

## The Consumer Product Safety Act: Risk Classification and Products Liability

### I. INTRODUCTION

The Consumer Product Safety Act<sup>1</sup> has consolidated and enlarged federal involvement in regulating the safety of consumer products.<sup>2</sup> The Consumer Product Safety Commission, an independent regulatory commission created by the Act,<sup>3</sup> is the focus of voluminous information on defective products, consumer injuries, recall campaigns, and design modifications. This information enables the Commission to determine which consumer products pose unreasonable, imminent, or substantial risks of injury and to take appropriate action under the Act against such products and their suppliers. This same data and the Commission's action thereon is available to the resourceful plaintiff who has been injured by a consumer product and can be of significant value to him in proving liability under theories of negligence or strict liability. This Note will explore the several product risk classifications available to the Commission, the data it may re-

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<sup>1</sup>15 U.S.C. §§ 2051-81 (Supp. III, 1973) [hereinafter referred to as the Act]. Comprehensive background information on the Act can be found in *THE CONSUMER PRODUCT SAFETY ACT* (Bureau of National Affairs ed. 1973). A leading discussion of the procedural aspects of the Act can be found in Scalia & Goodman, *Procedural Aspects of the Consumer Product Safety Act*, 20 U.C.L.A.L. REV. 899 (1973). Reviews of the Act and discussions of its consumer protection potential can be found in Note, *The Consumer Product Safety Act: Bold New Approaches to Regulatory Theory*, 5 LOY. L.J. 447 (1974); Note, *The Consumer Product Safety Act—Front-End Protection for the Consumer Creates an Increased Burden of Care for the Consumer Product Industry*, 3 MEMPHIS ST. U.L. REV. 344 (1973); Note, *The Consumer Product Safety Act—A Federal Commitment to Product Safety*, 48 ST. JOHN'S L. REV. 126 (1973); Note, *The Consumer Product Safety Act—Placebo or Panacea?*, 10 SAN DIEGO L. REV. 814 (1973).

<sup>2</sup>15 U.S.C. § 2079 (Supp. III, 1973) transfers to the Consumer Product Safety Commission the administration of: (1) The Federal Hazardous Substances Act, *id.* §§ 1261-74 (1970); (2) The Poison Prevention Packaging Act of 1970, *id.* §§ 1471-76; (3) The Flammable Fabrics Act, *id.* §§ 1191-1204; and (4) The Refrigerator Safety Act, *id.* §§ 1211-14. The scope of the Commission's authority was later extended to include the Child Protection and Toy Safety Act of 1969, *id.* §§ 1261-62, -74. For a study of the scope and adequacy of federal safety legislation, see *FEDERAL CONSUMER SAFETY LEGISLATION, A STUDY OF THE SCOPE AND ADEQUACY OF THE AUTOMOBILE SAFETY, FLAMMABLE FABRICS, TOYS, AND HAZARDOUS SUBSTANCES PROGRAMS* (June, 1970) (a special report prepared under the direction of H.A. Heffron for the National Comm'n on Product Safety).

<sup>3</sup>15 U.S.C. § 2053 (Supp. III, 1973) [hereinafter referred to as the Commission].

quire in the determination of those risks, and the value of this data to an injured consumer plaintiff.

## II. HISTORY

The National Commission on Product Safety (NCPS) was created in 1967 at the direction of President Johnson and the Congress to "conduct a comprehensive study and investigation of the scope and adequacy of measures now employed to protect consumers against unreasonable risk of injuries which may be caused by hazardous household products."<sup>4</sup> The Commission concluded:

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 30,000 are killed. A significant number could have been spared if more attention had been paid to hazard reduction.<sup>5</sup>

The solution proposed by the NCPS to this serious problem, after it found existing federal and state laws inadequate, was the Consumer Product Safety Act. The Act created the Consumer Product Safety Commission, consisting of five members, and vested in the Commission regulatory authority over all consumer products.<sup>6</sup> In the exercise of its authority, the Commission may promulgate and enforce consumer product safety standards,<sup>7</sup> collect and analyze data on injuries associated with con-

<sup>4</sup>81 Stat. 466 (1967).

<sup>5</sup>NATIONAL COMM'N ON PRODUCT SAFETY, FINAL REPORT PRESENTED TO THE PRESIDENT AND CONGRESS 1 (1970) (footnote omitted) [hereinafter cited as NCPS].

<sup>6</sup>15 U.S.C. § 2052(a) (1) (Supp. III, 1973) provides:

The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise . . . .

Excluded from the meaning of the term "consumer product" are articles not customarily produced for use by consumers, tobacco and tobacco products, motor vehicles, economic poisons, aircraft or aircraft components, boats, drugs, medical devices, cosmetics, and food. *Id.* § 2052(a) (1) (ii) (A) to (I).

<sup>7</sup>These consumer product safety standards are to consist of one or more of the following kinds of requirements:

- (1) Requirements as to performance, composition, contents, design, construction, finish, or packaging of a consumer product.
- (2) Requirements that a consumer product be marked with or accompanied by clear and adequate warnings or instructions, or requirements respecting the form of warnings or instructions.

Any requirement of such a standard shall be reasonably necessary

sumer products,<sup>8</sup> and promote research on the causes and prevention of injuries connected with consumer products.<sup>9</sup> In addition, when a consumer product falls into one of the following three risk classifications, the Commission may take a wide range of specific actions against the product and its suppliers.

First, whenever the Commission finds that a consumer product presents an unreasonable risk of injury from which the public cannot be protected by a feasible safety standard, that product may be declared a banned hazardous product.<sup>10</sup> Secondly, the Commission may seek an injunction allowing it to seize or require recall of a product which presents more than just an unreasonable risk of injury, namely, a product which presents an imminent and unreasonable risk of death, serious illness, or severe

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to prevent or reduce an *unreasonable risk of injury* associated with such product. The requirements of such a standard (other than requirements relating to labeling, warnings, or instructions) shall, whenever feasible, be expressed in terms of performance requirements.

*Id.* § 2056(a) (emphasis added).

<sup>8</sup>*Id.* § 2054(a) (1).

<sup>9</sup>*Id.* § 2054(b).

<sup>10</sup>*Id.* § 2057 provides:

Whenever the Commission finds that—

(1) a consumer product is being, or will be, distributed in commerce and such consumer product presents an unreasonable risk of injury; and

(2) no feasible consumer product safety standard under this chapter would adequately protect the public from the unreasonable risk of injury associated with such product, the Commission may propose and, in accordance with section 2058 of this title, promulgate a rule declaring such product a banned hazardous product.

In a recent decision, *Tuchinsky v. Consumer Prod. Safety Comm'n*, Civil No. 219-73 (D.D.C., Nov. 14, 1974), the plaintiff sought to compel the Commission to commence rule-making procedures to establish standards and criteria for determining what children's mechanical toys pose an unreasonable risk of personal injury pursuant to the Child Protection and Toy Safety Act of 1969, 15 U.S.C. §§ 1261-62, -74 (1970). See note 2 *supra*. While it was not disputed that the Commission could proceed on a toy-by-toy basis, the court concluded that the agency is under an obligation to attempt to promulgate general prescriptive regulations which would give broad notice to toy manufacturers and consumers of the types of toys that are hazardous. The import of this holding on the operation of the above quoted parallel provision of the Consumer Product Safety Act which empowers the Commission to declare a consumer product a banned hazardous product is that the Commission may be barred from banning a product unless it can persuade the court that it was impossible to promulgate general prescriptive safety regulations governing the particular hazard. The Commission subsequently published, in January 1975, regulations "establishing test methods to simulate the normal and reasonably foreseeable use, damage, or abuse to which toys, games, and other articles intended for use by children may be subjected." 40 Fed. Reg. 1480 (1975).

personal injury.<sup>11</sup> Thirdly, upon finding that a product creates a substantial product hazard, the Commission may direct a manufacturer, distributor, or retailer to notify purchasers and to repair, replace, recall, or refund the purchase price of the product.<sup>12</sup>

This Note will explore the parameters and the evidentiary implications of these risk classifications. Their significance is that a consumer product must be classified into one of them before specific action can be taken against the product or its supplier. A Commission finding that a product presents an unreasonable, imminent, or substantial hazard not only alerts the supplier that his product may be defective, but also signals counsel representing a consumer injured by one of these products that there likely exists a compilation of statistical and historical data on the product's deficiencies which will be valuable to him in proving liability.

### III. RISK CLASSIFICATIONS

#### A. *Unreasonable Risk of Injury*

The fundamental purpose of the Act is to protect consumers against unreasonable risk of injury from hazardous products. A product which poses an unreasonable risk of injury is one which is dangerous beyond the extent which would be contemplated by an ordinary consumer.<sup>13</sup> The challenge presented to the Commission is to differentiate between products whose risks of injury are reasonable and those whose risks are unreasonable. Congress suggested that the determination of an unreasonable risk take into account the following considerations:

1. the degree of the anticipated injury;

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<sup>11</sup>15 U.S.C. § 2061(a) (Supp. III, 1973) provides:

The Commission may file in a United States District Court an action (1) against an imminently hazardous consumer product for seizure of such product under subsection (b) (2) of this section, or (2) against any person who is a manufacturer, distributor, or retailer of such product, or (3) against both. Such an action may be filed notwithstanding the existence of a consumer product safety rule applicable to such product, or the pendency of any administrative or judicial proceedings under any other provision of this chapter.

<sup>12</sup>*Id.* § 2064(d).

<sup>13</sup>*Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1072 n.19 (4th Cir. 1974); *Greeno v. Clark Equipment Co.*, 237 F. Supp. 427 (N.D. Ind. 1965). "It is not negligent for one to manufacture and sell an axe or power saw because the dangers are obvious and the manufacturer can reasonably expect others in the exercise of ordinary prudence to perceive and appreciate the dangers." *Id.* at 430. See also RESTATEMENT (SECOND) OF TORTS § 402A (1965), comment *i*, which describes an unreasonably dangerous article as one which is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."

2. the frequency of such injury;
3. the effect upon the performance or availability of a product when the degree of the anticipated injury or the frequency of such industry [*sic*] is reduced; and
4. an evaluation of the utility of the product, in absolute terms and in varying modes of risk.<sup>14</sup>

A balance of the likelihood and seriousness of injury against the burden on the manufacturer to take appropriate precautions has been the traditional test for reasonableness of a risk of injury.<sup>15</sup> The likelihood and seriousness of an injury can be reduced by safe design, careful construction, or adequate labeling and warnings to users.

The emphasis in earlier safety legislation was primarily upon reducing injuries by improving labeling to provide adequate warning to consumers. One of the precursors to the Act, the Federal Hazardous Substances Act (FHSA),<sup>16</sup> whose enforcement was transferred from the Food and Drug Administration (FDA) to the Consumer Product Safety Commission, sought to protect consumers against unreasonable risk of injury by providing for cautionary labeling on household substances including toys. Under the FHSA, the test for an unreasonable risk of injury involved consideration of evidence of injuries and their seriousness, as well as the likelihood of additional occurrences and the effectiveness of cautionary labeling in minimizing the hazard. Judge Friendly, in *R.B. Jarts v. Richardson*,<sup>17</sup> applied these tests in upholding an FDA finding that a game called "Jarts"<sup>18</sup> presented a "mechanical hazard"<sup>19</sup> and thereby posed an unreasonable risk of harm.

While the point of the nose [of the Jart] is somewhat blunted, we do not understand petitioner seriously to question that the Commissioner could permissibly decide that the Jart presented a mechanical hazard . . . if it is

<sup>14</sup>S. REP. NO. 92-749, 92d Cong., 2d Sess. 6 (1972).

<sup>15</sup>W. PROSSER, *LAW OF TORTS* § 31, at 149 (4th ed. 1971) [hereinafter cited as PROSSER]. See also *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

<sup>16</sup>15 U.S.C. §§ 1261-74 (1970).

<sup>17</sup>438 F.2d 846 (2d Cir. 1971).

<sup>18</sup>"The Jart is a dart, about 13 [inches] long and weighing about half a pound, with three plastic fins, an aluminum shaft and a metal nose; as a result of its design and weight distribution, it will tend to land nose-first when thrown in the air. . . ." *Id.* at 850.

<sup>19</sup>A "mechanical hazard" is defined under the Federal Hazardous Substances Act as follows:

An article may be determined to present a mechanical hazard if, in normal use or when subjected to reasonably foreseeable damage or abuse, its design or manufacture presents an unreasonable

a "toy or other article intended for use by children." In any event the evidence of injuries . . . and simple common sense constitute sufficient basis for a determination that it presents a mechanical hazard, at least "when subjected to reasonable foreseeable . . . abuse."<sup>20</sup>

Since the hazard was necessarily present in the article, design modification consistent with its purpose was impracticable. However, the risk could be made reasonable with no cost or performance penalty by enabling the consumer to appraise the likelihood and severity of the risk through proper labeling giving adequate directions and warnings for safe use.<sup>21</sup>

The test for reasonableness of risk was aptly summarized by the National Commission on Product Safety in its final report to Congress recommending adoption of the Act. The Commission supplemented its own guidelines with the following statement:

"Risks of bodily harm to users are not unreasonable when consumers understand that risks exist, can appraise their probability and severity, know how to cope with them, and voluntarily accept them to get benefits that could not be obtained in less risky ways. When there is a risk of this character, consumers have reasonable opportunity to protect themselves; and public authorities should hesitate to substitute their value judgments about the desirability of the risk for those of the consumers who choose to incur it.

"But preventable risk is not reasonable (a) when consumers do not know that it exists; or (b) when, though aware of it, consumers are unable to estimate its frequency and severity; or (c) when consumers do not know how to cope with it, and hence are likely to incur harm unnecessarily; or (d) when risk is unnecessary in . . . that it could be reduced or eliminated at a cost in money or in the performance of the product that consumers would willingly incur if they knew the facts and were given the choice."<sup>22</sup>

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risk of personal injury or illness (1) from fracture, fragmentation, or disassembly of the article, (2) from propulsion of the article (or any part or accessory thereof), (3) from points or protrusions, surfaces, edges, openings, or closures . . . .

15 U.S.C. § 1261(s) (1970).

<sup>20</sup>438 F.2d at 850.

<sup>21</sup>*Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974); *Dillard & Hart, Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145 (1955); *Noel, Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962).

<sup>22</sup>NCPS, *supra* note 5, at 11 (quoting testimony of Prof. Corwin D. Edwards before the NCPS on March 4, 1970).

By applying those indicia, the Commission has found unreasonable risks associated with several classes of consumer products for which it has initiated its standard-setting mandate. These products include power lawn mowers,<sup>23</sup> bicycles,<sup>24</sup> bookmatches,<sup>25</sup> architectural glass,<sup>26</sup> and swimming pool slides.<sup>27</sup> Each of these products ranks high on the Commission's "Frequency-Severity Index"<sup>28</sup> and can, to some extent, be made less hazardous with only minor cost and performance penalties.<sup>29</sup>

### B. Imminent Hazard

When the Commission finds that a consumer product presents an "imminent and unreasonable risk of death, serious illness, or severe personal injury,"<sup>30</sup> it may immediately seek injunctive relief against the manufacturer, distributor, or retailer of the product. The injunctive relief may bar further distribution, require notification to consumers via national television or otherwise, and require recall, replacement, or refund.<sup>31</sup>

To sustain its action, the Commission must persuade the court that the product presents not only an unreasonable risk of harm, but that the potential harm is of such immediate and serious consequences that prompt injunctive relief is warranted. In its notice of a finding of an imminent hazard associated with the use of various spray adhesives,<sup>32</sup> the Commission determined that the use of certain adhesives could cause chromosome damage leading to genetic birth defects. In making this determination,

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<sup>23</sup>39 Fed. Reg. 26,662 (1974).

<sup>24</sup>*Id.* at 26,100. After receiving more than fifty written communications concerning these proposed regulations, the Commission suspended indefinitely their effective date. *Id.* at 43,536.

<sup>25</sup>*Id.* at 32,050.

<sup>26</sup>*Id.* at 18,502.

<sup>27</sup>*Id.* at 24,028.

<sup>28</sup>See note 59 *infra*.

<sup>29</sup>118 CONG. REC. 31,382 (1972). Representative Carney, expressing his support for the Act, observed that many products can be made safer at little expense. As examples, he cited refrigerators with a magnetic latch to prevent entrapment, electric drills with double insulation to prevent electrical shock, TV sets using less flammable materials, and wringer washers with an instinctive release. In each case, the safety feature imposed little or no cost penalty.

However, not all the Commission's safety standards are as compelling as Congressman Carney suggests. For example, there has been widespread criticism of the reasonableness of the Commission's proposed regulations for bicycles. See note 24 *supra*.

<sup>30</sup>15 U.S.C. § 2061(a) (Supp. III, 1973).

<sup>31</sup>*Id.* § 2061(b) (1).

<sup>32</sup>38 Fed. Reg. 22,569 (1973). The finding of imminent hazard was subsequently withdrawn because the data on which it was based was not reproducible. 39 Fed. Reg. 3582 (1973).

the Commission suggested that an imminent hazard will arise when the nature, severity, and duration of anticipated injury is significant.<sup>33</sup> Moreover, the generally accepted meaning of the term "imminent hazard" is that harm is reasonably certain to occur and can be averted only by swift action.<sup>34</sup> In the original Senate bill, a hazard was said to be "imminent" when action was required "prior to the completion of administrative proceedings held pursuant to this Act."<sup>35</sup>

In *United States Consumer Product Safety Commission v. A.K. Electric Corp.*,<sup>36</sup> the Commission sought to enjoin the sale and distribution of an automobile trouble light. The A.K. trouble light, one of several embraced by the Commission's complaint, was an extension-type light with a female electrical receptacle in its handle. Because of the flexible construction of the handle, the prongs of the receptacle could protrude and expose the user to a possibly fatal electrical shock.<sup>37</sup> The Commission had no

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<sup>33</sup>38 Fed. Reg. 22,569 (1973).

<sup>34</sup>*Employers' Liab. Assurance Corp. v. Columbus McKinnon Chain Co.*, 13 F.2d 128 (W.D.N.Y. 1926) (defective chain reasonably certain to place life or limb in peril is imminently dangerous); *Jump v. Ensign-Bickford Co.*, 117 Conn. 110, 118, 167 A. 90, 92 (1933) (defective blasting fuse is imminently dangerous because it is fraught with immediate peril and carries a threat of serious impending danger); *Coca-Cola Bottling Works v. Shelton*, 214 Ky. 118, 282 S.W. 778 (1926) (improperly charged soft drink bottles present imminent danger).

<sup>35</sup>S. 3419, 92d Cong., 2d Sess. § 311 (1972). In its review of the bill, the Senate Commerce Committee expressed its understanding of the emergency provisions of the Act as follows:

Section 311 allows the Administrator or the Attorney General to file an action seeking a Federal court to restrain any person in the distribution chain who is marketing a consumer product which is "imminently hazardous". An "imminently hazardous consumer product" is defined as a "consumer product presenting an unreasonable risk of injury or death which requires action to protect adequately the public health and safety prior to the completion of administrative proceedings held pursuant to this Act." For example, a toy may possess an electrical hazard which could cause injury to children during the period for promulgation [of] a product safety standard. In that situation, the Administrator could ask the court to take action to remove the dangerous toy from the marketplace pending completion of the standard-setting process. Or, a product that has been declared a banned hazardous substance may be so dangerous as to require its total recall instead of a recall limited to those products sold after the publication of the proposal to ban.

S. REP. No. 92-749, 92d Cong., 2d Sess. 35 (1972).

<sup>36</sup>Civil No. 74-1206 (D.D.C., Sept. 9, 1974).

<sup>37</sup>Transcript, Vol. I, at 5, Public Hearing Before the Consumer Product Safety Comm'n, *In re* A.K. Electric "Trouble Light" (July 31, 1974). The Commission alleged that one death had already been caused by the trouble light. Transcript at 14, *United States Consumer Prod. Safety Comm'n v. A.K. Electric Corp.*, Civil No. 74-1206 (D.D.C., Sept. 9, 1974).

trouble persuading Judge Hart that the A.K. trouble light presented an imminent hazard. In a lively dialogue with defendant's counsel during the hearing, Judge Hart asserted that the product was a deathtrap.<sup>38</sup> In its order enjoining further manufacture or distribution and ordering that the product be recalled, the court found that a large number of trouble lights with flagrant design and construction defects had been sold, and that users of these lights were subject to risks of severe injury or death.<sup>39</sup>

When the Commission has evidence of serious injury or death and reason to believe that additional injuries are likely to occur before the standard-setting procedure can operate, a finding of imminent hazard is appropriate. As the results in *A.K. Electric* indicate, this procedure provides the Commission with a swift and effective mechanism to protect consumers.

### C. Substantial Product Hazard

Section 15(b) of the Act and subsequent Commission rule-making require manufacturers, distributors, and retailers to notify the Commission within twenty-four hours after obtaining information "which reasonably supports the conclusion that such product . . . contains a defect which could create a substantial product hazard . . . ."<sup>40</sup> A "substantial product hazard" is defined in the Act as

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<sup>38</sup>Transcript at 7, United States Consumer Prod. Safety Comm'n v. A.K. Electric Corp., Civil No. 74-1206 (D.D.C., Sept. 9, 1974).

THE COURT: . . . [Y]ou have here a product that is so obvious to this Court, the hazard to anyone using it, it is a simple deathtrap, that the Court feels that it must take action to see that the public is protected. . . .

MR. JOSEPH: . . . But, Your Honor, as to Your Honor's statement that the product itself is at least, the Court has indicated that it is an inherently dangerous product. I would have to take issue, most respectfully, with the Court, on that.

THE COURT: You may take issue, but if we are talking about the exhibit that was put in evidence on the temporary restraining order, I think it is so patently a danger and a deathtrap that this Court is not likely to change its mind on the matter.

MR. JOSEPH: But, you would, Your Honor, of course, preserve to the defendants the right to present some evidence on that issue. We have had no opportunity whatsoever to cross-examine or to inquire into the determinations made by the Commission. We may have some expert testimony of our own to present to the Court.

THE COURT: You may, and you might have expert testimony that you could set off a stick of dynamite on that table and not endanger anyone, but it wouldn't be very effective.

<sup>39</sup>Declaratory Judgment and Permanent Injunction at 1, United States Consumer Prod. Safety Comm'n v. A.K. Electric Corp., Civil No. 74-1206 (D.D.C., Sept. 9, 1974).

<sup>40</sup>15 U.S.C. § 2064(b) (Supp. III, 1973) [hereinafter referred to as

- (1) a failure to comply with an applicable consumer product safety rule which creates a substantial risk of injury to the public, or
- (2) a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.<sup>41</sup>

To fall within section 15(a) the product must first be defective. For the purpose of the Act, a product may be defective when it fails to comply with an applicable consumer product safety rule. However, since it is likely that for the vast majority of consumer products there will be no applicable product safety rules, it is important to consider the kinds of defects which will bring a product within the second category of substantially hazardous products. It is clear from a reading of the Act that Congress intended to reach all types of defects which could cause a substantial risk of injury. Generally, a product is defective whenever it fails to perform in the manner reasonably expected.<sup>42</sup> Historically, in actions founded on negligence and strict liability, courts have included in the concept of a defective product those products having manufacturing defects,<sup>43</sup> products not accompanied by adequate instructions and warnings of the dangers attending use,<sup>44</sup> and products properly made according to an unreasonably dangerous design.<sup>45</sup>

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section 15(b)]. The twenty-four hour deadline was later added by the Commission. 39 Fed. Reg. 6068 (1974).

<sup>41</sup>15 U.S.C. § 2064(a) (Supp. III, 1973) [hereinafter referred to as section 15(a)].

<sup>42</sup>*Dunham v. Vaughan & Bushnell Mfg. Co.*, 42 Ill. 2d 339, 247 N.E.2d 401 (1969) (metal chip broke off hammer while striking metal pin); *Santor v. A & M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965) (carpet which was unfit for normal wear was defective); *Markle v. Mulholland's, Inc.*, 265 Ore. 259, 509 P.2d 529 (1973) (recapped tire blew out within period of anticipated use); *Engberg v. Ford Motor Co.*, 205 N.W.2d 104 (S.D. 1973) (seat belts must restrain driver during collision). See also PROSSER § 99, at 659; *Dickerson, Products Liability: How Good Does a Product Have To Be?*, 42 IND. L. J. 301 (1967); *Keeton, Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEXAS L. REV. 855 (1963); *Rheingold, Proof of Defect in Product Liability Cases*, 38 TENN. L. REV. 325 (1971).

<sup>43</sup>*Bradford v. Bendix-Westinghouse Automotive Air Brake Co.*, 517 P.2d 406 (Colo. Ct. App. 1973) (manufacturing defect in brake pedal).

<sup>44</sup>*R.B. Jarts v. Richardson*, 438 F.2d 846 (2d Cir. 1971); *Wright v. Carter Prod.*, 244 F.2d 53 (2d Cir. 1957).

<sup>45</sup>*Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 467 P.2d 229, 85 Cal. Rptr. 629 (1970) (defective design of pay dozer which restricted operator's vision was unreasonable); *Berkibile v. Brantly Helicopter Corp.*, 219 Pa. Super. 479, 281 A.2d 707 (1971) (defective design of helicopter rotor blade unreasonably dangerous).

When a product is defective because it is made according to an unreasonably dangerous design, the Senate Commerce Committee<sup>46</sup> has suggested that the Commission can eliminate the hazard either by setting appropriate standards or by seeking an injunction under its imminent hazard procedure. It can be argued that omission of any reference to design defects in the Senate's report should be construed to remove such defects from the operation of section 15. Such a reading, however, would remove from the Commission the power to take prompt administrative action to cause the repair or recall of a product which presents a substantial risk of injury to the public. Moreover, to predicate recall of a dangerous product on the origin of the defect causing the hazard, rather than on the existence of the hazard, would be inconsistent with the Act's purpose of protecting consumers.

The limited use of the phrase "substantial risk of injury" within section 15 in the context of defect notification and recall, instead of the more conventional "unreasonable risk of injury" as used generally throughout the Act, suggests that Congress intended a different standard to apply to the former risk classification. When read in context with the power of the Commission to require notice, recall, or refund upon a finding of a substantial risk of injury, where no such action could be ordered following a finding of a merely unreasonable risk, the phrase "substantial risk of injury" suggests the existence of a more serious level of risk in terms of the frequency or severity of the anticipated injury. Moreover, the first part of the definition of a substantial product hazard implies that not all violations of product safety rules, which are instituted to eliminate unreasonable hazards, create substantial product hazards; rather, only those violations which create a substantial risk of injury rise to the level of substantial product hazard.

What, then, is a substantial risk of injury? In the original Senate version of the bill, the comparable section required notice to consumers of defects related to the safety or use of the product which present an unreasonable risk of injury or death.<sup>47</sup> The House version, on the other hand, spoke only of a product defect which creates a substantial hazard to the public.<sup>48</sup> By analogy to earlier safety legislation, the term "substantial" in the House version and in the Act would appear to exclude only those hazards which are wholly insignificant, negligible, or trivial.<sup>49</sup>

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<sup>46</sup>S. REP. No. 92-749, 92d Cong., 2d Sess. 36 (1972).

<sup>47</sup>S. 3419, 92d Cong., 2d Sess. § 313 (1972).

<sup>48</sup>H.R. 15,003, 92d Cong., 2d Sess. § 15(a)(2) (1972)

<sup>49</sup>The Federal Hazardous Substances Act defines a hazardous substance as, *inter alia*, a product that "may cause substantial personal injury or substantial illness." 15 U.S.C. § 1261(f) (1970). "Substantial personal injury or illness"

Congressional intent that "substantial" hazard was to be broadly construed to include any defect affecting the safety of the product was expressed during the House debate on the Act wherein both Congressmen Halpern and Donohue referred to section 15 as allowing the Commission to "administratively order the notification and remedy of products which fail to comply with Commission safety rules or *which contain safety defects*."<sup>50</sup> The only qualification to this otherwise sweeping statement appears in the accompanying House Commerce Committee report, which adds: "This definition looks to the extent of public exposure to the hazard. A few defective products will not normally provide a proper basis for compelling notification under this section."<sup>51</sup> This last qualification would presumably allow a few defective products, as could be expected due to the finite imprecision of any practicable quality control program.

The legislative history of section 15, coupled with well-established principles of products liability, thus suggest that a substantial product hazard is one in which (1) a nontrivial or moderately serious injury to a consumer is reasonably foreseeable due to any defect in the product, and (2) more than only a small quantity of the consumer product is defective. Each of the three "substantial hazard" proceedings initiated to date by the Commission easily meets this two-pronged test for a substantial product hazard. The three fact situations encompass design and manufacturing defects found in large numbers of each product. In each case the defect was capable of causing serious personal injury. In *In re McCulloch Corp.*,<sup>52</sup> the Commission staff concluded that over 300,000 gasoline-powered chain saws had potentially leaking fuel hoses and thereby presented a risk of fire or explosion. In *In re National Presto Industries, Inc.*,<sup>53</sup> 4,000,000 electric frying pans were suspected of high electrical current leakage with the possibility of causing serious electrical shock. In *In re Relco, Inc.*,<sup>54</sup> over 200,000 arc welders had high voltage terminals which were exposed and presented a potentially lethal shock hazard.

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is defined in the regulations as any injury or illness of a significant nature. It need not be severe or serious. What is excluded by the word "substantial" is a wholly insignificant or negligible injury or illness. 16 C.F.R. § 1500.3(c) (7) (ii) (1974), noted in Levine, *Statutory Liability: The Federal Hazardous Substances Labeling Act—Sword or Shield?*, 19 FOOD DRUG COSM. L.J. 412, 420 n.42 (1964).

<sup>50</sup>118 CONG. REC. 31,391 (1972) (emphasis added).

<sup>51</sup>H.R. REP. NO. 92-1153, 92d Cong., 2d Sess. 42 (1972).

<sup>52</sup>No. 74-1 (Consumer Product Safety Comm'n, Mar. 4, 1974).

<sup>53</sup>No. 74-2 (Consumer Product Safety Comm'n, Apr. 12, 1974).

<sup>54</sup>No. 74-4 (Consumer Product Safety Comm'n, filed Aug. 7, 1974).

Except for *Relco*, which is as yet undecided, each of the foregoing section 15 actions ended in stipulated settlements providing for the issuance of defect notices to consumers. Consequently, there has yet to be either an administrative or judicial determination of what constitutes a substantial product hazard. *Relco* has brought a collateral action in federal district court challenging the substantial product hazard classification, urging that the lack of sufficient standards to which a product must conform makes the section void for vagueness.<sup>55</sup> Since *Relco* cannot be required to notify its customers of the alleged hazard or initiate a recall program until after a judicially reviewable administrative hearing, its due process rights are protected.<sup>56</sup> Nevertheless, *Relco* could be subject to a fine under section 19 for "knowingly" failing to notify the Commission of a suspected substantial product hazard in the first instance.<sup>57</sup> However, in the absence of a final order declaring that a specific product presents a substantial product hazard, the unspecific language of section 15 makes it unlikely that a section 19 sanction will be enforceable against a manufacturer, distributor, or retailer who in good faith decides that his product does not present a substantial product hazard.

This brief analysis of the three risk classifications leads to the conclusion that a substantial product hazard requires something more than a showing of mere unreasonableness. Not all unreasonably dangerous products pose a substantial risk of injury, but all substantial product hazards are unreasonable. On the other hand, the magnitude of the risk created by a substantially hazardous product need not reach the level of severe personal injury or death as is characteristic of an imminently hazardous product, although the cases cited do not exclude this possibility. Finally, all imminent hazards are both substantial and unreasonable.

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<sup>55</sup>Plaintiff's Response in Opposition to Defendant's Motion to Dismiss at 16, *Relco, Inc. v. Consumer Prod. Safety Comm'n*, Civil No. 74-H-362 (S.D. Tex., filed Mar. 12, 1974), *citing* *Connally v. General Constr. Co.*, 269 U.S. 385 (1926). The *Connally* Court stated that "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Id.* at 391.

<sup>56</sup>Defendant's Motion to Dismiss at 12, *Relco, Inc., v. Consumer Prod. Safety Comm'n*, Civil No. 74-H-362 (S.D. Tex., filed Mar. 12, 1974), *citing* *Ewing v. Mytinger & Castleberry, Inc.*, 339 U.S. 594 (1950).

<sup>57</sup>15 U.S.C. § 2069(c) (Supp. III, 1973) [hereinafter referred to as section 19]:

[T]he term "knowingly" means (1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.

#### IV. INJURY INFORMATION

##### A. *Information Sources*

In addition to effecting the removal of dangerous products from the hands of consumers, a major thrust of the Act is to generate data on injuries caused by consumer products. Information gathering is stimulated by several provisions of the Act which taken together will result in a reservoir of detail on actual and potential product defects. In the hands of the Commission, the information is valuable in setting priorities and in identifying product categories requiring closer scrutiny before the selection of a specific mode of relief. In the hands of an injured plaintiff, this information is potentially of significant value in stimulating discovery and as evidentiary material.

There are three sources of information available under the Act. The first and most automated is the National Electronic Injury Surveillance System (NEISS) maintained as part of the Injury Information Clearinghouse.<sup>58</sup> NEISS is a computerized data collection system connected to 119 hospital emergency rooms throughout the United States.<sup>59</sup> When an injury attributable to a consumer product is treated at one of these emergency rooms, this information is entered into a computer memory bank along with details of the type of product involved and the severity of the injury. The system thus contains a continuously updated profile of injury-causing products. The output of the computer is published annually, listing by product classification the number and severity of each reported injury.

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<sup>58</sup>*Id.* § 2054(a):

The Commission shall—

(1) maintain an Injury Information Clearinghouse to collect, investigate, analyze, and disseminate injury data, and information, relating to the causes and prevention of death, injury, and illness associated with consumer products; and (2) conduct such continuing studies and investigations of deaths, injuries, diseases, other health impairments, and economic losses resulting from accidents involving consumer products as it deems necessary.

<sup>59</sup>Consumer Product Safety Index Background Paper, September 28, 1973 (available from Consumer Product Safety Commission, Bureau of Epidemiology):

Hospitals participating in NEISS represent about a 2 percent sample of all hospital emergency rooms in the Continental United States. Multiplying the number of injuries reported by 50 will give a very general estimate of how many injuries were treated in all emergency rooms nationwide. An independent study conducted by Market Facts, Inc., found that only 38 percent of all injuries result in emergency room treatment, the balance being treated in physicians' offices or at home.

The Commission selects from the NEISS results those product categories which, because of the frequency and severity of injuries received, deserve an in-depth hazard analysis. These analyses by Commission personnel are conducted by detailed investigation and are available publicly.<sup>60</sup> The hazard analysis lists the products involved and identifies the manufacturer, the nature of the defect, and the apparent cause of the injury.

Supplementing NEISS and the in-depth hazard analyses are the notices received by the Commission under section 15(b). These notices are supplied by manufacturers, distributors, and retailers who obtain information which reasonably supports the conclusion that a product fails to comply with an applicable consumer product safety rule or contains a defect which could create a substantial product hazard. Subsequent to the initial notification given to the Commission within twenty-four hours of reaching the above conclusion, a manufacturer, distributor, or retailer must identify the product, describe the potential hazard, and give the date when the information supporting the existence of the hazard was obtained, the manner in which the information was obtained, the nature of the potential injury, the number and severity of such injuries, the number of products which present the hazard, the number of units in the hands of consumers, shipping dates and destinations, identifying marks or numbers, corrective action being taken, engineering and quality control changes to be made, whether refund or repair actions have been taken, whether notice has been or will be given, and plans for disposition of finished goods.<sup>61</sup> Copies of section 15 notices are publicly disclosed except as limited by the Act to exclude trade secret information.<sup>62</sup>

Finally the Commission has taken a significant step, as authorized by the Act, by proposing extensive recordkeeping requirements.<sup>63</sup> The proposed rule would require that records of all consumer product safety complaints received after the effective date of the rule, regardless of the truth of the allegation, be

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<sup>60</sup>In-depth analyses are available from the Consumer Product Safety Commission, Bureau of Epidemiology, on Bicycles (1973), Fireworks (1973), Infant Seats (1974), Fire Extinguishers (1974), High Chairs (1974), Baby Walkers (1974), Aerosol Cans (1974), Liquefied Petroleum Gas (1974), and Power Jointers (1974).

<sup>61</sup>39 Fed. Reg. 6061 (1974).

<sup>62</sup>There have been approximately 180 section 15 notices to the Commission since June 1973, affecting in excess of 12 million consumer product units. More than half the defects are capable of causing either fire or electrical shock. Another one-fourth of the defects are related to gas leakage, leading to the possibility of explosion, or loss of control of bicycles and rider mowers. The mean number of units affected by a defect notice is 60,000 units, but three notices affect in excess of one million units each.

<sup>63</sup>39 Fed. Reg. 31,916 (1974).

maintained for a period of at least five years from date of receipt. The rule would require further that the record of safety complaints contain a copy or memorandum of the complaint, a record of any lawsuits filed related to the safety complaint, an analysis of the allegations of the complaint including such records as technical studies, tests, or other records of investigation, and any written response to the complainant.

### *B. Effect on Private Product Liability Action*

The several informational activities discussed above provide to a potential plaintiff a wealth of data which could show a pattern of defect-related injuries identical to his own. This data gives the plaintiff a unique view of the defendant's prior and subsequent accident history, including the number and type of injuries, names of injured claimants, results of any defect analyses made by the manufacturer, as well as any subsequent design changes or repairs. That such information could have a marked effect on private products liability litigation was acknowledged by the Commission in the preamble to the proposed recordkeeping requirements.<sup>64</sup>

Detailed product injury data is valuable in actions brought under theories of either negligence or strict liability.<sup>65</sup> In a negligence action, plaintiff must show that defendant failed in his duty to exercise reasonable care under the circumstances.<sup>66</sup> In particular, a manufacturer may be negligent for failing to discover and correct defects in his products. When a defendant manufacturer has notice of such defects but has failed to take corrective action, he has breached his duty of care. Evidence of prior accidents involving the same product under similar circumstances is discoverable<sup>67</sup> and may be admissible to show notice to the defendant of the hazardous nature of the product.<sup>68</sup>

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<sup>64</sup>*Id.*

<sup>65</sup>See Rheingold, *supra* note 42.

<sup>66</sup>PROSSER § 96, at 644.

<sup>67</sup>Tytel v. Richardson-Merrell, Inc., 37 F.R.D. 351 (S.D.N.Y. 1965) (names and addresses of injured claimants discoverable); Cohen v. Proctor & Gamble, Inc., 18 F.R.D. 301 (D. Del. 1955) (names and addresses of claimants compensated for injuries discoverable); Bleacher v. Bristol-Myers Co., 53 Del. 1, 163 A.2d 526 (1960) (records of prior claims and lawsuits of a similar nature discoverable). *But see* Johnson v. Stemco, 11 F.R.D. 603 (N.D. Ohio 1951) (names of injured persons held irrelevant and of doubtful admissibility); Proctor & Gamble Distrib. Co. v. Vasseur, 275 S.W.2d 941 (Ky. Ct. App. 1955) (discovery of names and addresses of complaining users and list of lawsuits brought by other users refused as irrelevant). *See generally* Annot., 20 A.L.R.3d 1430 (1968).

<sup>68</sup>Prashker v. Beech Aircraft Corp., 258 F.2d 602 (3d Cir.), *cert. denied*, 358 U.S. 910 (1958) (trial court properly allowed introduction of seven accident reports, limited solely to issue of notice of alleged defects in airplane);

In an action founded on a theory of strict liability, the proof of a defect and its unreasonableness can be aided by a showing of a pattern of injuries due to the same defect. The existence of such a pattern would be aided by NEISS data compilations, the results of in-depth hazard analyses, and other Commission investigative reports which are admissible as exceptions to the hearsay rule.<sup>69</sup> Moreover, section 15(b) notices should be admissible as an admission by a party-opponent that he had obtained information which reasonably supported the conclusion that his product either failed to comply with an applicable consumer product safety rule or contained a defect which could create a substantial product hazard.<sup>70</sup>

Records kept pursuant to section 15(b) and the above-mentioned proposed rules disclose prior and subsequent accidents, claims, and corrective actions taken. Evidence of subsequent accidents is generally not admissible to prove that a supplier was negligent in manufacturing a particular product, but such evidence might not be excluded when it is probative of other relevant issues. For example, evidence of subsequent accidents may be admissible to prove that the product was in fact dangerous.<sup>71</sup> Similarly, evidence of subsequent corrective measures or design changes is irrelevant to the issue of defendant's negligent conduct at the time of the accident and probably therefore is not admissible.<sup>72</sup> However, when used to demonstrate the defective

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Wright v. Carter Prod., 244 F.2d 53 (2d Cir. 1957) (trial court erred in refusing Federal Trade Commission findings of harmful propensities of deodorant); Becker v. American Airlines, Inc., 200 F. Supp. 243 (S.D.N.Y. 1961) (evidence of prior malfunctions of identical altimeters admitted); Berry v. Fruehauf Trailer Co., 371 Mich. 428, 124 N.W.2d 290 (1963) (evidence of prior accident involving ramp of trailer on other equipment where both ramps of similar design admitted); Miller v. A.B. Kirschbaum, 298 Pa. 560, 148 A. 851 (1930) (evidence admissible that, on three occasions within preceding five years, like accidents had occurred from the same cause, of which defendant had knowledge). See 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 12.01, at 232 (1974); McCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE § 200, at 473 (2d ed. E. Cleary 1972) [hereinafter cited as McCORMICK]; D. NOEL & J. PHILLIPS, PRODUCTS LIABILITY IN A NUTSHELL 249 (1974); 2 J. WIGMORE, EVIDENCE § 252, at 458 (3d ed. 1940). See generally Annot., 42 A.L.R.3d 780 (1972).

<sup>69</sup>FED. R. EVID. 803(8).

<sup>70</sup>McCORMICK § 262, at 628.

<sup>71</sup>Ginnis v. Mapes Hotel Corp., 86 Nev. 408, 470 P.2d 135 (1970) (evidence of subsequent accidents involving same door admitted to prove faulty design or manufacture); DiPangrazio v. Salemonsens, 64 Wash. 2d 720, 393 P.2d 936 (1964) (evidence of subsequent accident is relevant in determining hazardous nature of product).

<sup>72</sup>FED. R. EVID. 407; Price v. Buckingham Mfg. Co., 110 N. J. Super. 462, 266 A.2d 140 (1970) (evidence of modification of seat belt snap after accident not admissible in relation to issue of negligence).

condition of the product at the time of the injury, such evidence may be admissible.<sup>73</sup>

From a defense standpoint, the absence of any injuries associated with a product is generally admissible for the purpose of proving the absence of a defective condition.<sup>74</sup> But such evidence is not conclusive since the defect may be present in only certain lots or under certain conditions of use.<sup>75</sup> However, when the extensive data-gathering activity carried on pursuant to the Act fails to disclose a single injury associated with a widely used consumer product, the inference that a product is safe and not defective may be stronger.<sup>76</sup>

## V. CONCLUSION

It is reasonable to expect that the data compiled by the Consumer Product Safety Commission under its several grants of authority will be used by injured plaintiffs in seeking to prove negligence or defectiveness. More importantly, the mere availability of this data should provide ample motivation to a manufacturer to improve the safety of his product. Indeed, the impact of this data in stimulating product safety improvements may

<sup>73</sup>*Kate Mahoney v. Roper Wright Mfg. Co.*, Civil No. CV-70-156-D (7th Cir., Dec. 19, 1974); *Bailey v. Kawasaki-Kisen, K.K.*, 455 F.2d 392 (5th Cir. 1972); *Eastern Airlines, Inc. v. American Cyanamid*, 321 F.2d 683 (5th Cir. 1963); *Steele v. Wiedemann Mach. Co.*, 280 F.2d 380 (3d Cir. 1960); *Ault v. International Harvester Co.*, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974) (evidence of post-accident design change held properly admitted in action founded on theory of strict liability); *accord*, *Sutkowski v. Universal Marion Corp.*, 5 Ill. App. 3d 313, 281 N.E.2d 749 (1972).

<sup>74</sup>*Hardman v. Helene Curtis Indus., Inc.*, 48 Ill. App. 2d 42, 198 N.E.2d 681 (1964); *William Laurie Co. v. McCullough*, 174 Ind. 477, 90 N.E. 1014 (1910); *Savage v. Peterson Distrib. Co.*, 379 Mich. 197, 150 N.W.2d 804 (1967). *But see* *Hodges v. Bearse*, 129 Ill. 87, 21 N.E. 613 (1889); *Nave v. Flack*, 90 Ind. 205 (1883). *See generally* *Morris, Proof of Safety History in Negligence Cases*, 61 HARV. L. REV. 205 (1948); *Rheingold, supra* note 42.

<sup>75</sup>*Walker v. Trico Mfg. Co.*, 487 F.2d 595 (7th Cir. 1973), *cert. denied*, 415 U.S. 978 (1974).

<sup>76</sup>*Clever Idea Co. v. Consumer Prod. Safety Comm'n*, Civil No. 74-C-1638 (E.D.N.Y., Dec. 4, 1974). In granting plaintiff's application for a preliminary injunction which sought to restrain the Commission from enforcing its banning order following a finding of a mechanical hazard within the Federal Hazardous Substances Act, 15 U.S.C. § 1261(s) (1970), the court stated:

[T]he Court finds it difficult to believe that the plaintiff's products [paper and blow-out horns with plastic mouthpieces manufactured for thirty years; at a rate of two million per year] withstood so many years of normal child use, damage and abuse without *one single complaint or alleged defect* if they really do constitute a hazardous item or present an unreasonable risk of personal injury as the government contends.

(emphasis added). *See also* MCCORMICK § 200, at 476.

far exceed the statutory remedies or the standard-setting activities of the Commission which are both slow and costly. The data collection process itself is relatively inexpensive and relying as it does on "self-policing" has the ability to reach each manufacturer of every product long before the Commission can reach him through its other powers.

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