THE CONSUMER PRODUCT SAFETY COMMISSION: **WHAT CONGRESS INTENDED**[1]

In enacting the Consumer Product Safety Act (CPSA) and creating the Consumer Product Safety Commission (CPSC), Congress intended to focus above all on protecting the consumer from dangerous and defective products, as well as from foreseeable risks from products. No where in the legislative history or language of the statute is it suggested that caregiver or parental "negligence" be factored in to CPSC's decision to take action. Consideration of comparative or contributory negligence may be appropriate in a civil lawsuit; it was not contemplated by Congress that CPSC use consumer negligence as the basis for a failure to act.

BACKGROUND

In a 1970 precursor study to the establishment of the CPSC, the National Commission on Product Safety's Final Report (Final Report) was issued to the President and Congress. This report included extensive surveys – on product hazards, accident information systems, voluntary product standards, consumer education, the state of product safety law, the relationship between Federal law and State law, product safety policy in other countries – and also contained proposals for general product safety legislation, the core of which was to be the creation of a Federal Consumer Product Safety Commission (CPSC).

The report concluded that not only was the American public being exposed to many unreasonably dangerous products, but that the existing measures, such as product liability litigation, state and local regulation, industry self-regulation, and previous federal safety laws, were *not protecting consumers*.

"STRONG MANDATE FROM CONGRESS"

Within two years, the Consumer Product Safety Act of 1972 passed both the House and Senate 1972 and was signed into law by President Richard Nixon. The law established the Consumer Product Safety Commission as a bipartisan, independent regulatory commission following proposals in the Final Report.
Conference Committee members who negotiated and signed the bill included 9 Democrats and 7 Republicans.[2] Its passage was considered a breakthrough in consumer protection, and Congressmembers of both parties made it a point to officially endorse the

[1] Based in part on an article by Robert Adler, "Addressing Product Misuse at the Consumer Product Safety Commission: Redesigning People Versus Redesigning Products," Vol. XI, n1 University of Virginia Journal of Law & Politics 79 (Winter 1995).

[2] Representatives Harley Staggers (D-WV); John Moss (D-CA); W.S. Stuckley (D-GA); Bob Eckhardt (D-TX); William Springer (R-IL); James Broyhill (R-NC); John Ware (R-PA); and Senators Warren Magnuson (D-WA); John Pastore (D-RI); Frank Moss (D-UT); Abraham Ribicoff (D-CT); Edward Kennedy (D-MA); Norris Cotton (R-NH); Marlow Cook (R-KY); Charles Percy (R-IL); and Jacob Javits (R-NY).

creation of the agency.[3] Senator Warren Magnuson (D-WA) remarked, "The new Consumer Product Safety Commission has been given a strong mandate from Congress to drastically reduce losses from product-related injuries."[4] Representative Hamilton Fish, Jr. (R-NY) declared, "…this new agency spells a massive step forward in insuring product safety."[5]

LANGUAGE

The language of the Act plainly shows what Congress intended: that the CPSC regulate products that result in injury and death because of the product's design, and because of the product's *foreseeable* use by consumers in real life settings, (even if the manufacturer does not intend the product to be used in such ways). Three terms in particular selected by the drafting committee confirm this purpose:

1. **"Unreasonable risk"** of injury, illness, or death associated with products.[6] Although "unreasonable risk" is not defined in the Act itself, the legislative history makes clear that the term sets forth a *balancing test* that weighs performance and availability of a product against frequency and severity of injury, with an emphasis on health and safety. Reasonably foreseeable consumer abuse is a factor in that analysis.[7]

2. As explained by Senator Frank Moss (D-UT), Chairman of the Senate Subcommittee on Consumers of the Senate Commerce Committee, Congress deliberately used the word **"associated"** in the phrase "unreasonable risk associated with a consumer product" to convey the notion that the risk of injury did not have to result from "normal use" of the consumer product but could also result from such things such as "exposure to or reasonable foreseeable misuse of the consumer product."[8]

3. Senator Moss also specified that **"use"** and "normal use" included reasonably foreseeable misuse: "The ambit of risk, then, extends beyond exposure being misused if such misuse is 'reasonably foreseeable'."[9]

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[3] These members include: Representative Peter Frelinghuysen (R-NJ); Representative Hamilton Fish, Jr. (R-NY); Representative Edward Roybal (D-CA); Senator Warren Magnuson (D-WA); Senator Norris Cotton (R-NH).
[4] 118 Cong. Rec. S36199 (October 14, 1972).
[5] 118 Cong. Rec. H36141 (October 13, 1972).
[6] Under 15 U.S.C. § 2058(f)(3)(A) of the CPSA, the Commission may not promulgate a consumer product safety rule, i.e., a safety standard or a ban, unless it finds that the rule is reasonably necessary "to eliminate or reduce an unreasonable risk of injury associated with such product."
[7] While the Senate bill explicitly defined "unreasonable risk" to set forth this balancing test, the House bill did not contain a specific definition of their analogous term "unreasonable hazard," although it did define "hazard" as "risk of injury." However, the report accompanying the House amendment to the Senate bill set forth the same kind of balancing test that was incorporated in the definition of "unreasonable risk" in the Senate bill. Senator Frank Moss (D-CT) stressed this alignment in floor remarks and confirmed the balancing test as the intended analysis. S. Rep. No. 749, 92d Cong., 2d Sess. 15 (1972).
[8] S. Rep. No. 749, 92d Cong., 2d Sess. 15 (1972).
[9] S. Rep. No. 749, 92d Cong., 2d Sess. 15 (1972).

Protecting consumers -- even careless ones -- from dangerous consumer products is an integral part of CPSC's mandate. To be sure, the mandate is limited by Congress' desire that the agency not impose unreasonably high costs on, impede the usefulness of, nor limit the availability of regulated consumer products (the balancing test provision). But, the agency is in no way constrained from action simply because injuries result from consumer misuse of products. Quite to the contrary, as the following provisions demonstrate.

THE "TRANSFERRED ACTS"

All of the acts enforced by the CPSC authorize and direct the agency to address hazards attributable to consumer abuse:

1. The Federal Hazardous Substances Act of 1960 (FHSA) directs the CPSC to regulate "hazardous substances" either by requiring warning labels or by banning such products when cautionary labeling proves inadequate to protect the public health and safety. The FHSA defines a "hazardous substance" in part as one that "may cause substantial personal injury or illness during or **as a proximate result of any customary or *reasonably foreseeable handling or use*, including reasonably foreseeable ingestion by children."**[10]

2. Flammable Fabrics Act of 1953 (FFA) authorizes CPSC to establish flammability standards to protect the public against the unreasonable risk of injury from fire. The FFA does not address the concepts of consumer use and misuse; it **simply addresses product flammability regardless of how products are used -- or misused**.

Were consumers not sometimes irresponsible, these standards would be unnecessary. For example, if consumers did not smoke in bed, there would be a substantially reduced need for a flammability standard for mattresses. Similarly, if children did not play with matches or climb on stoves, there would be little need for a flammability standard for children's sleepwear. **The focus of the standards is on the level of flammability of the consumer products, not on the degree of culpability of the consumers who ignited them.**

3. The Poison Prevention Packaging Act of 1970 (PPPA) directs the CPSC to provide "special packaging" to protect children from injury or illness resulting from handling or ingesting dangerous household substances.

As with the Flammable Fabrics Act**, the basic premise of the PPPA is to protect consumers from product misuse**. If parents always safeguarded hazardous substances in their households or if children never mishandled such materials or improperly ingested them, there would be little need for regulations under the PPPA. As with the FFA, the **PPPA does not distinguish between consumer use and misuse**. The only test is whether children are being harmed by household hazardous substances, not whether such harm is caused by improper consumer behavior.

[10] 15 U.S.C. § 1261(f)(1)(A). (Emphasis added).

4. The Refrigerator Safety Act of 1956 (RSA) is the oldest and perhaps the most successful act enforced by the CPSC. Enacted to deal with dozens of deaths annually resulting from children climbing into abandoned refrigerators and suffocating when the doors closed, the Act requires that refrigerator doors be easily opened from within. Since the Act's requirements went into effect, most manufacturers have produced complying refrigerators and childhood fatalities from this hazard have virtually disappeared.

In a fashion similar to that under the FFA and the PPPA, **consumer misuse constitutes the operating premise** of the Refrigerator Safety Act. If consumers did not carelessly dispose of refrigerators or if children did not improperly climb into them and close the doors, there would be no need for this legislation.

If a CPSC commissioner focuses on consumer misuse of a product as a justification for taking no action to make the product safer, he or she misunderstands and/or misapplies the CPSC's mandate, and does a terrible disservice to consumers in the process.