WebMemo
Published by The Heritage Foundation
No. 1831
March 3, 2008

# Senate CPSC Bill: A Boon for Trial Lawyers at the Expense of Product Safety

*Andrew Grossman*

Driving the debate over reauthorization of the Consumer Product Safety Commission (CPSC) is public concern about the importation of unsafe products from China. In response to this concern, the Senate Commerce Committee has drafted legislation (the forthcoming substitute for the CPSC Reform Act, S. 2045) that is larded with massive gifts to the plaintiffs' trial bar and would undermine the CPSC's efforts to improve product safety. It would boost criminal penalties for distributing products in violation of consumer-products laws and regulations, dramatically raise fines for such violations, and give state attorneys general the power to sue firms on behalf of their citizens—a great boon for trial lawyers. These three provisions are likely to have serious unintended consequences, especially for small businesses, independent retailers, and American products manufacturers and distributors. The House versions of these provisions (in H.R. 4040), though not perfect, present a more balanced approach. At a time when economic growth is slowing, Congress should take care to avoid policies such as these that raise the cost of doing business, increase legal uncertainty and risk, and threaten jobs.

**Fifty Sets of Standards.** One virtue of the Consumer Product Safety Commission is that it creates a single set of product safety regulations for manufacturers and distributors to follow no matter where in the U.S. they sell their goods.[1] Many of these regulatory standards are hyper-technical, specifying such things as the mineral content of paint on screws used in the internal mechanics of a children's toy.[2] With a single set of standards, complicated as they may be, diligent manufacturers and distributors are able to produce and sell products that they are confident are in compliance with all aspects of the law.

Indeed, uniformity of standards was one of the reasons that Congress created the CPSC in 1972.[3] Congress recognized that the burden of complying with myriad conflicting state standards for consumer product safety would actually undermine efforts to improve safety while imposing unacceptable costs on manufacturers and distributors.

Further, Congress charged the CPSC to balance the cost of proposed products standards with the predicted gains in safety, a practice often lacking at the state level, to ensure that new standards would, taken as a whole, promote the public good rather than imposing unreasonable costs on the economy.[4] It was particularly concerned that CPSC standards improve safety "while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices."[5] This is an inquiry to which courts and juries, lacking the expertise of a regulatory agency, are especially ill-suited.

This paper, in its entirety, can be found at:
*www.heritage.org/Research/Regulation/wm1831.cfm*

Produced by the Center for Legal and Judicial Studies

Published by The Heritage Foundation
214 Massachusetts Avenue, NE
Washington, DC 20002–4999
(202) 546-4400 • heritage.org

To give effect to these aims, the 1972 act specifically preempted all state regulation of consumer products covered by CPSC action.[6] This clear standard served to prevent states from undermining the purposes of federal product safety regulation by any means. The act directed the CPSC to accept recommendations from state entities for safety standards and to deputize state officials as enforcement agents, but it also made clear that the CPSC would make all final decisions and supervise any enforcement actions.[7] In short, the act was carefully drafted to carry out Congress's intent to improve product safety as efficiently as possible, which precluded continued state action in the area.

The CPSC Reform Act, however, sacrifices uniformity and the deliberative value of the CPSC process for promise of political and monetary gain at the state level. Section 20 of the legislation would reverse 35 years of successful policy experience by allowing state attorneys general to bring lawsuits on behalf of its residents for violations of consumer safety rules. The effect of such lawsuits would be to create *de facto* state product safety standards and to preempt, in practice, uniform CPSC standards. Though the bill limits such suits to seeking injunctive relief (such as ceasing sale of certain products)[8], companies are likely to seek settlements with state attorneys general, including payments to the state and other concessions, in order to avoid the risk and uncertainty of litigation.

In recent years, many state attorney general offices have become increasingly politicized, viewed by many as a steppingstone to higher office. State attorneys general have been bringing more suits concerning political questions—suits that stir up widespread publicity and great opportunity for political posturing to offices that, until recently, were merely concerned with the comparatively mundane enforcement of the laws. This trend has been particularly evident in state-directed litigation over global warming and carbon emissions, activities in financial and securities markets, the marketing and sale of tobacco, and competition in high-technology markets. In all of these cases, the states effectively made policy that, for a variety of policy reasons, is better considered at the federal level by regulatory agencies or, in some cases, at the state level by legislatures, but not by prosecutors.

It is especially important to understand that the existing law gives the CPSC great discretion over when to bring lawsuits or other enforcement actions and, alternatively, when to work with manufacturers and distributors to reduce product-related risks.[9] Indeed, lawsuits and enforcement actions are not the CPSC's primary tools in its efforts to improve consumer safety.[10] More frequently, it issues warning letters and works with companies to organize recalls or other actions. Lawsuits, which are expensive, adversarial, and often drawn out, can be an impediment to a successful long-term relationship that maximizes compliance and safety.[11] State attorneys general should not have the power to reduce the effectiveness of the CPSC's efforts by undermining its balanced approach to enforcement.

1. 15 USC §§ 2054, 2056, 2075.
2. *See, e.g.,* 16 C.F.R. § 170.5(a)(2) (specifying that an internal knob on a refrigerator door "Shall permit the refrigerator door to be opened on the application of a force equivalent to one which, if directed perpendicularly to the plane of the door and applied anywhere along the latch edge of the inside of the closed door, shall not exceed 66.7 newtons (15 pounds)").
3. "Consumer Product Safety Act," P.L. 92-573 (1972), § 2.
4. *Id.* at § 9(c).
5. *Id.*
6. *Id.* at § 26(a).
7. *Id.* at § 29.
8. Commerce Committee Substitute for S. 2045, 110th Cong. (2008).
9. 15 U.S.C. § 2076.
10. *See* Consumer Product Safety Comm'n, 2003 ANNUAL REPORT, *www.cpsc.gov/cpscpub/pubs/reports/2003rpt.pdf.*
11. *Id.* at 2, 5.



The Heritage Foundation LEADERSHIP FOR AMERICA

Giving state politicians a backdoor route to making policy in consumer products safety regulation would directly undermine core values of the federal regulatory program: uniformity, cost-benefit balancing, legal certainty, reasonable discretion in enforcement, and the removal of highly technical product-standards determinations from the heated political realm. In sum, this seemingly minor change would dramatically reshape the realm of consumer product safety regulation, likely to the detriment of product safety.

**A Boon for Trial Lawyers.** Among the groups lobbying hard for an increased state role in enforcement of consumer products safety regulation are trial lawyers, who stand to benefit handsomely by this change in several ways.[12]

As has been widely reported in recent years, trial lawyers often have close relationships with state law-enforcement officials. In some states, they are able to use these relationships to bring lawsuits on behalf of the state and can collect large fees for doing so.[13] In addition to the possibility of corruption in the awarding of these licenses to sue, this practice warps the incentives of state officials charged with serving the public and litigating for the common good.[14] The CPSC Reform Act would be particularly invidious in this respect because it would award prevailing state actors bringing lawsuits against manufacturers and distributors litigation expenses and attorney's fees.[15] State attorneys general, then, would be hard-pressed to deny politically-active state trial lawyers the opportunity to sue out-of-state companies when the litigation is unlikely to cost the state a dime and could, in many cases, bring the attorney general positive publicity. In this way, the legislation would create an inappropriate incentive for states to bring suits when they are not needed to protect public safety and would also create, in many cases, openings for trial attorneys that may result in corruption or at least the strong appearance of impropriety.

Trial lawyers stand to benefit in other ways. Violations of CPSC regulations and standards are considered *per se* violations of tort law in suits by individuals who have been harmed by faulty products.[16] State lawsuits that establish a violation, then, even if it is a very minor one that the CPSC, acting on its own, would not have addressed, give trial lawyers the opportunity to bring follow-on tort lawsuits in which they need not prove the presence of a product defect. Legal uncertainty concerning the risk of enormous and disproportionate jury awards in such lawsuits, as well as the possibility of large litigation expenses, would prompt many companies to settle, at great expense, or to fight suits. Again, the incentives presented by such litigation would run precisely counter to the CPSC's mandate to carefully balance cost and benefit in making safety regulations.

Even when products are found not to violate CPSC standards in lawsuits brought by state attorneys general, trial lawyers would still benefit from them. This is because manufacturers and distributors may be subject to tort liability for defects in manufacturing, design, and failure to warn.[17] In many cases, proving liability and winning huge damages awards (particularly punitive damages) depends on trial lawyers' ability to access internal company documents, some of which may be privileged and so not discoverable in lawsuits. State attorneys general, however, are often able to coerce companies into waiving such privileges to avoid potentially damaging litigation. News reports reveal that trial lawyers often work closely with state authorities in determining how such waivers are struck and what materials are disclosed so that the trial lawyers may use these materials in subsequent private litigation.[18]

12. *See, e.g.,* Am. Ass'n for Justice, *Congress: Adopt Tough Measures to Stop Corporations From Evading Accountability for Unsafe Foreign Toys, AAJ Urges*, *www.atla.org/pressroom/PressReleases/2007/nov14.aspx* (last visited March 3, 2008).
13. *See Lawsuit Inc.*, WALL ST. J., Feb. 25, 2008, at A14.
14. *Id.*
15. Commerce Committee Substitute for S. 2045 § 21(g), 110th Cong. (2008).
16. PROSSER AND KEETON ON TORTS § 220 (5th ed.).
17. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2.

Americans recognize that lawsuit abuse is a major problem that harms the economy and perverts justice. Congress should not give the trial lawyers behind lawsuit abuse a new avenue to bring big-money litigation against all those involved in the making and sale of products.

**Criminal Liability.** The CPSC Reform Act would boost criminal penalties for violation of CPSC regulations to levels that are disproportionate, coercive, and possibly counterproductive. Under current law, individuals who violate CPSC regulations after having received a notice of noncompliance from the CPSC, and corporate officers who have authorized such conduct, may be subject to criminal fines of up to $50,000 and up to a year's imprisonment.[19] The Senate's legislation would increase these penalties to up to $250,000 in fines and imprisonment of up to five years.[20] There is a real risk that such massive penalties would discourage the reporting of possible violations and so actually undermine the effect of SPSC safety regulations.

At the same time, individuals at companies already under investigation by the CPSC and possibly subject to criminal penalties will feel greater pressure to waive fundamental legal privileges that exist to ensure the integrity of the legal system, such as the attorney-client privilege, the attorney work-product privilege, and the privilege against self-incrimination.

Further, the prospect of massive fines under the CPSC Reform Act (discussed in greater detail below) could cause companies to waive such legal protections to the detriment of their employees in criminal suits. In recent years, this has become an increasingly recognized problem in Department of Justice corporate prosecutions, to the extent that federal courts have ruled some such tactics simply unconstitutional[21], prominent former U.S. attorneys general and top government litigators have called them unnecessary and unethical[22], and Congress is now considering legislation to address the problem directly.[23] It would be counterproductive for Congress to act now to worsen this significant problem. The prospect of litigation by state attorneys general carries the same risk.

Most troubling in the criminal domain, the CPSC Reform Act would remove a major requirement in criminal prosecution of individuals for CPSC regulatory violations. Current law limits prosecution to a corporate officer or agent who "who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of [CPSC regulations], and who has knowledge of notice of noncompliance received by the corporation from the Commission."[24] Because CPSC regulations are, in many cases, complicated and hyper-technical, it is important that the heavy hand of the criminal law is limited to violations identified by the CPSC and communicated to the individual so that criminal liability does not reach possible violations, mistakes of law, or minor violations that even the CPSC does not consider to be significant. The CPSC Reform Act, however, would remove this requirement, making the most extreme penalty for CPSC violations available even in cases where the violations were minor or not unquestionably intentional.[25] This change is part of a troubling long-term trend of watering down traditional criminal intent requirements and increasing criminal penalties for regulatory violations. Such changes further divorce the criminal law from traditional notions of right and wrong.

**Disproportionate Fines.** Finally, the CPSC would dramatically increase civil penalties for violations of

18. *See, e.g., Mississippi Hoods*, WALL ST. J., Nov. 17, 2007.
19. 15 U.S.C. § 2070.
20. Commerce Committee Substitute for S. 2045 § 16(b), 110th Cong. (2008).
21. *See, e.g.,* United States v. Klein, F.Supp. 330, 356-69 (S.D.N.Y. 2006).
22. *See, e.g.*, Edwin Meese III, Testimony before the Committee on the Judiciary of the United States Senate concerning *The Thompson Memorandum's Effect On The Right To Counsel In Corporate Investigations*, Sept. 12, 2006.
23. Attorney-Client Privilege Protection Act of 2007, § 186, 110th Cong. (2007).
24. 15 USC § 2070(b).
25. Commerce Committee Substitute for S. 2045 § 16(b)(2), 110th Cong. (2008).

CPSC regulations, which risks several serious unintended consequences. The legislation would boost penalties for a single offense (e.g., the sale of a single item that violates CPSC standards) to up to $250,000 and raise the maximum fine for related violations (e.g., selling more than one of an item that violates CPSC standards) to $20 million.[26]

First, as described above, above, the prospect of massive penalties may coerce companies into cooperating with the government in ways that sacrifice the rights of their employees. When firms are threatened with penalties that could put them out of business, they may make such choices that are not in the best interest of their employees and other stakeholders.[27] A small, independent retailer, for example, could face enormous fines for selling an item that is in violation of CPSC standards. Facing ruin of his business, and possibly personal financial ruin, a small business owner would face enormous pressure to cooperate with the government in any way that it proposes, no matter the consequences to others.

The prospect of massive fines may actually reduce compliance by leading some companies and individuals to fear that close cooperation with the CPSC could put them at financial risk. Small businesses, especially, may not have the resources to ensure perfect compliance and so may be unwilling to work with the CPSC to identify possible violations.

**Conclusion.** Massive penalties and new options for litigation may help Congress convince the public that it is getting tough on manufacturers and distributors of products that fall short of safety standards, but these actions are unlikely to stem the flow of unsafe products and may actually be counterproductive in that respect. The last thing that the nation's economy needs is a new legal mechanism that would dramatically increase the cost of doing business, to the detriment of economic and job growth. This provision, in particular, is little more than a handout to trial lawyers, who would stand to reap enormous fees in lawsuits against businesses large and small, and would do nothing to improve product safety. Increased civil and criminal penalties threaten to reduce voluntary compliance and may lead to the loss of fundamental legal rights. In the current climate, it is understandable that Congress wishes to score political points on the issue of product safety, but the major provisions of the Senate Commerce Committee's bill are a step in the wrong direction.

*—Andrew M. Grossman is Senior Legal Policy Analyst in the Center for Legal and Judicial Studies at The Heritage Foundation.*

26. Commerce Committee Substitute for S. 2045 § 16(a), 110th Cong. (2008).

27. *See* John Hasnas, TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW (2006).