td>1815 *</td>
<td>Jewelry, Watches, Keys and Key Rings</td>
<td>51,290</td>
</tr>
<tr>
<td>Rank</td>
<td>Number</td>
<td>Product Description</td>
<td>AFSI</td>
</tr>
<tr>
<td>------</td>
<td>--------</td>
<td>----------------------</td>
<td>------</td>
</tr>
<tr>
<td>46</td>
<td>1214</td>
<td>Hockey Equipment and Apparel</td>
<td>51,180</td>
</tr>
<tr>
<td>47</td>
<td>0298 *</td>
<td>Irons</td>
<td>48,540</td>
</tr>
<tr>
<td>48</td>
<td>1810</td>
<td>Outside Structures (Inc. Retaining Walls, Patios, Terraces)</td>
<td>45,840</td>
</tr>
<tr>
<td>49</td>
<td>1328 *</td>
<td>Wagons and Other Ride-On Toys (Not Inc. Bicycles and Tricycles)</td>
<td>45,480</td>
</tr>
<tr>
<td>50</td>
<td>1263</td>
<td>Minibikes</td>
<td>43,350</td>
</tr>
</tbody>
</table>

1. Except where two or more NEISS products have been grouped, Product Numbers correspond to Product Codes as they appear in the NEISS Coding Manual. For grouped products the Product Number is the NEISS Product Code for a typical product in the group. In the listing, these grouped Products Numbers are starred (*).

2. In some cases, the product descriptions include more than one NEISS product category.

3. The Age Adjusted Frequency Severity Index (AFSI) was derived by multiplying the total number of injuries in a product category by the mean severity of these injuries, repeating the same calculation for the injuries occurring to children (0-10 years) to give added emphasis, then summing all such weighted injury-severity values. The resulting AFSI numbers have been rounded to the nearest 10.

* Two or more NEISS products grouped. See Note 1.
<table>
<thead>
<tr>
<th>I. GENERAL HOUSEHOLD APPLIANCES INCLUDING BUT NOT LIMITED TO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clothes washers without wringers or other dryers</td>
</tr>
<tr>
<td>Washing machines with wringers</td>
</tr>
<tr>
<td>Washing machines with spin dryers without thermal dryers</td>
</tr>
<tr>
<td>Washing machines with electric dryers</td>
</tr>
<tr>
<td>Washing machines with gas dryers</td>
</tr>
<tr>
<td>Electric dryers without washing machines attached</td>
</tr>
<tr>
<td>Ironers</td>
</tr>
<tr>
<td>Electric blankets and electric sheets</td>
</tr>
<tr>
<td>Electric heating pads</td>
</tr>
<tr>
<td>Electric fans</td>
</tr>
<tr>
<td>Sewing machines</td>
</tr>
<tr>
<td>Floor buffers and waxes</td>
</tr>
<tr>
<td>Electric rug cleaners</td>
</tr>
<tr>
<td>Vacuum cleaners</td>
</tr>
<tr>
<td>Electric sweepers</td>
</tr>
<tr>
<td>Automatic door openers and closers</td>
</tr>
<tr>
<td>Gas water heaters</td>
</tr>
<tr>
<td>Electric water heaters</td>
</tr>
<tr>
<td>Oil water heaters</td>
</tr>
<tr>
<td>Incinerators without gas or electric heat supply</td>
</tr>
<tr>
<td>Electric incinerators</td>
</tr>
<tr>
<td>Water fountains with or without cooking or heating units</td>
</tr>
<tr>
<td>Water coolers and condensers</td>
</tr>
<tr>
<td>Washing machines not otherwise specified</td>
</tr>
<tr>
<td>Clothes dryers not otherwise specified</td>
</tr>
<tr>
<td>Water heaters not otherwise specified</td>
</tr>
<tr>
<td>Incinerators not otherwise specified</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>II. KITCHEN APPLIANCES INCLUDING BUT NOT LIMITED TO—Cont'd</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gas refrigerators</td>
</tr>
<tr>
<td>Electric freezers</td>
</tr>
<tr>
<td>Gas freezers</td>
</tr>
<tr>
<td>Automatic corn poppers</td>
</tr>
<tr>
<td>Can openers, powered</td>
</tr>
<tr>
<td>Dishwashers</td>
</tr>
<tr>
<td>Electric blenders</td>
</tr>
<tr>
<td>Electric broilers</td>
</tr>
<tr>
<td>Electric coffee makers and toasters</td>
</tr>
<tr>
<td>Cutters, powered</td>
</tr>
<tr>
<td>Electric deep fryers</td>
</tr>
<tr>
<td>Electrical defroster devices</td>
</tr>
<tr>
<td>Electric food warmers and hot trays</td>
</tr>
<tr>
<td>Electric fry pans and skillets</td>
</tr>
<tr>
<td>Electric griddles</td>
</tr>
<tr>
<td>Electric hot plates and grills</td>
</tr>
<tr>
<td>Electric ice-cream makers</td>
</tr>
<tr>
<td>Electric ice creamers</td>
</tr>
<tr>
<td>Electric ice makers separate from refrigerators</td>
</tr>
<tr>
<td>Electric juicers</td>
</tr>
<tr>
<td>Electric kettles</td>
</tr>
<tr>
<td>Electric meat grinders</td>
</tr>
<tr>
<td>Electric mixers</td>
</tr>
<tr>
<td>Electric scissors</td>
</tr>
<tr>
<td>Electric slicers</td>
</tr>
<tr>
<td>Toasters</td>
</tr>
<tr>
<td>Electric waffle irons</td>
</tr>
<tr>
<td>Faucet water heaters</td>
</tr>
<tr>
<td>Garbage disposers</td>
</tr>
<tr>
<td>Front with dry heat</td>
</tr>
<tr>
<td>Steam irons</td>
</tr>
<tr>
<td>Knife sharpeners</td>
</tr>
<tr>
<td>Rotisseries</td>
</tr>
<tr>
<td>Electric immersion heaters</td>
</tr>
<tr>
<td>Ranges not otherwise specified</td>
</tr>
<tr>
<td>Ovens, not otherwise specified</td>
</tr>
<tr>
<td>Refrigerators not otherwise specified</td>
</tr>
<tr>
<td>Freezers not otherwise specified</td>
</tr>
<tr>
<td>Fronts, not otherwise specified</td>
</tr>
<tr>
<td>Electric ovens self-cleaning</td>
</tr>
<tr>
<td>Gas ovens self-cleaning</td>
</tr>
<tr>
<td>Range and oven accessories (including racks, broiler pans, etc.)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>III. SPACE HEATING, COOLING, AND VENTILATING APPLIANCES INCLUDING BUT NOT LIMITED TO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electric air conditioners</td>
</tr>
<tr>
<td>Gas air conditioners</td>
</tr>
<tr>
<td>Fans, water-cooled</td>
</tr>
</tbody>
</table>

*In the event of certain product categories (primarily IX and X) and some products may be subject to limited hazards not subject to regulation or because some residual impact (such as labeling) are covered, while others (such as performance standards) are not.*
III. SPACE HEATING, COOLING, AND VENTILATING APPLIANCES INCLUDING BUT NOT LIMITED TO—Continued

Humidifiers
Vaporizers
Dehumidifiers
Fans
Blowers
Coal furnaces including floor furnaces
Gas furnaces including floor furnaces
Oil furnaces including floor furnaces
Panel and cabinet electric radiant heat units
Electric space heaters
Gas space heaters and gas heating stoves, attached
Note: For portable heaters see category XII. sports and recreation equipment
Kerosene space heaters and kerosene heating stoves attached
Fireplaces and wood or coal stoves, factory built
Chimneys, factory built
Electric furnaces, including floor furnaces
Other heating systems, including heat pumps
Heaters and hot water or steam pipes
Air conditioners, not otherwise specified
Furnaces, not otherwise specified
Space heaters, not otherwise specified
Heating stoves, not otherwise specified
Water heaters, not otherwise specified
Floor furnaces, not otherwise specified

IV. HOUSEWARES INCLUDING BUT NOT LIMITED TO

Can openers unpowered
China dish with open frame handles
Table knives—open flange
Non-electric coffee grinders
Coffee makers and teapots, unpowered
Cooking utensils and overware including glass
Cutlery, unpowered
Inning boards and covers
Manual ice crushers
Manual juicers
Manual heat grinders

V. HOME COMMUNICATIONS AND ENTERTAINMENT APPLIANCES AND EQUIPMENT INCLUDING BUT NOT LIMITED TO

Television sets
Radio sets, and record players, including Hi-Fi and stereo equipment
Sound and video recording and reproducing equipment (tape recorders and players)
Musical instruments including electric musical instruments
Motion picture and still cameras
Other photographic equipment and accessories
Movie projectors
Slide projectors
Intercommunication devices
Telephones and telephone accessories
Typewriters, electric and manual
TV and radio antennas
Art supplies and equipment
Clay, pottery and ceramic supplies and equipment
Printing presses

VI. HOME FURNISHING AND FIXTURES INCLUDING BUT NOT LIMITED TO

Beds, springs, mattresses, covers and pads
Chairs
Tables
Other furniture including multiple use and lawn furniture
Electrical outlets, built-in wiring devices, and distribution systems for use in or around the household
Electric power plants
Gas pipes, fittings and distribution systems
Plumbing fixtures and pipes, including sinks and toilets
Structural glass and glass doors, including rainproof and shower enclosures
Bathtub and shower enclosures of materials other than glass
<table>
<thead>
<tr>
<th>VI. HOME FURNISHING AND FIXTURES INCLUDING BUT NOT LIMITED TO—Continued</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bathtub and shower structures other than doors and panels, including the tub, walls, handgrips, etc.</td>
</tr>
<tr>
<td>Runners and throw rugs</td>
</tr>
<tr>
<td>Carpeting including outdoor carpeting but excluding runners</td>
</tr>
<tr>
<td>Sheets and pillow cases</td>
</tr>
<tr>
<td>Pillows</td>
</tr>
<tr>
<td>Blankets, except electric and baby blankets</td>
</tr>
<tr>
<td>Drapes curtains including plastic curtains and shower curtains</td>
</tr>
<tr>
<td>Step ladders</td>
</tr>
<tr>
<td>Straight ladders</td>
</tr>
<tr>
<td>Steps stools</td>
</tr>
<tr>
<td>Appliance cords, extension cords and replacement wire</td>
</tr>
<tr>
<td>Gas meters</td>
</tr>
<tr>
<td>Meters for LP gas</td>
</tr>
<tr>
<td>Electric meters</td>
</tr>
<tr>
<td>Gas lamps</td>
</tr>
<tr>
<td>Electric table lamps and floor lamps</td>
</tr>
<tr>
<td>Light bulbs</td>
</tr>
<tr>
<td>Electric light fixtures, attached</td>
</tr>
<tr>
<td>Electric clocks</td>
</tr>
<tr>
<td>Medicine cabinets</td>
</tr>
<tr>
<td>Gun cabinets, ammunition cabinets and racks</td>
</tr>
<tr>
<td>Other cabinets, shelves and storage areas</td>
</tr>
<tr>
<td>Sump pumps</td>
</tr>
<tr>
<td>Furniture, not otherwise specified</td>
</tr>
<tr>
<td>Fabrics, not otherwise specified</td>
</tr>
<tr>
<td>Ladders or steps stools, not otherwise specified</td>
</tr>
<tr>
<td>Meters, not otherwise specified</td>
</tr>
<tr>
<td>Window shades and venetian blinds</td>
</tr>
<tr>
<td>Flashlights and electric lanterns</td>
</tr>
<tr>
<td>Mirrors and mirror glass</td>
</tr>
<tr>
<td>Glass—unknown origin</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>VII. HOME ALARM, ESCAPE, AND PROTECTION DEVICES INCLUDING BUT NOT LIMITED TO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fire extinguishers</td>
</tr>
<tr>
<td>Fire and smoke alarms</td>
</tr>
<tr>
<td>Fire escape devices, including chain ladders</td>
</tr>
<tr>
<td>Burglar alarms</td>
</tr>
<tr>
<td>Ground fault circuit interrupters</td>
</tr>
<tr>
<td>Lightning arresters, rods and grounding devices</td>
</tr>
<tr>
<td>Locks and padlocks</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>VIII. HOME WORKSHOP APPARATUS, TOOLS, AND ATTACHMENTS INCLUDING BUT NOT LIMITED TO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power saws</td>
</tr>
<tr>
<td>Power drills</td>
</tr>
<tr>
<td>Power sanders</td>
</tr>
<tr>
<td>Power routers</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>VIII. HOME WORKSHOP APPARATUS, TOOLS, AND ATTACHMENTS INCLUDING BUT NOT LIMITED TO—Continued</th>
</tr>
</thead>
<tbody>
<tr>
<td>Power lathes</td>
</tr>
<tr>
<td>Power grinders</td>
</tr>
<tr>
<td>Power jointers</td>
</tr>
<tr>
<td>Power shapers</td>
</tr>
<tr>
<td>Other portable and stationary power tools</td>
</tr>
<tr>
<td>Workshop manual tools and accessories</td>
</tr>
<tr>
<td>Torches</td>
</tr>
<tr>
<td>Welding equipment</td>
</tr>
<tr>
<td>Soldering guns and boxes</td>
</tr>
<tr>
<td>Hoists, lifts, jacks and chains</td>
</tr>
<tr>
<td>Test equipment</td>
</tr>
<tr>
<td>Battery chargers</td>
</tr>
<tr>
<td>Batteries</td>
</tr>
<tr>
<td>Extension work lights and continuos use flood lights</td>
</tr>
<tr>
<td>Separate electric motors</td>
</tr>
<tr>
<td>Internal combustion engines, for use in or around the household</td>
</tr>
<tr>
<td>Automotive tools and accessories</td>
</tr>
<tr>
<td>Paint sprayers</td>
</tr>
<tr>
<td>Air compressors</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>IX. HOME AND FAMILY MAINTENANCE PRODUCTS INCLUDING BUT NOT LIMITED TO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cleaning agents and compounds</td>
</tr>
<tr>
<td>Bleaches and dyes</td>
</tr>
<tr>
<td>Solvent based cleaning and sanitizing compounds</td>
</tr>
<tr>
<td>Waxes</td>
</tr>
<tr>
<td>Polishes</td>
</tr>
<tr>
<td>Paints, paint removers, brushes and rollers</td>
</tr>
<tr>
<td>Thinners</td>
</tr>
<tr>
<td>Adhesives and adhesive products including gies and tapes</td>
</tr>
<tr>
<td>Gasoline</td>
</tr>
<tr>
<td>Kerosene</td>
</tr>
<tr>
<td>Anti freeze</td>
</tr>
<tr>
<td>Lubricants</td>
</tr>
<tr>
<td>Alcohols</td>
</tr>
<tr>
<td>Caustics</td>
</tr>
<tr>
<td>Chemical compounds</td>
</tr>
<tr>
<td>Other chemicals including photographic chemicals</td>
</tr>
<tr>
<td>Wallpaper cleaners and removers, including steamers</td>
</tr>
<tr>
<td>Other cleaning equipment</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>X. FARM EQUIPMENT INCLUDING BUT NOT LIMITED TO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Electric fences</td>
</tr>
<tr>
<td>Home pasteurizers</td>
</tr>
<tr>
<td>Cream separators</td>
</tr>
</tbody>
</table>
**XI. PACKAGING AND CONTAINERS FOR HOUSEHOLD PRODUCTS INCLUDING BUT NOT LIMITED TO**

- Pressurized containers
- Vacuum containers
- Self-contained openers
- Resealable closures
- Child resistant closures
- Glass bottles and containers
- Containers made of materials other than glass, except vacuum or pressure containers
- Plastic wrapping products, including plastic trash and garden bags
- Paper and cardboard products, and other paper objects, including magazines, newspapers, books, etc.

**XII. SPORTS AND RECREATIONAL EQUIPMENT INCLUDING BUT NOT LIMITED TO**

- Playground equipment, swings, slides and associated hardware
- Bicycles and bicycle equipment
- Boats, motors and accessories for recreational use
- Baseball equipment
- Basketball and volleyball equipment
- Boxing and wrestling equipment
- Crocket equipment
- Exercise equipment
- Fishing equipment
- Football equipment
- Golf equipment except golf cars
- Golf cars
- Hockey equipment, including ice skates
- Lacrosse equipment
- Skiing equipment, including skis, poles, boots and bindings
- Sleds and toboggans
- Snowmobiles
- Tennis equipment, including badminton and table tennis
- Swimming and underwater sports equipment, including scuba accessories and spear guns
- Headgear for cycling
- Beach equipment
- Stationary and portable grills, kebabs, charcoal and gas
- Portable gasoline and kerosene stoves
- Portable gasoline, alcohol, and gas heating equipment

**XIII. SPORTS AND RECREATIONAL EQUIPMENT INCLUDING BUT NOT LIMITED TO—Continued**

- Gasoline, kerosene and propane lanterns and lamps
- Battery powered cooking devices
- Picnic equipment including coolers
- Camping equipment including tents, cot, and sleeping bags
- Camping trailers, other than mobile homes
- Swimming and wading pools and associated equipment
- Charcoal grills, electrical or chemical
- Rebound tumbling devices
- Play houses and tree houses
- Archery equipment and darts
- Unlicensed motor scooters and go-karts
- Gas, air and spring operated guns
- Other special sports and camping clothing
- Horseback riding equipment
- Aquariums, including pumps, heaters and accessories

**XIII. TOYS INCLUDING BUT NOT LIMITED TO**

- Wheeled toys—carrying the child, powered and unpowered including wagons, tricycles, stand-up scooters, pedal cars, sit-in airplanes, sit-in tricycles
- Non-mechanical dolls and toy animals
- Mechanical dolls and toy animals including keywind and battery operated
- Other windup and battery operated toys
- Wheeled toys not carrying the child, powered and unpowered including toy cars, electric trains, and non-flying airplanes
- Gasoline powered toys, including model airplanes
- Electric games
- Skates and skateboards
- Kites and kite string
- Pop sticks and sticks
- Toy guns and other toy weapons without projectiles
- Toy guns and other toy weapons with projectiles
- Fireworks, explosives and caps
- Rocketry sets
- Chemistry sets
- Other science kits and toys
XIII. TOYS INCLUDING BUT NOT LIMITED TO—Continued

- Flying devices, not gasoline or rocket powered
- Other models and their construction materials. For glues see category IX
- Metal and plastic molding sets
- Games, other than electric
- Toy home equipment, including ovens, stoves, sinks, roofs, sewing machines, washing machines, etc.
- Children play tents, play tunnels and other enclosures
- Toy balls and balloons
- Inflated toys other than balloons
- Blocks, pull toys, and similar items

XIV. YARD AND GARDEN EQUIPMENT INCLUDING BUT NOT LIMITED TO

- Power mowers of all types
- Hand mowers
- Hand garden tools
- Power trimmers and edgers
- Garden tractors
- Snow blowers and snow plows
- Garden sprayers
- Power tillers and cultivators
- Other power garden tools
- Outdoor lighting equipment
- Lawn mowers
- Power including electric submersible fountain pumps
- Greenhouse equipment
- Garden hose, nozzles, and sprinklers
- Winter manual yard tools
- Insect traps and insecticide vaporizers, electrically operated
- Yard decorative equipment including fish ponds, bird baths, planters, bird houses, etc.

XV. CHILD NURSERY EQUIPMENT AND SUPPLIES INCLUDING BUT NOT LIMITED TO

- Highchairs
- Changing tables
- Infant seats
- Cribs, including springs and mattresses
- Carriages
- Gates
- Baby blankets, sheets, pads, pillows, etc., and other baby bedding equipment
- Walkers
- Bottles, nipples and related items
- Bottle warmers
- Sterilizers
- Diapers and diaper pails, including disposable diapers
- Playpens

XVI. PERSONAL USE ITEMS INCLUDING BUT NOT LIMITED TO

- Razors and shavers
- Hair dryers
- Hair curlers
- Cigarette, cigar and pipe lighters and lighter fluid
- Wigs
- Eyeglasses, not including contact lenses
- Eye protection devices including light filters, sun glasses
- Powered toothbrushes and picks
- Sun lamps
- Massage devices
- Manicure devices
- Saunas, including facial saunas
- Electric shoe polishers
- Clothing
- Footwear except for sports footwear
- Other beauty aids and jewelry
- Ear protection devices, including noise plugs
- Respiratory protection devices
- Personal protection devices, including tear gas pens and tear gas guns
- Hearing aids
- Umbrellas
- Wrist watches, wrist compasses, pendant watches, pocket watches, etc.
- Luggage
- Contact lenses

XVII. HOME STRUCTURES, CONSTRUCTION MATERIALS, INCLUDING BUT NOT LIMITED TO

- Stairs, ramps and handrails indoors and outdoors
- Fireplaces, individually built
- Insulation materials
- Siding materials, including aluminum siding
- Doors, trap doors, hatches and other ingress-egress devices
- Roofs and roofing materials
- Floors and flooring materials, including patios
- Awnings and shutters
- Windows
- Cabinet pulls, door springs, etc.

XVIII. OTHER PRODUCTS INCLUDING BUT NOT LIMITED TO

- Christmas and other seasonal decorations, including trees
- Switches and gravity knobs
- Mobile homes and related equipment, including campers
- Matches
- Ash trays
- Cigarette lighters and cans
- Wheelchairs
- Special beds
- Other special equipment for the injured or aged
- Home first-aid and health equipment, including hot water bottles, thermometers, etc.
APPENDIX D

PRODUCT LIABILITY LEGISLATION

Twenty-seven states by the end of 1981 had enacted product liability legislation. Additional bills are pending in several states but their bills were not approved in the last legislature meetings. States that have passed laws are:

Arizona
Arkansas
California
Colorado* HB 1536: 1977
Connecticut
Florida
Georgia
Idaho* HB 577: 1980
Illinois* Amendment: 1979
Indiana* HB 1396: 1978
Kansas* SB 165: 1981
Kentucky* SB 119: 1978
Louisiana Ordered study
Michigan* HB 5689: 1978
Minnesota* HB 338: 1978
Nebraska* Legis. 665: 1979
New Hampshire* Amend 507-D: 1978
New York
North Carolina* SB 189: 1979
North Dakota* HB 1075: 1979
Ohio
Oregon* HB 3039: 1977
Rhode Island* HB 7634: 1978
South Dakota* HB 1116: 1979
Tennessee* SB 2188: 1978
Utah* SB 158: 1977
Washington* SB 3158: 1981

*Bills examined to determine trend of affirmative defenses

Source: Louis R. Frumer & Melvin L. Friedman, Products Liability, Vol. 5, Appendix K
KANSAS

Senate Bill No. 165
(Effective July 1, 1981)

Be it enacted by the Legislature of the State of Kansas:

SECTION 1. This act shall be known and may be cited as the "Kansas product liability act."

SECTION 2. (a) "Product seller" means any person or entity that is engaged in the business of selling products, whether the sale is for resale, or for use or consumption. The term includes a manufacturer, wholesaler, distributor or retailer of the relevant product.

(b) "Manufacturer" includes a product seller who designs, produces, makes, fabricates, constructs or remanufactures the relevant product or component part of a product before its sale to a user or consumer. It includes a product seller or entity not otherwise a manufacturer that holds itself out as a manufacturer, or that is owned in whole or in part by the manufacturer.

(c) "Product liability claim" includes any claim or action brought for harm caused by the manufacture, production, making, construction, fabrication, design, formula, preparation, assembly, installation, testing, warnings, instructions, marketing, packaging, storage or labeling of the relevant product. It includes, but is not limited to, any action based on, strict liability in tort, negligence, breach of express or implied warranty, breach of, or failure to, discharge a duty to warn or instruct, whether negligent or innocent, misrepresentation, concealment or nondisclosure, whether negligent or innocent, or under any other substantive legal theory.

(d) "Harm" includes: (1) Damage to property; (2) personal physical injuries, illness and death; (3) mental anguish or emotional harm attendant to such personal physical inju-
ies, illness or death. The term "harm" does not include direct or consequential economic loss.

SECTION 3. (a)(1) Except as provided in paragraph (2) of subsection (a) of this section, a product seller shall not be subject to liability in a product liability claim if the product seller proves by a preponderance of the evidence that the harm was caused after the product's "useful safe life" had expired. "Useful safe life" begins at the time of delivery of the product and extends for the time during which the product would normally be likely to perform or be stored in a safe manner. For the purposes of this section, "time of delivery" means the time of delivery of a product to its first purchaser or lessee who was not engaged in the business of either selling such products or using them as component parts of another product to be sold.

Examples of evidence that is especially probative in determining whether a product's useful safe life had expired include:

(A) The amount of wear and tear to which the product had been subject;

(B) the effect of deterioration from natural causes, and from climate and other conditions under which the product was used or stored;

(C) the normal practices of the user, similar users and the product seller with respect to the circumstances, frequency and purposes of the product's use, and with respect to repairs, renewals and replacements;

(D) any representations, instructions or warnings made by the product seller concerning proper maintenance, storage and use of the product or the expected useful safe life of the product; and

(E) any modification or alteration of the product by a user or third party.

(2) A product seller may be subject to liability for harm caused by a product used beyond its useful safe life to the
extent that the product seller has expressly warranted the product for a longer period.

(b) (1) In claims that involve harm caused more than 10 years after time of delivery, a presumption arises that the harm was caused after the useful safe life had expired. This presumption may only be rebutted by clear and convincing evidence.

(2) (A) If a product seller expressly warrants that its product can be utilized safely for a period longer than 10 years, the period of repose, after which the presumption created in paragraph (1) of this subsection arises, shall be extended according to that warranty or promise.

(B) The ten-year period of repose established in paragraph (1) of this subsection does not apply if the product seller intentionally misrepresents facts about its product, or fraudulently conceals information about it, and that conduct was a substantial cause of the claimant’s harm.

(C) Nothing contained in this subsection shall affect the right of any person liable under a product liability claim to seek and obtain indemnity from any other person who is responsible for the harm which gave rise to the product liability claim.

(D) The ten-year period of repose established in paragraph (1) of this subsection shall not apply if the harm was caused by prolonged exposure to a defective product, or if the injury-causing aspect of the product that existed at the time of delivery was not discoverable by a reasonably prudent person until more than 10 years after the time of delivery, or if the harm caused within 10 years after the time of delivery, did not manifest itself until after that time.

(c) Nothing contained in subsections (a) and (b) above shall modify the application of K.S.A. 60-513.

SECTION 4. (a) When the injury-causing aspect of the product was, at the time of manufacture, in compliance with legislative regulatory standards or administrative regula-
tory safety standards relating to design or performance, the product shall be deemed not defective by reason of design or performance, or, if the standard addressed warnings or instructions, the product shall be deemed not defective by reason of warnings or instructions, unless the claimant proves by a preponderance of the evidence that a reasonably prudent product seller could and would have taken additional precautions.

(b) When the injury-causing aspect of the product was not, at the time of manufacture, in compliance with legislative regulatory standards or administrative regulatory safety standards relating to design, performance, warnings or instructions, the product shall be deemed defective unless the product seller proves by a preponderance of the evidence that its failure to comply was a reasonably prudent course of conduct under the circumstances.

(c) When the injury-causing aspect of the product was, at the time of manufacture, in compliance with a mandatory government contract specification relating to design, this shall be an absolute defense and the product shall be deemed not defective for that reason, or, if the specification related to warnings or instructions, then the product shall be deemed not defective for that reason.

(d) When the injury-causing aspect of the product was not, at the time of manufacture, in compliance with a mandatory government contract specification relating to design, the product shall be deemed defective for that reason, or if the specification related to warnings or instructions, the product shall be deemed defective for that reason.

SECTION 5. In any product liability claim any duty on the part of the manufacturer or seller of the product to warn or protect against a danger or hazard which could or did arise in the use or misuse of such product, and any duty to have properly instructed in the use of such product shall not extend: (a) To warnings, protecting against or instructing with regard to those safeguards, precautions and actions which a
reasonable user or consumer of the product, with the training, experience, education and any special knowledge the user or consumer did, should or was required to possess, could and should have taken for such user or consumer or others, under all the facts and circumstances;

(b) to situations where the safeguards, precautions and actions would or should have been taken by a reasonable user or consumer of the product similarly situated exercising reasonable care, caution and procedure; or

(c) to warnings, protecting against or instructing with regard to dangers, hazards or risks which are patent, open or obvious and which should have been realized by a reasonable user or consumer of the product.

SECTION 6. A product seller shall not be subject to liability in a product liability claim arising from an alleged defect in a product, if the product seller establishes that: (a) Such seller had no knowledge of the defect;

(b) such seller in the performance of any duties the seller performed, or was required to perform, could not have discovered the defect while exercising reasonable care;

(c) the seller was not a manufacturer of the defective product or product component:

(d) the manufacturer of the defective product or product component is subject to service of process either under the laws of the state of Kansas or the domicile of the person making the product liability claim; and

(e) any judgment against the manufacturer obtained by the person making the product liability claim would be reasonably certain of being satisfied.

SECTION 7. This act shall take effect and be in force from and after its publication in the statute book.
KENTUCKY

Senate Bill No. 119 (Effective June 17, 1978)
AN ACT relating to product liability.

WHEREAS, in recent years there has been an increasing public awareness of a need for safer products for the consumer with a resulting increase in the size and number of product liability claims, and

WHEREAS, this dramatic increase of product liability claims is causing an increase in the cost to the consumer of purchasing products, and an increase in the cost of manufacturing, wholesaling, retailing, and insuring said products, and

WHEREAS, a portion of said increased costs is caused by the absence of clear legal precedents and guidelines which govern the rights and liabilities of consumers, manufacturers, wholesalers, retailers, and insurers in the litigation of product liability claims, and

WHEREAS, it is in the interest of the public, consumers, manufacturers, wholesalers, retailers, and insurers, for the General Assembly to codify certain existing legal precedents and to establish certain guidelines which shall govern the rights of all participants in product liability litigation:

NOW, THEREFORE,

Be It Enacted by the General Assembly of the Commonwealth of Kentucky:

SECTION 1. A new section of KRS Chapter 411 is created to read as follows:

This Act shall be known as the "Product Liability Act of Kentucky."

SECTION 2. A new section of KRS Chapter 411 is created to read as follows:

(1) As used in this Act, a "product liability action" shall include any action brought for or on account of personal in-
jury, death or property damage caused by or resulting from
the manufacture, construction, design, formulation, develop-
ment of standards, preparation, processing, assembly, testing,
listing, certifying, warning, instructing, marketing, ad-
vertising, packaging or labeling of any product.

(2) As used in this Act, a "plaintiff" shall mean a person
asserting a claim and, if said claim is asserted on behalf of an
estate, "plaintiff" shall include plaintiff's decedent.

SECTION 3. A new section of KRS Chapter 411 is created
to read as follows:

(1) In any product liability action, it shall be presumed,
until rebutted by a preponderance of the evidence to
the contrary, that the subject product was not defec-
tive if the injury, death or property damage occurred
either more than five (5) years after the date of sale
to the first consumer or more than eight (8) years after
the date of manufacture.

(2) In any product liability action, it shall be presumed,
until rebutted by a preponderance of the evidence to
the contrary, that the product was not defective if the
design, methods of manufacture, and testing conformed
to the generally recognized and prevailing standards or
the state of the art in existence at the time the design
was prepared, and the product was manufactured.

SECTION 4. A new section of KRS Chapter 411 is created
to read as follows:

(1) In any product liability action, a manufacturer shall be
liable only for the personal injury, death or property
damage that would have occurred if the product had
been used in its original, unaltered and unmodified con-
dition. For the purpose of this section, product altera-
tion or modification shall include failure to observe
routine care and maintenance, but shall not include
ordinary wear and tear. This section shall apply to
alterations or modifications made by any person or
entity, except those made in accordance with specifica-
tions or instructions furnished by the manufacturer.
(2) In any product liability action, if the plaintiff performed an unauthorized alteration or an unauthorized modification, and such alteration or modification was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.

(3) In any product liability action, if the plaintiff failed to exercise ordinary care in the circumstances in his use of the product, and such failure was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.

SECTION 5. A new section of KRS Chapter 411 is created to read as follows:

In any product liability action, evidence of any alteration, modification, improvement, repair or change in or discontinuance of the manufacture, construction, design, formula, development of standards, preparation, processing, assembly, testing, listing, certifying, warning, instruction, marketing, advertising, packaging, or labeling of a product, whether made by the defendant or any other person or entity after the date of manufacture, shall be admissible in evidence only after the same has been offered to the court in a hearing out of the presence of the jury and the court has ruled that the evidence is relevant and material.

SECTION 6. A new section of KRS Chapter 411 is created to read as follows:

In any product liability action, if the manufacturer is identified and subject to the jurisdiction of the court, a wholesaler, distributor, or retailer who distributes or sells a product, upon his showing by a preponderance of the evidence that said product was sold by him in its original manufactured condition or package, or in the same condition such product was in when received by said wholesaler, distributor or retailer, shall not be
liable to the plaintiff for damages arising solely from the distribution or sale of such product, unless such wholesaler, distributor or retailer, breached an express warranty or knew or should have known at the time of distribution or sale of such product that the product was in a defective condition, unreasonably dangerous to the user or consumer.

SECTION 7. A new section of KRS Chapter 411 is created to read as follows:

If any provision or clause of this Act or application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of this Act which can be given effect without the invalid provisions or application, and to this end the provisions of this Act are declared to be severable.
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