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Marsha N. Cohen
UC Hastings College of the Law, cohenm@uchastings.edu

James A. Brodsky

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"UNCLE SAM", THE PRODUCT SAFETY MAN: CONSUMER PRODUCT SAFETY STANDARDS IN THE MARKETPLACE AND IN THE COURTS

James A. Brodsky* & Marsha N. Cohen**

In February of 1904, a raging fire erupted in downtown Baltimore, Maryland. Although the turn of the century was still largely an age of kerosene lamps and wooden buildings, the business community had prided itself on the “fireproof” brick and stone construction of its office buildings. One by one, however, these completely “fireproof” structures, surrounded as they were with wooden stables and filled with highly combustible partitions and furnishings, succumbed to the intensity of the flames. Within three hours, engine companies arrived by train from Washington, and all that day and the next, additional fire units from nearby counties, from New York, Philadelphia, Annapolis, Wilmington, Chester, York, Altoona, and Harrisburg, rushed to the scene. Unfortunately, these firefighters were able to do little more than stand helplessly until the fire eventually burned itself out, thirty hours later.

The reason? Although there was plenty of water, the hoses of the visiting fire companies matched neither those of the other visitors nor the nozzles of the Baltimore hydrants.

The cost? Incalculable human suffering, the destruction of 1,526 buildings and all electric light, telephone, telegraph, and power facilities in an area of more than seventy city blocks.¹

The moral? A standard, describing uniform screw thread construction, was urgently needed.

Sixty years earlier, in an 1864 paper read before the Franklin Institute, William Sellers had urged the creation of a uniform American screw thread standard, arguing that “in this country no organized attempt has as yet been made to establish any system [of screw threads], each manufacturer having adopted whatever his judgment may have dictated as the best, or as the most convenient, for himself, but . . . so radical a defect should be

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* B.S., Cornell University; M.S. (Electrical Engineering), Columbia University; J.D., Georgetown University Law Center.

Both authors are attorneys on the staff of the Washington, D.C., law office of Consumers Union of United States, Inc. The views expressed herein are solely those of the authors.

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allowed to exist no longer.”

Sixty years after the Baltimore fire, in 1964, the surrounding counties still were being confronted with and confounded by varying fire hydrant screw threads.³

Ironically, prehistoric man had proven more prescient in his recognition of the necessity for standardization in certain fields than his modern descendants in Baltimore, Maryland. Ancient civilizations, for instance, had long recognized the necessity for a uniform system of weights and measures. In fact, specimens of standardized weights in ratios of 1:2:4:8, and decimally divided length scales, dating back to 3500 B.C., have been unearthed at several sites in the Indus Valley on the Indian subcontinent.⁴ And it is known that the Mohenjo-daro civilization of that area developed a linear scale bearing a striking resemblance to the contemporary measuring devices of Babylon, thousands of miles away.⁵ Even the Bible cautions in Proverbs11:1 that: “A false balance is abomination to the Lord, but a just weight is His delight.”

With the development at the end of the eighteenth century of the metric system by the French Academy of Science, the system of measurement prevalent during the Middle Ages and based on the dimensions of the human body gave way, and the present day standards movement was launched.⁶ Spurred by the advent of mass production and the interchangeability of parts, as well as the needs of allied nations during the international wars, the standards movement has spawned a bureaucracy and motive force of its own on both the international and national levels.⁷

Though the standards movement in general—and the voluntary standardization system in particular—is ripe for intensive public scrutiny,⁸ the scope of this article is not so comprehensive.

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3. See Cochrane, supra note 1, at 85.
5. Id.
6. Id. at 8.
7. The American National Standards Institute (ANSI), for example, serves as the nation’s coordinating body and clearinghouse for some 200 organizations which develop standards in the United States. ANSI also represents this country in the International Organization for Standardization (ISO) and other international standards groups. See note 20, infra, and accompanying text.
We narrow our focus to that portion of the standards movement which is concerned with consumer product safety in the United States. Of necessity, our examination requires a definitional framework and a brief inquiry into standardization as a discipline. It also requires a familiarity with the economic forces that shape the voluntary and mandatory standards. But once having brushed these areas lightly, we will turn to the core of our inquiry: the role of consumer product safety standards in the marketplace and in the courts.

I. Consumer Product Safety Standards in the Marketplace

A. Definitional Framework

Perhaps the best definition of the term "standard" was offered by one who early recognized the importance of standardization, Jessie Coles. He defined a standard as

a model for a material object or a rule for a course of action established by authority, custom or general consent by which others of a like nature may be identified, compared, or regulated, or which in itself represents the ideal or the "one best" for a particular purpose.

9. J. Coles, Standardization of Consumers' Goods 78 (1932). Coles had not been alone in attempting to field a workable definition. The "classic" attempt, offering a "most picturesque panorama of what is covered by the term standard," Verman, supra note 4 at 22, is that of John Gaillard. His comprehensive and original treatise, Industrial Standardization—Its Principles and Application (1934), offered the following at p. 123:

A standard is a formulation established verbally, in writing or by any other graphical method, or by means of a model, sample or other physical means of representation, to serve during a certain period of time for defining, designating or specifying certain features of a unit or basis of measurement, a physical object, an action, a process, a method, a practice, a capacity, a function, a duty, a right, a responsibility, a behaviour, an attitude, a concept or a conception.
Standards are developed, naturally enough, through the process of “standardization”: 10

Standardization is the process of formulating and applying rules for an orderly approach to a specific activity for the benefit and with the cooperation of all concerned, and in particular for the promotion of optimum overall economy taking due account of functional conditions and safety requirements.

It is based on the consolidated results of science, technique and experience. It determines not only the basis for the present but also for future development, and it should keep pace with progress.

Some particular applications are:

(1) Units of measurement.
(2) Terminology and symbolic representation.
(3) Products and processes (definition and selection of characteristics of products; testing and measuring methods; specifications of characteristics of production, for defining their quality, regulation of variety, interchangeability, etc.).
(4) Safety of persons and goods.

Standards cover almost all phases of mankind’s socio-economic activity: engineering, transportation, housing, food, agriculture, forestry, textiles, chemicals, commerce, science, education, sport, and music, for instance. And for each of these different “subjects” of standardization, a variety of “aspects” may be addressed. For example, if the “subject” of a particular stan-

And, in terms of authoritative impact, the International Organization for Standardization’s definition, though it is brief, should not be ignored:

A standard is the result of a particular standardization effort, approved by a recognized authority. It may take the form of:

(1) a document containing a set of conditions to be fulfilled (in French “norme”)
(2) a fundamental unit or physical constant—examples: ampere, absolute zero (Kelvin) (in French “étalon”)
(3) an object for physical comparison—examples: metre (in French “étalon”).

Definitions 1—Standardization vocabulary: basic terms and definitions, INTERNATIONAL ORGANIZATION FOR STANDARDIZATION, 5 (1971).

Critics of this ISO formulation have proposed still further revisions. See Sen, Defining Standardization, 23 ISI BULLETIN 389-90 (1971).

standard is the ubiquitous "widget", the following "aspects" of the "widget" are among those which particular standards might address: specifications of safety, quality, composition, or performance; nomenclature for the "widget" and its parts; test methods to evaluate particularized characteristics; component designs to promote interchangeability; and packaging or labeling protocols. Finally, depending on which group of interests creates and uses the standards, each "subject", such as the "widget", for each of its "aspects", may be regulated by standards at any one of a number of "levels." Thus, the standard which specifies the "safe performance" aspect of the "widget" might be: an individual standard established by a large governmental agency, such as the General Services Administration, to guide purchasing; a company-wide standard designed to guide manufacturing operations; an industry-wide or trade association standard; or a national or international standard.11

Standards also fall into different categories. They may, for example, be either mandatory or voluntary in character. Mandatory standards are established by government and are enforced by law. The federal Consumer Product Safety Commission,12 for example, has issued a mandatory standard under the Federal Hazardous Substances Act13 for full-size baby cribs.13.1 Cribs which do not meet the standard's requirements as to dimensions, spacing between crib slats, hardware, construction, finishing, warnings, and labels are banned. Violation of such mandatory standards may constitute a public offense, even when no one is injured.14 In contrast, voluntary standards are not promulgated by govern-

11. Verman, in his text on STANDARDIZATION, supra note 4 at 32-39, has organized these three phases of the standardization discipline into what he has denominated the "standardization space." Diagrammatically, this space is three-dimensional, with "subject," "aspect" and "level" constituting the X-, Y- and Z- axes of reference. In such a space, the widget would occupy a point on the "subject" or X-axis, with, say, the safety "aspect" of its design occupying a point on the Y-axis, and the national "level" standard describing its Z-axis location. The virtue of this, or any other, organization of the complex world of standardization, is that it permits this discipline to be studied and discussed in a systematic fashion to "bring about a deeper understanding of the underlying theories and the guiding principles so essential for the advancement and practical application of any given body of knowledge." Id. at xiv.

12. The Commission and the Act which created it are described in greater detail at notes 42.1-56, infra, and accompanying text.


13.1. This standard became effective on February 1, 1974. See 16 C.F.R. 1508.

ment and their use and acceptance by those segments of the private sector which do formulate them is not required by either state or federal statute or regulation.\textsuperscript{15}

Standards may also be classified as either "performance" or "descriptive." "Descriptive or 'specification' or 'design' standards define materials or forms; whereas performance standards tell what a product should do, no matter how it is made."\textsuperscript{16} By describing the physical form of the product, or the warnings, or instruction labels that must accompany it, as opposed to the levels of performance the product must meet, the descriptive standard necessarily limits design initiatives. For that reason, performance standards, where practicable, are favored.\textsuperscript{17}

To promote voluntary compliance with safety standards, manufacturers frequently adopt a certification program. Certification is the mechanism by which products are identified as conforming to a given standard or set of standards. It generally consists of seals, stamps, or endorsements which indicate conformity to the certifier's requirements. If the manufacturer certifies his own products, he acts as a self-certifier. Unfortunately, as the National Commission on Product Safety (N.C.P.S.) found, "[s]elf-certification too often is merely self-serving."\textsuperscript{18} Third-party certification, on the other hand, is normally done by an

\textsuperscript{15} As discussed \textit{infra} at note 22 and accompanying text, however, the use of the term "voluntary" to describe these industry-promulgated standards is misleading, since economic and other considerations exert an element of compulsion to comply with such standards. Cf. NCPS Final Report, at 48. A recent Federal Trade Commission study concluded that while most private standards activity is termed "voluntary," its economic effect is often no different than if the standards had the force of law. "In either case, the ability of a manufacturer to sell a product which does not meet the prevailing standard is severely restricted and in some cases may not exist at all. This is due to heavy reliance upon the standards by government procurement agencies, industrial buyers, local legislative bodies and increasingly by consumers, none of whom may possess the information or the expertise necessary to evaluate the standard itself or the true meaning of any certification based upon it." \textbf{Federal Trade Commission, Preliminary Staff Study (Precis): Self-Regulation—Product Standardization, Certification and Seals of Approval}, at 18.

\textsuperscript{16} NCPS Final Report at 47-48.

\textsuperscript{17} Id. at 48. Under Section 7(a) of the Consumer Product Safety Act, 15 U.S.C. § 2056(a), the Commission is authorized to promulgate consumer product safety standards consisting "of one or more of any of the following types 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." The Act goes on to caution, however, that "[t]he requirements of such a standard (other than requirements relating to labeling, warnings, or instructions) shall, whenever feasible, be expressed in terms of performance requirements."

\textsuperscript{18} NCPS Final Report at 48.
outside organization, supposedly free of the control or influence of the manufacturer. "At worst, certification may be employed primarily to gain the consumer's confidence rather than to assure compliance with high safety or quality standards."¹⁹

B. Economics

Given the complexity, difficulty, and cost of the effort,²⁰ why do the various producer groups write and pay for the development of voluntary standards for the products they manufacture? The answer, suggests the staff of the Federal Trade Commission, is two-fold:²¹

First, by lessening, for example, the amount of communication that would otherwise have to go on between the individual seller and his buyers in order to create a meeting of the minds on the essentials of quality, quantity, and price, the firm's—and, in the aggregate, the industry's—costs are reduced and, ultimately (assuming the presence of effective competition) prices to the consuming public.[²²] That motivation alone, however, would not, in many instances, be sufficient to produce the elaborate standardization and certification programs that exist in the in-

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¹⁹. Id. A properly validated idealized certification program can be beneficial. A product bearing the mark of a third-party certifier can represent a guarantee to the consumer that: (1) the product has been produced according to an accepted standard, which is publicly available for everyone's inspection; (2) its production has been carried out under continued supervision; (3) the product has been tested and inspected for conformity with the standard; and (4) the owner of the certification mark stands ready to redress any grievance flowing from the failure of the product to live up to the quality the presence of the mark signifies. See Verman, supra note 4, at 232. This latter guarantee of the certifier has led to legally enforceable rights of action by the victims of inadequate certification. See, e.g., Hempstead v. General Fire Extinguisher Corp., 269 F. Supp. 109 (D. Del. 1967) (Underwriters' Laboratories, which had arranged with the manufacturer to prescribe standards that would render the manufacturer's fire extinguisher safe for use, could be held liable under state law to one injured as a result of its negligent approval of the extinguisher design).

²⁰. The central coordinating body for the entire system of voluntary standardization in the United States is the American National Standards Institute (ANSI). See generally Opala, supra note 8. ANSI's two million dollar annual budget has been described as "severely limited," allowing "very little room for executing its total mission once the operating costs related to processing standards are met." Safety in the Marketplace, supra note 8 at 41. The American Society for Testing and Materials (ASTM), the largest standards writer in the country, has a staff of 150 with 120 national technical committees which have written nearly 5,000 voluntary consensus standards. See ASTM and Voluntary Consensus Standards, AMER. SOC. FOR TESTING AND MATERIALS (1973).

²¹. Preliminary Staff Study, supra note 15 at 9 (emphasis in the original).

²². Dividing up society into groups of "producers" (including processors, assemblers, and service agencies), "traders" (including wholesalers, retailers, importers, and exporters), "consumers" (including industrial and ultimate users), and "technologists" (including scientists, engineers, testers, and certifiers), Verman, supra note 4 at 44-45, lists the
dustries. The more compelling motive for the development of these programs is generally the fact that the buyers of the product, or at least those that are large enough to be able to do so, have demanded the development of this kind of information, thereby forcing the industry to produce it.

In other words, as is not surprising, producers develop standards largely in response to the market's demand for them, and because such standards are in the producer's economic self-interest.

In the producer-goods market, for example, commercial enterprises buy products from suppliers for incorporation into their own "producer-goods" and eventually, for retail sale to the consumer. In this highly organized producer-goods market, expert buyers at the producer level demand sufficient product information to facilitate the making of economical purchasing decisions. Adequate standards which enable such buyers to compare similar products in terms of their real economic value soon follow. In the consumer-goods market, however, the small quantities purchased

values served by standardization for each of these units as follows: For "producers," standards

1. provide short cuts to design procedures by furnishing ready-made and generally accepted solutions to recurring problems; (2) make possible longer production runs with fewer changes in production line and reduce tooling and set-up time; (3) streamline inspection and testing and enable quality control procedures to reduce rejections and re-working; (4) enable the procurement of raw materials, interchangeable parts and components from ready stocks without loss of time; (5) reduce stocks and inventory of materials, parts and end-products; (6) simplify servicing and maintenance; (7) facilitate training of staff and operators; (8) reduce overheads on clerical and administrative work; (9) facilitate marketing and winning of consumer confidence; and (10) as a consequence of all these factors, lead to higher productivity in every department, which means reduced costs, lower prices, higher sales and greater profitability.

According to Verman, those members of his "trade" class derive much of these same benefits from the existence of standards, as well as "facility in market expansion" and "greater turn-over and higher profit on investment," a "basis [upon] which procurement of stocks and their sales can be readily arranged to meet clearly defined customer needs," and the reduction to a minimum of "the possibility of misunderstanding leading to unnecessary trade disputes and arbitration proceedings—a great asset, particularly in international trade." Id. at 45.

Finally, after noting similar benefits for both "consumers" and "technologists," Verman turns to the "ultimate or everyday consumer—the common man." He, states Verman, "has been somewhat limited in his ability to profit fully from the benefits conferred by standards. . . . Suffice it to say here that though he may be somewhat limited in deriving the full scope of the benefits as compared to his counterpart, the industrial consumer, he nevertheless shares with the latter the possibility of deriving the same or similar benefits." Id. at 46.

For a similar example of Verman's hopelessly unrealistic view of the benefits to be derived by the ultimate consumer from the existing standardization process, see the text at note 36 infra.
by the individual consumer preordain to failure his efforts to obtain comparable product information through standards. As Tibor Scitovsky has succinctly noted:23

*I should regard the buyer's information as cause and the market's organization as effect; and I believe that the market's perfection depends on the buyer's expertness. For it is only the expert buyer who insists on comparing rival products before every purchase; and it is only his insistence on making comparisons that forces the seller—or rather makes it profitable for him—to make his product easily comparable to competing products. Hence the geographical concentration of the expert's market and the grading and standardization of products in such a market should not be considered data . . . . They are a result of a deliberate effort on the part of producers; and I believe that such an effort will only be made in the expert's market, in response to the expert buyer's demand for easy comparability.*

Without the information the individual consumer needs (which could be supplied by objective standards in the consumer-goods market just as it is furnished to the producer-goods market), he is unable to play his essential function in the free-enterprise system.24 This has especially serious consequences for product safety. "The theoretical function of the market is to arrive at mutually satisfactory cost-benefit ratios for buyers and sellers. As applied to product safety, the market in theory asks, given limited resources, what goods and performance should be traded off at what cost for the removal of specific hazards?"25 The problem, however, is that "[c]onsumers generally have no way of knowing how much more they would have to pay to obtain a comparable product as serviceable and less hazardous. Even when aware of a risk in a product, consumers cannot predict the frequency, severity, or probability of injury."26

Though hamstrung by limited information, the consumer in the marketplace still must engage in trade-offs. Most products cannot be 100% safe and, even if it were technologically feasible to make them so, the cost could be prohibitive.27 The consumer

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25. NCPS Final Report at 69.
26. Id. See also Rosenthal, Illusory Promises, 8 Trial No. 1 at 18 (1972).
27. Some products, however, may undergo quantum leaps in safety characteristics with only negligible cost increases. "The cost to the consumer of reducing injuries from
then must, within the limits of his own knowledge, balance the
cost to him of safety, performance, aesthetic quality, and main-
tenance, against the costs of other budget items before making the
purchasing decision.

The manufacturer also makes trade-offs. He balances be-
tween the costs of achieving performance, safety, the quality that can
be sold at a range of prices, consumer demand for safety,
spending money on safety vs. the sales organization or service
organization, or building durability into products, holding down
maintenance expenditure, advertising and other forms of pro-
motion, relative prices, etc. In short, the producers must analyze
the elasticity of response of the consumer in relation to the
variables to which the producer applies outlays.

But these trade-offs, made by both manufacturer and ill-
formed consumer in the competitive marketplace, hardly begin
to balance the vast social costs associated with dangerous con-
sumer products against their benefits. And that is where, in the
words of the N.C.P.S., “the transaction between manufacturer
and consumer will need assistance from a third party.”

C. The Government as Third Party

The role of this third party, so necessary in the view of the
N.C.P.S. to protect consumers from unreasonably hazardous
products, is to define, with the public interest in mind, the terms or even
the specific standards of safety which govern the transaction
between the manufacturer and consumer, to their mutual satis-
faction. The third party may substitute the judgment of a safety

explosions of soda bottles through 100 percent pressure testing works out to less than 2/10
cents per bottle.

. . . The cost to the consumer of reducing injuries from explosion of aerosol cans,
through the use of a safety vent, was said to be between 3.5 and 5.5 cents per can.
. . . It would cost next to nothing to color furniture polish so that children would not
mistake it for milk or sirup.” NCPS FINAL REPORT at 68.

9A, at IX-161. See NCPS FINAL REPORT, at 69.

29. The social costs of product injury, as summarized by the National Commission
on Product Safety, include, in addition to the generally nonquantifiable loss of consor-
tium, massive expenditures for health care facilities for, and delivery to, those injured
through safety defects, loss of income and tax revenues, and lost production. See NCPS
FINAL REPORT at 68.

30. Id. at 69.

committee with no funds at stake for the judgment of a manufacturer who risks his capital to offer the consumer a choice of products.

The third party may also substitute the committee's judgment for the consumer's supposedly free choice. . . .

Given authority, the third party may say that, in the interest of protecting others the manufacturer must accept a smaller profit or risk a large loss unless the consumer is willing to pay what it costs to reduce an unreasonable hazard to an acceptable degree.

Third party intervention also may, in some cases, tell the consumer how much of a risk he should accept, even when he is willing to accept a greater risk without regard for the consequences to others.

There is nothing unfamiliar about such third-party intervention in the economy. Third parties regulate a wide range of services and products, and they frequently supersede decisions by those who take the immediate and primary risk—producers and consumers. A producer, of course, risks only capital, while the consumer risks his money and his safety, perhaps even his life.

Writing in June, 1970, the N.C.P.S. concluded that: "[a]lthough there remains ample room for private enterprise to reduce undue risks, even in a competitive market, only a Government presence can require prompt compliance with responsible manufacturing practices in the interest of safety."32

It is now almost four years later, and although that third party governmental entity is alive in the form of the Consumer Product Safety Commission,33 the desirability of and necessity for such a public, instead of private, third party intervenor in the standards-writing business is still being questioned.34 For example, some skeptics continue to believe that the preexisting voluntary standards system is entirely adequate. Consider the following paean to the voluntary standards-writing process offered

32. NCPS Final Report, at 71-72. But see Friedman, A Libertarian Speaks, 8 Trial No. 1 at 22 (1972). Economist Milton Friedman argues, and not without some cogency, that "The consumer is best served when government intervention into business is minimal. . . . The basic uncontroversible fact is that improvements in services come from free, competitive enterprise. It is government which provides the shoddy products."

33. See notes 42.1-62, infra, and accompanying text.

34. See, e.g., Moore, Product Safety—Who Should Absorb the Cost?, 8 Trial No. 1 at 26 (1972) (arguing for enterprise liability rather than product safety standards to reduce product injuries); O'Connell, Expanding No-fault Beyond Auto Insurance: Some Proposals, 59 Va. L. Rev. 749 (1973); Friedman, supra note 32.
only a year ago by the Managing Director of the world's largest
standards writing body:35

Once upon a time in the far-away kingdom of Platonia, a child
was flying a kite, when a thunderstorm came up suddenly.
Lightning struck the kite, ran down the string, and killed the
child.

The citizens were horrified. The king responded with an
edict: "Kite strings shall not conduct electricity." The citizens
sat back in relief. But the men who made kite strings were in a
turmoil. They knew that everything conducts electricity, more
or less, and when it is wet, more rather than less. They peti-
tioned the king to be more explicit.

So the king studied the matter. Twelve months later he
issued a new royal edict telling more precisely what conductivity
would be allowed in kite strings and under what conditions.

The kite string makers went back to their plants and se-
lected materials to meet the new edict, and soon children
throughout Platonia were happily flying kites with the new
strings.

But before long the children were complaining of sore and
bleeding hands. The surface of the new string material was too
abrasive for their tender flesh.

So the king issued a new edict, and the manufacturers re-
ponded by treating their kite string material to make it less
abrasive.

This time, when the children took to the fields and pastures
of Platonia, their kites began flying off in all directions, because
the strings were breaking.

So the king amended his edict once again, adding a mini-
mum tensile strength requirement.
Now the kite strings held, but they were so strong and stiff that
the children were unable to wind them on their bobbins without
much snarling and kinking.

Again the king issued a pronunciamento. The manufactur-
ers devised a chemical treatment to relax the string material
without sacrificing its strength.

For some months it appeared that the problem was solved.
But then a strange rash began to appear on many of the chil-
$dren's$ hands. The king's dermatologist told him that these chil-
dren apparently were allergic to the chemicals used by the string
manufacturers.

The king demanded that the chemical treatment be
changed.

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35. Cavanaugh, Standards the Hard Way, ASTM Standardization News, February,
After much laboratory work and more than two years of allergy tests, the manufacturers perfected a treatment for their strings to replace the rash-producing one.

This time, however, when the children rushed out to try their new kite string material, to their great disappointment the kites refused to fly, except in the very strongest of gales. The new string was too heavy.

By now, it was nearly seven years since the lightning tragedy. The price of kite string was so high that only the children of the wealthiest families could afford to fly kites. Manufacturers were abandoning kite string for other products. The old king had died. His young successor decided to try a new approach. He formed a Royal Committee on Kite Strings, to which he appointed certain of his subjects who were experts on materials of every kind, several of the remaining string manufacturers, the most precocious of the young kite fliers, the Court Physician, the Royal Treasurer, and other sundry sages. "Give me," he said, "a full consensus standard for kite strings."

Which was a Solomon-like move. To do some things, a committee is no way; to do others, it is the only way.

Or consider this excerpt from Verman's comprehensive text, entitled *Standardization*:

The most remarkable historical development in the realm of standardization has been the evolution of the authority which makes voluntary standards effective instruments for guiding commerce and industry and thus constituting an economic force in national life and also in international trade. *This is brought about mainly by following the consensus principle in preparing standards*, by which the largest possible agreement is secured among all interests concerned with the use of standards, such as the producer, the user, the trader and the technologist. Once all these interests have agreed and a common ground upon which to base the standard has been found, the standard acquires an authority possibly much more powerful than a legal instrument might which has secured only a 51 percent majority vote in its favour. . . . Standardization through consensus does sometimes mean compromises to be made, but then it is always much more practical to have voluntary standards prevail where constant policing is neither feasible nor necessary . . .

The question has sometimes been asked: if the consensus principle has been so successful in voluntary standardization, why can't it be extended to other spheres of man's activity, such

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36. Verman, *supra* note 4, at 11-12 (emphasis added) (footnotes omitted).
as the democratic decisions to be made in his political and social affairs? [footnote omitted]. A time may come when the commonly prevailing 51 percent majority rule may yet be replaced by the consensus principle and man may as a result begin to live more harmoniously under a new form of democracy in which every voice would carry its own weight, however small, and decisions would be made more on the basis of weightages of the complex needs of society as a whole rather than on what the party holding 51 percent seats might have decided. Exactly how this state of affairs would be brought about is not quite clear, but it may well be the next step in the evolution of democracies that govern the majority of humanity today.

When the rose-colored glasses of the apologists are removed, however, the all-too-dismal prior record of the voluntary consensus groups, at least in the field of consumer product safety, is revealed. The consensus principle in reality bears little resemblance to these Disneyland versions of its attributes. Morris Kaplan, then Technical Director of Consumers Union of United States, Inc. (Consumers Union) offered a very different view in testimony before the National Commission on Product Safety:37

The industry representatives dominate the meetings. The consensus principle means in practice that the industry people have veto power over any action taken by the committee. . . . In effect, then, the object of the exercise is to get industry agreement, often arranged before the meeting anyway, and to push the standard through the paperwork of [the standard group’s] procedures so that it may be issued as a [national] standard. Our proposals [as consumer representatives], our negative votes, are given “due deliberation,” which is the phrase used in examining negative votes, but are ultimately vetoed or overridden, as without merit. After a while it seems fruitless to spend the time and money to go to such meetings. . . . If standards for consumer goods in general and safety standards in particular are to be developed and used in the consumer interest, a better way will have to be found than this consensus principle. Volunteerism and token consumer representation have been generally unsuccessful in protecting the consumer interest, and for the reasons given, can be expected to be no more effective in the future.

Indeed, the safety record of the voluntary standards-writing consensus groups bears out this dismal portrait. In 1970, when the

37. NCPS HEARINGS, vol. 1, I-296-98. See also Opala, supra note 8, at 53-54.
National Commission on Product Safety finished its work, it estimated that there were approximately 20 million consumer product-related injuries a year, 110,000 of which left their victims permanently disabled, and 30,000 of which were fatal. These estimates are conservative. Yet, while this carnage was continuing unabated, the NCPS noted that the 48 leading voluntary standards-writing organizations had already promulgated more than 1,000 industry standards applicable in some fashion to the safety characteristics of the 350 product categories it surveyed.

No wonder, then, that the NCPS concluded that "[t]hese [voluntary] standards are chronically inadequate, both in scope and permissible levels of risk." It went on to state that

[i]n no standards procedure can it be said that consumers have a substantial voice. Rarely have they an effective veto. Safety itself has been a secondary consideration in the usual process of developing voluntary standards. The need for a consensus commonly waters down a proposed standard until it is little more than an affirmation of the status quo. . . .

Dependence on industry financing and technical experts who are paid by industry as regular employees, consultants, or contractors tend to subordinate national interest to private ends. Compliance with voluntary safety standards consists in large part of an honor system which has proven on occasion to be less than honorable.

Moreover, these voluntary organizations have a substantial history of failing to comply even with their own written procedures. Thus, in 1968, in its report to the Select Committee on Small Business of the United States House of Representatives, a subcommittee concluded that:

The records of hearings . . . are replete with examples of

38. "In the few months since we've been in business, we've analyzed some of our data and believe the National Commission's injury estimates are LOW (emphasis original)! Now I don't particularly like to play the numbers game, but suffice it to say, we are dealing with more like 25 to 30 million injuries a year." Remarks of Richard O. Simpson, Chairman, Consumer Product Safety Commission, before the 4th Annual Product Liability Prevention Conference, Newark College of Engineering, Newark, New Jersey, Aug. 22, 1973.


40. Id. at 62.

41. The Effect Upon Small Business of Voluntary Industrial Standards, Report of
code bodies not following their own procedures and trade associations hiring officials of the code-writing bodies to, in effect, lobby their former colleagues. It would not appear that tactics of this sort are calculated to serve the public interest.

It was against this background that Congress wrote the Consumer Product Safety Act. In so doing, the recommendation of the National Commission on Product Safety that a third party was necessary to assure the protection of consumers from unreasonable hazards, and that, indeed, the third party could only be constituted from the public sector, was accepted.

D. Consumer Product Safety Standards

The Consumer Product Safety Commission is that third party. Now at full strength, it began operations with four of its five Commissioners on May 14, 1973. The Commission, created by the Consumer Product Safety Act, has wide-ranging powers and responsibilities over consumer products, designed

(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.


42.1. Id.

43. The Act defines the term "consumer product" as including "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," but then goes on to list nine product areas where the Commission's jurisdiction is limited. Act, Section 3(a)(1), 15 U.S.C. § 2052(a)(1). The Commission apparently plans to read this grant of statutory authority broadly. In response to a petition from Consumers Union, for example, seeking the ban of the live pet turtle as a "hazardous product" since it causes many thousands of cases of Salmonella-poisoning each year (which cannot be eliminated by commercial breeding techniques), the Commission's General Counsel ruled that notwithstanding the general emphasis in the Act upon the inanimate, such live animals are within the Commission's grant of statutory authority. See Current Report, BNA Prod. SAFETY & LIAB. RPRTR., at 123 (Feb. 15, 1974).

Our focus is only on the standards-making powers of the Commission. When the Commission determines that the adoption of a safety standard for a given product is necessary to protect consumers from an unreasonable risk of injury, it commences a proceeding by inviting interested parties to submit within thirty days either an existing voluntary standard or an offer to develop a product safety standard. Unless the Commission accepts an existing voluntary standard as adequate to the task, it must accept one or more offers by qualified offerors responding to its invitation to develop an appropriate standard within a narrowly prescribed period of time. The standards development process, under the direction of the offeror, must be open for public participation.

If the Commission has not received an offer within thirty days after publication of its notice, or if none of the selected offerors is making suitable progress in its developmental work, the Commission may develop its own proposed safety standard. When the sole offeror is the manufacturer, distributor, or retailer of the consumer product proposed to be regulated, the Commission may proceed independently to develop its own proposals for a safety rule. Once the work of the offeror is completed, the Commission may publish in the Federal Register a proposed consumer product safety rule for formal hearing or, absent a proposed ban of the product, discontinue the proceeding altogether.

Within a limited period of time after proposing a product safety rule, the Commission must reach a final decision as to its

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These articles, and other works such as The Consumer Product Safety Act written by the Editorial Staff of the Bureau of National Affairs, Inc., provide ample background material on the non-standards aspects of the Act and the Commission.

46. See Act, §§ 7, 8 and 9, 15 U.S.C. §§ 2056-58. An excellent critique of this scheme is found in Scalia and Goodman, supra note 45, at 906-08.

47. This provision in the Act reflects the concern of the Congress for the severe deficiencies in the voluntary standards-writing process. During its consideration of the
contents. Before the final decision, all interested parties must again be given an opportunity to present their views. The end result is a “consumer product safety standard”.

This procedure for the promulgation of consumer product safety standards is unique. Ordinary informal “notice and comment” rule-making under the Administrative Procedure Act requires, as a first step, the publication in the Federal Register of the agency’s proposal for comment by interested persons. Not so, however, under the Consumer Product Safety Act. Here, the first required step is not publication of a proposed rule, but rather of the agency’s determination that a rule is necessary, and an invitation to all interested parties to help write it. The invitation comes, therefore, at a time when the agency itself is still in the process of developing its own initial proposals, and not after those proposals have been formalized for comment. It is only after this initial invitational phase is completed that the informal rulemaking under the Administrative Procedure Act proceeds.

As Scalia and Goodman have pointed out:

Depending on how they are interpreted and applied, the “pre-rulemaking procedures” of Section 7 may constitute anything from the very core of the rulemaking process to a set of troublesome but inconsequential preliminaries. In and of themselves, these procedures have little operative effect. They do not produce a rule, or even a proposed rule, but rather a proposal for a proposed rule—which, if accepted by the Commission, then becomes nothing more than the basis for debate in the

Act, the Senate had adopted amendments offered on the floor by Senator Nelson which excluded from the class of prospective standards-writers any person who is a “manufacturer, distributor or retailer . . . of a consumer product proposed to be included in the consumer product safety standard to which the offer applies.” In explaining the purpose of his amendment, Senator Nelson commented: “The most serious condemnation of the voluntary standards system which emerged from the studies of the Product Safety Commission and others—upon whose recommendations this entire bill is based—was the chronic tendency of the standards committees to be dominated by companies with an economic stake in the product. . . . Because consumers have had little or no voice in the voluntary standards-making procedures, the standards have been industry dominated.” 118 Cong. Rec. S99256 (daily ed., June 21, 1972). The House, however, did not prohibit the acceptance of offers from offerors who were manufacturers, distributors, or retailers. In Conference, the final provisions of the Act were worked out as a legislative compromise, with the caution, however, that these “provisions should not be interpreted . . . as preventing the Commission or its staff—while awaiting the submission of recommended standards—from developing or acquiring the technical capability necessary to properly evaluate the standards recommended to it.” H. Rep. No. 92-1593, 92nd Cong., 2d Sess., 14 (1972).

48. Scalia and Goodman, supra note 45 at 908.
rulemaking proceeding under Section 9.

One of the major issues of procedural policy the Commission will face is the importance it wishes to assign the Section 7 stage of the rulemaking process.... It may rely heavily upon its selection of an appropriate developer and upon its specification of development procedures (pursuant to Section 7(d)(3)) to assure a proposal which can ordinarily be adopted without substantial independent work. Or it may instead plan to devote a large portion of its own resources to standards development, and treat Section 7 as essentially a means of placing useful private suggestions before its staff.

On May 7, 1974, the Commission published final rules to govern this “offeror” process. These rules clearly indicate the importance which the Commission attaches to the development of standards by offerors. Among the “general policy considerations” underlying their formulation, the proposed rules establish that “[t]he general policy under which [these] procedures... are issued is that the interest and participation of the public is vital for carrying out the functions of the Consumer Product Safety Commission.” They go on to state that “since safety standards are intended to eliminate or reduce unreasonable risks of injury associated with the use of consumer products, the Commission, in issuing these rules, seeks the involvement of all interested persons, the general public and especially, ultimate consumers.” Moreover, they stipulate that “[p]ersons who are not members of an established organization may form a group for the express purpose of submitting offers and developing standards”; that “[p]ublic involvement will be encouraged through the use of extensive public notice”; and that the provisions of the Act permitting the Commission to contribute to the offeror’s costs in developing as standard should provide the means by which “a cross section of interested persons, including consumers, can participate in the development of standards.”

Obviously, then, the Commission intends to make its offeror program the heart of its standards-writing effort. Moreover, the rule jettisons the “consensus” approach to standards writing. It explicitly provides that “unanimity among all participants [in the offeror process] shall not be a prerequisite to the submission by the offeror to the Commission of a standard which, in the

48.2. Id.
49. See notes 35-37, supra, and accompanying text.
offeror's judgment, optimally meets the terms of the offer accepted by the Commission."^{49}\footnote{49. 39 Fed. Reg. 16206, 16215.}

Commissioner Lawrence Kushner, when asked if he thought the Commission would adopt many of the existing voluntary standards, stated:^{50}\footnote{50. Interview with Consumer Product Safety Commissioner Lawrence Kushner, \textit{Current Report}, BNA \textit{PROD. SAFETY AND LIAB. RPR.}, at 7 (Jan. 4, 1974).}

In my view, it's very, very unlikely that an existing voluntary standard would be appropriately made mandatory.

... First of all, if the standard was developed by a consensus method, its principal feature was that it was acceptable to everybody, not that it reflected the best that was available, even within the existing state of the art. And for us to make such a standard a matter of law seems to me not to be a good practice ...

In fact, although petitions have been submitted to the Commission urging the adoption of voluntary standards, it has uniformly declined such invitations. Instead, it has thus far directed that all such standards-writing efforts be channelled through the offeror process.\footnote{51. \textit{See, e.g.}, \textit{Current Reports}, BNA \textit{PROD. SAFETY AND LIAB. RPR.} at 792 (October 19, 1973).}

On paper then, the Commission's offeror program—the prime process chosen by the Commission to generate consumer product safety standards—would appear to be in fine shape. In fact, though the first anniversary of the Commission's activation has already passed, it is hardly off the ground, and is still under a cloud of unresolved policy questions which could hobble the

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What Section 7 [of the Act, dealing with the offeror process] envisages is that this group [of non-professionals] would be the ones which would offer the invitation to the experts in the field to sit down around the table, and on a schedule that they determine, to try to write the standard. Regardless of who the successful offeror is, I would imagine that essentially the same people, the same group of experts, would be involved in developing the standard. It still will be principally industry-type people who will be sitting down at the table. But, as I said, the table will be somebody else's table. This is not a trivial distinction because the schedule will be different depending who the offeror may be. The group that is administering the development of the standards will have a lot to do with the rate at which the standard is developed. ... [If consumer groups] don't come forward and really take advantage of the opportunity which we will be presenting under Section 7 rulemaking regulations, then I can only conclude that it's a lack of interest, and to my way of thinking, that would be a lack of responsibility on their part. \textit{Id.}


\end{footnotesize}
If the Commission's offeror program is to live up to its promise of generating effective consumer product safety standards through widespread participation, it must resolve two areas of criticism. First, it must find a way to encourage the ongoing activities of the voluntary standards-writing groups while maintaining objectivity in reviewing their work product. Second, the Commission must overcome its current difficulties in effectively com-

62. The Commission has already committed itself to commencing proceedings on the following product groups: matches, swimming pools, lawnmowers, architectural glass, and electric extension cords. The next targets for regulations are likely to include space heaters, water heaters, furnaces, ovens and ranges, irons, ladders and liquid fuels. See Product Safety Letter, at 1 (Jan. 28, 1974).

63. The Act permits the Commission to publish an existing voluntary standard as its own if it determines that such a standard "would eliminate or reduce the unreasonable risk of injury associated with the product." Act § 7(c)(2), 15 U.S.C. § 2056(c)(2). This requires the Commission to examine voluntary standards it might adopt with some care. See H. Rep. No. 92-1152, 92d Cong., 2d Sess., at 14-15 (1972). The Commission is also authorized to "assist public and private organizations, administratively and technically, in the development of safety standards and test methods." Act, § 5(b)(3), 15 U.S.C. § 2054(b)(3). This would seem to permit Commission participation in the internal workings of the voluntary standards groups.

The Commission has established an Office of Standards Coordination and Appraisal for handling these two tasks. It is "responsible for the development of standards and rules for all standards developed by the Commission or by an offeror. It considers the legal, technological, economic, and social impact of proposed standards. . . . It establishes the governing policies for and encourages the development of standards by other agencies, organizations and offerors. . . . It coordinates or calls industry-CPSC meetings during standards development or potential standards development phases and establishes criteria for and determines the adequacy of standards development offerors." Organization of the Consumer Product Safety Commission, Order No. 130.1, at 3-4 (May 14, 1973).

Unfortunately, because this one office of the Commission is given these simultaneous responsibilities under the Act (i.e. to evaluate existing voluntary standards for possible Commission use and to encourage the development of voluntary standards by private groups), it and the Commission are locked into a disturbing potential conflict-of-interest pattern. If the Commission, its Commissioners, or its employees are members or active supporters of a private standards organization, and a standard proposed by such an organization is subsequently adopted by the Commission, charges that the Commission's action was taken or influenced as a result of the employee's membership in the private organization can surely be anticipated. Further, it is quite possible that an employee's membership in a particular standards organization may lead him to favor that group with which he is familiar, over another equally qualified group. And needless to say, any "suggestions" from a Commission employee to a private standards organization in which he plays an active role as to the direction the organization might follow in formulating a safety standard—even if labeled as the individual opinion of the suggestor and not that of the Commission itself—would carry extraordinary weight. In short, membership or active non-membership participation in the affairs of private standards-writing groups creates the appearance of giving preferential treatment, and is probably prohibited by existing statute and regulation. See 5 U.S.C. §§ 4410, 5946; 5 C.F.R. §§ 735.201(a)(b), a(d), a(f); 38 Comp. Gen. 800 (1959). Each of these issues has been thoroughly discussed
municating with, and responding to, requests for action from individual consumers and their relatively underorganized representatives.54

The potential of the Commission's offeror program is as yet unfulfilled. If that potential is realized, the primacy of consumer protection as the goal of product safety standardization will at last be assured.

II. CONSUMER PRODUCT SAFETY STANDARDS IN THE COURTS

A. Overview

Mandatory government safety standards for consumer products, such as those which will be formulated under the Consumer

in a publicly available memorandum by the Commission's Office of General Counsel on "Membership of the CPSC in Private Standards Setting Organizations," dated January 3, 1974. The memorandum also discusses potential antitrust enforcement problems associated with governmental participation in these groups.

This institutional problem, created by the Act itself, has been examined at the Commissioner level. It is a significant policy question which, unless promptly and fairly resolved, could seriously impair the integrity of the nascent offeror program.

54. Ralph Nader's Health Research Group, for example, focusing on long-pending petitions on toys and children's sleepwear, has severely criticized the Commission for its inability to respond rapidly to important problems, and for its failure to issue standards already proposed by its predecessor agencies. It complained about "the failure to promulgate regulations months and even years after they have been proposed and the period for comment has run"; "the inability to answer petitions, letters or requests within a reasonable time"; "the failure to communicate, with any dispatch, Commission decisions to those most immediately affected by them"; "an inability to inform parties, interested persons and, perhaps, other sections of the Agency itself on the current status of matters under investigation or the subject of formal deliberations"; "a weak and uncoordinated enforcement effort"; and "a failure to develop housekeeping regulations that would clarify responsibility and procedure for various duties." It concluded by noting that it did "not mean to suggest that the Commission [was] in a state of chaos. What concerns us are our fears that a continuance of the present pattern of inaction or non-response, particularly as the Commission embarks on standard setting, may seriously undermine [its] ability to maintain the level of performance which consumers have a right to expect." Current Report, BNA PROD. SAFETY AND LAB. Rpr., at 85 (February 1, 1974).

The Commission is slowly moving to remedy these administrative problems, and much to its credit. It has established a meetings policy requiring advance public notice of outside contacts at the Commissioner and staff level and an "openness" about the way it conducts its business which is unprecedented in the federal bureaucracy. See 16 C.F.R. § 1001.60; Current Report, BNA PROD. SAFETY AND LAB. Rpr., at 758 (Oct. 5, 1973). It has also published a "consumer product hazard index based on the frequency and severity of injuries reported to hospital emergency rooms" to serve as a general guide to its priorities in establishing safety regulations. See id. at 707 (Sept. 28, 1973).

It has not done well, however, in setting meaningful priorities among the consumer-initiated petitions it has received. For example, despite an alarming injury pattern involving thousands of children each month in potentially serious illness, in the admittedly biased view of the authors the Commission has yet to take significant action on the petition of Consumers Union to ban the sale of pet turtles as an irremedial source of salmonellosis. See id. at 943 (Dec. 14, 1973); at 123 (Feb. 15, 1974). In contrast, when
Product Safety Act, will profoundly affect the relationship between the manufacturer and the marketplace. But the effects of product safety standards may extend far beyond penalties for non-compliance and into the courts through the medium of civil tort litigation. Even with a greatly increased number of mandatory safety standards, injured consumers will continue to initiate lawsuits to seek recovery for product-related injuries. As the Consumer Product Safety Commission gears up its operation, and sets standards for various products, the courts will ever more frequently be faced with the question of determining the relevance of those standards in private tort litigation.

Although mandatory government safety standards are a relatively recent phenomenon, and although the first consumer product safety standard has yet to be issued under the Consumer Product Safety Act, the courts are nevertheless thoroughly familiar with the general concept of a "standard". Standards are in-

Consumers Union recently asked the Commission to ban a two-dollar gadget which had the possibility of delivering a lethal electrical shock, but about which the Commission apparently had not even a single confirmed report of injury, the Commission completed its testing and evaluation of the product, and stopped its distribution within days rather than months. See PROD. SAFETY LETTER, at 1 (Feb. 11, 1974).

To aid the Commission in setting priorities among the consumer-initiated petitions it receives, and to serve as an institutional focus within the Commission for consumer input, Consumers Union has urged the Commission to create the staff position of "Consumer Counsel", patterned after the "Consumer Safety Advocate" post recommended by the National Commission on Product Safety, but not made part of the final Act. See NCPS FINAL REPORT, Proposed Consumer Product Safety Act, at 5-6. As the Chairman of the National Commission on Product Safety had made clear, the purpose of this independent safety advocate was to have been to help "safeguard against the weaknesses . . . observed in existing agencies . . . and to build a kind of tension into the agency." Elkind, supra note 45 at 54.

The responsibilities of a "Consumer Counsel", as outlined by the Consumers Union proposal, would include:

(a) reorganizing the consumer complaint handling operation of CPSC, (b) advising CPSC as to the impact on consumers of potential CPSC decisions, (c) representing and articulating consumer viewpoints, especially at the CPSC staff level at the formative stages of policymaking, and (d) establishing liaison with consumer organizations and representatives, alerting them to ongoing activities of CPSC and aiding them in formulating sound and supportable policy positions for CPSC consideration.

Unless the Commission, either through the appointment of a Consumer Counsel, or by some other technique, makes changes in the manner in which it responds to individual and consumer group requests for action, it may be unable to generate widespread interest and participation among these groups and individuals in the arduous task of standards-writing under the Commission's offeror program.

54. 15 U.S.C. § 2051 et seq. See notes 42.1-54 supra, and accompanying text.
57. See notes 46-51, supra, and accompanying text.
volved in both negligence and strict products liability tort actions.

Recovery in tort under a negligence theory, for example, is premised upon the concept of a legally recognized duty to conform to a standard of conduct or a standard of due care. To the injured plaintiff falls the initial task of defining the duty and delineating a standard of conduct which the defendant failed to meet.

Dissatisfaction with negligence and warranty theories as the bases for recovery by injured consumers, however, led to the development of strict products liability as an alternative cause of action. This development aroused great hope that the injured would be freed of the considerable burden imposed by the law of negligence. Unfortunately, as is well documented in the literature, this hope has largely been dashed. The plaintiff in a strict liability case no longer must set forth a standard of due care which the defendant has failed to meet, but still need prove that the product which caused the injury contained a "defect." Although the concept of defectiveness has eluded precise definition, proof of "defect" invariably requires a showing of deviation from a norm. Therefore, under any of the prevailing tort theories, the court, of necessity, must be concerned with a standard of conduct which the defendant failed to meet. An examination of the treatment by the courts of such standards in tort litigation

61. The most widely accepted formulation of this relatively new tort is that of Restatement (Second) of Torts § 402A:
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, 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.
(2) The rule stated in Subsection (1) applies although
should shed some light on the future role of consumer product safety standards in the courts. It is to this examination that we turn.

B. Industry Custom and Voluntary Standards in the Courts

Industry custom has played a pervasive role in tort litigation. The generally accepted safety practices within an industry—its customs—are essentially precursors to its formalized safety standards.

Failure to follow industry custom has long been recognized as evidence of negligence. On rare occasion, such failure has even been deemed the equivalent of negligence per se. Compliance with custom, however, though routinely admitted as evidence of proper conduct, is, almost without exception, never taken as the conclusive measure of duty or due care. As Justice Holmes succinctly stated, "What usually is done may be evidence

(a) the seller has exercised all possible care in the preparation and sale of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

The Restatement formulation has recently been criticized as "burden[ing] the injured plaintiff with proof of an element which rings of negligence," Cronin v. J.B.E. Olson Corp., 8 Cal. 3d 121, 132, 501 P.2d 1153, 1162, 104 Cal. Rptr. 433, 442 (1972). The alternate formulation of the tort is that of Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 62-63, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963): "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."


Because the standard of conduct is a judicial concern in both negligence and strict products liability cases, references in the remainder of this article to negligence concepts are also intended to include strict liability causes of action.

See, e.g., Gorman v. United States Lines Co., 7 Cal. 3d 488, 501-502, 102 Cal. Rptr. 795, 498 P.2d 1043 (1972) and cases cited therein (custom as admissible evidence for its bearing upon contributory negligence).

See also, Rhode Island Hospital Trust National Bank v. Swartz, Bresenoff, Yavner & Jacobs, 455 P.2d 847, 852 (4th Cir. 1972).

67. See Restatement (Second) of Torts, Section 295A: "In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them"; HARPER AND JAMES, 2 LAW OF TORTS $17.3 (1956). See also, Princemont
of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.\(^8\)

Voluntary standards\(^6\) have similarly received this two-level treatment from the courts. They are generally admitted as evidence on the negligence issue;\(^9\) they are virtually never taken as a conclusive measure of duty or due care.\(^7\)

Industry custom and the tort standard of due care are, therefore, interrelated but not identical concepts. And, as with its logical successor—the formalized voluntary standard—industry


\[\text{68. Texas & Pacific Railway Co. v. Behymer, 189 U.S. 468, 470 (1903).}\]

\[\text{69. For a definition and discussion of voluntary standards, see notes 15-30, supra, and accompanying text.}\]

\[\text{70. See L. FRUMER and M. FRIEDMAN, 1 PRODUCTS LIABILITY §5.04. Compare Post v. Manitowoc Engineering Corp., 88 N.J. Super. 199, 211 A.2d 386, 391 (1965) and McComish v. DeSoi, 42 N.J. 274, 200 A.2d 116, 120-23 (1964) with Vroman v. Sears, Roebuck & Co., 387 F.2d 732, 737-38 (6th Cir. 1967) and Swearngin v. Sears Roebuck & Co., 376 F.2d 637, 640-41 (10th Cir. 1967). In McComish, supra, a leading case, expert witnesses had testified that the cables and clamps used in the construction of an “A” sling were not in accord with various safety codes and manuals, and that these manuals set up standards of safe practice in the field. In holding that the safety codes or manuals were admissible in evidence on the issue of negligence, the McComish court stated:}\]

\[\text{The basic test as to the responsibility of [the manufacturer] here is whether reasonable care was exercised in the construction and assembly of the A sling. That is the standard to be used and departure or deviation therefrom is negligence. In applying the standard reasonable men recognize that what is usually done may be evidence of what ought to be done. And so the law permits the methods, practices or rules experienced men generally accept and follow to be shown as an aid to the jury in comparing the conduct of the alleged tortfeasor with the required norm of reasonable prudence. It is not suggested that the safety practices are of themselves the absolute measure of due care. They are simply evidence of ‘how to’ assemble the sling as commonly practiced by those who have experience in doing it. It is important that their limited function and probative force as evidence be appreciated. What ought to be done is fixed by the standard of reasonable prudence, and in law that requirement remains the same whether it is usually complied with or not. Thus, what is usually done in a particular industry cannot be regarded as what ought to be done unless the conduct and the test are in harmony.}\]

\[\text{200 A.2d at 121 (emphasis added).}\]

\[\text{71. See, e.g., Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392, 396 (1932) (“Obviously, manufacturers cannot, by concurring in a careless or dangerous method of manufacture [as prescribed by the American Society of Mechanical}\]


custom in safety-related areas has set something less than a blistering pace in reducing human injury.\textsuperscript{72}

\textbf{C. Statutes and Regulation in the Courts}

Unlike industry custom and voluntary standards, statutes, the formal public reflection of the total community's judgment about requirements for its own safety and health, are treated by the courts in tort litigation with considerable respect.\textsuperscript{73} Where relevant, courts always admit statutes as evidence on the issue of negligence at the instance of either the plaintiff or the defendant.\textsuperscript{74} And most jurisdictions treat the violation of a statute which was meant to protect the plaintiff from the type of harm complained of, and which was the proximate cause of the harm, as negligence \textit{per se}.\textsuperscript{75} Defendants, however, are still precluded

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  \item [\textsuperscript{73}] See notes 37-41, supra and accompanying text; The T.J. Hooper, 60 F.2d 737, 740 (2d Cir.), \textit{cert. denied sub nom.} Eastern Transportation Co. v. Northern Barge Co., 287 U.S. 682 (1932). In \textit{The T.J. Hooper}, barges towed by tugboats were lost off the New Jersey coast in an easterly gale. The tugs carried no radio receivers with which to obtain warnings of the changing weather conditions. Even though only one tugboat line customarily equipped its tugs with receiving sets, the trial court ruled that the tugs, which were not so outfitted, were unseaworthy. Judge Learned Hand, affirming that judgment for the Court of Appeals, stated:

  \text{[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It never may set its own test, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission. 60 F.2d at 740.}

  \item [\textsuperscript{74}] See, e.g., \textit{Restatement (Second) of Torts:}

  \text{§ 288B. Effect of Violation}

  (1) The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.

  (2) The unexcused violation of an enactment or regulation which is not so adopted may be relevant evidence bearing on the issue of negligent conduct.

  \text{§ 288 C. Compliance With Legislation or Regulation}

  Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.


  \item [\textsuperscript{76}] See, e.g., Kinney v. Smith, 35 Idaho 328, 508 P.2d 1234, 1237 (1973); Hall v.
from asserting that compliance with a statute is conclusive on the question of due care, since reasonable men may have done more.\textsuperscript{76}

Municipal ordinances, administrative regulations, and other pronouncements of lesser consequence than state or federal statutes do not fare quite as well at the hands of judges. Although they are routinely admitted into evidence, it is less common that proof of their violation is treated as negligence \textit{per se}.\textsuperscript{77}

The courts, in sum, are not strangers to specific and detailed standards in civil litigation. Such standards have regularly been admitted into evidence on the issue of due care, and, where the standards have been formulated through governmental procedures, they have been elevated to a most important role in the plaintiff’s, though not the defendant’s, case.

\textbf{D. Product Safety Standards in the Courts}

The primary technique that will be utilized by the Consumer Product Safety Commission to reduce unreasonable risks of injury from consumer products is the issuance of consumer product safety standards. Although products likely to be the subject of regulation have been targeted by the Commission, the first such

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76. “Compliance with a law or administrative regulation relieves the actor of negligence \textit{per se}, but it does not establish as a matter of law that due care was exercised.” Berkebile v. Brantley Helicopter Corp., 219 Pa. Super. 479, 281 A.2d 707 (1971); Grand Trunk Ry. Co. v. Ives, 144 U.S. 408 (1892).

\end{quote}
safety standard has yet to be promulgated. Therefore, no judge has yet been confronted with the problem of determining the status of mandatory consumer product safety standards in private tort litigation. However, judicial attitudes toward industry customs, voluntary standards, and statutes and ordinances, as well as the Consumer Product Safety Act itself, provide reliable guideposts for predicting the manner in which consumer product safety standards will be received by the courts.

Consumer product safety standards, like statutes, bear the imprimatur of public approval, and their violation is punishable by criminal and/or civil penalties. Consumer product safety standards should, where relevant, always be admitted into evidence on negligence issues at the instance of either the plaintiff or the defendant. Industry custom and voluntary standards are routinely accepted as probative of due care or its absence. Yet, custom and voluntary standards, unlike statutes and consumer product safety standards, largely reflect only the affected industry's collective perception of requisite minimum safety precautions. Consumer product safety standards, however, involve far more comprehensive determinations. These standards may not issue without findings with respect to:

(A) the degree and nature of the risk of injury the rule is designed to eliminate or reduce;
(B) the approximate number of consumer products, or types or classes thereof, subject to such rule;
(C) the need of the public for the consumer products subject to such rule, and the probable effect of such rule upon the utility, cost, or availability of such products to meet such need; and
(D) any means of achieving the objective of the order while minimizing adverse effects on competition or disruption or dislocation of manufacturing and other commercial practices consistent with the public health and safety.

and the additional conclusions that:

(A) . . . the rule (including its effective date) is reasonable necessary to eliminate or reduce an unreasonable risk of injury associated with such product;

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78. See note 52 supra, and accompanying text.
80. See notes 73-77 supra, and accompanying text.
81. See notes 65-72 supra, and accompanying text.
82. See notes 35-41 supra, and accompanying text.
the promulgation of the rule is in the public interest; and
(C) in the case of a rule declaring the product a banned hazardous product, that no feasible consumer product safety standard under this chapter would adequately protect the public from unreasonable risk of injury associated with such product.

It follows, then, that consumer product safety standards, like safety statutes and their less illustrious brethren, industry custom and voluntary standards, should be admitted into evidence in private tort litigation on the issue of due care.\(^8^5\)

Whether failure to comply with consumer product safety standards should be considered, as are statutes, negligence *per se*,\(^8^6\) is a slightly more difficult question. General safety statutes, such as traffic laws, are directed to the public at large whose members may or may not be aware of their content. By contrast, consumer product safety standards are aimed at, and regulate the conduct of, well-defined groups: manufacturers, distributors, retailers, and importers. These groups, which profit from the sale of the regulated products, not only have the opportunity to participate directly in the formulation of the standards by which their products are regulated, but also are ignorant of their provisions at pain of substantial penalties.\(^8^7\) Thus, while a sense of injustice might be aroused when the violation of a general safety statute results in a finding of negligence *per se* against a member of the general public,\(^8^8\) the same sense of injustice would not be engendered by a rule which imposes upon a special highly knowledgeable class a similar level of responsibility for complying with consumer product safety standards. Indeed, judicial treatment of the violation of such standards as negligence *per se* will further the general purposes of the *Consumer Product Safety Act*.\(^8^9\)

There is no doubt, however, that compliance with consumer product safety standards should never be considered conclusive on the question of due care. No extra-judicial standard—be it industry custom, voluntary standard, or even safety statute—is ever accorded such conclusive effect.\(^9^0\) Consumer product safety

\(^{8^5}\) *Cf.* Raymond v. Riegel Textile Corporation, 484 F.2d 1025 (1st Cir. 1973).

\(^{8^6}\) See notes 73-77 *supra*, and accompanying text.

\(^{8^7}\) See note 79 *supra*, and accompanying text.

\(^{8^8}\) See note 75 *supra*, and accompanying text.

\(^{8^9}\) Section 23 of the *Act*, 15 U.S.C. § 2072, for example, provides for private damage suits by persons injured by knowing, including willful, violations of Commission standards or rules.

\(^{9^0}\) See notes 67, 68, and 76 *supra*, and accompanying text.
standards set a safety floor below which consumer products must not fall. If persons are injured by products which meet these mandatory standards, they nevertheless are entitled to their day in court to demonstrate that additional precautions were necessary in the exercise of due care.  

Insofar as the Consumer Product Safety Act addresses the role of product safety standards in the courts, it supports these projections about their likely treatment. Section 25(a) of the Act provides:

Compliance with consumer product safety rules or other rules or orders under this Act shall not relieve any person from liability at common law or under State statutory law to any other person.

On its face, this provision prohibits in very clear terms the conclusive, defensive, use of such standards in tort litigation. But it does not address the question of the admissibility of these standards, and it does not consider the offensive use of the standards by a plaintiff who is the victim of a manufacturer's failure to comply. Nevertheless, it has been suggested that section 25(a) of the Act might prohibit the admission into evidence of such standards in the case for the defense. Previous judicial treatment of

91. This discussion does not address the complication of injuries caused by products marketed before the formulation or effective date of a consumer product safety standard.  
93. The Senate version of the Act, S. 3419, correctly spoke in terms of compliance with any consumer product safety “standard” and not, as indicated in this Act, of such “rules or orders.” The legislative history offers no explanation of why the incorrect House language prevailed.  
94. The Senate Commerce Committee's report on the Senate bill, S. 3419 (Senate Report No. 92-749, 92d Cong., 2d Sess.), explained: “This subsection [§319(c)] reaffirms the fact that product safety standards promulgated in accordance with this bill are ‘minimum’ standards. Therefore, in product liability litigation compliance with applicable Federal safety standards would not automatically create a defense for the manufacturer.” The House Commerce Committee's Report (No. 92-1153, 92d Cong., 2d Sess.) described the section without offering any explanation. No mention of the section was made in the Conference Report (No. 92-1593, 92d Cong., 2d Sess.), or in the Senate or House debates.  
95. Scalia and Goodman, supra note 45, at 903 n.34 (1973). For analysis of a similar
standards in the courts and the language of the Act and its legislative history, however, fail to support this suggestion.

As part of its Report to the President and the Congress, the National Commission on Product Safety submitted proposed legislation. That proposal contained provisions virtually identical to §25 of the Act, with one crucial difference. It included the following subsection:

Evidence that an entire finished product complies with regulations or standards issued by the Commission shall be inadmissible in any private litigation except an action to recover treble damages pursuant to Section 30.

This subsection would have rendered inadmissible in private tort litigation evidence of compliance with consumer product safety standards. The fact that this subsection had been proposed to the Congress, but was never included in either the House or Senate versions of the Act, suggests a legislative intent to permit the introduction of such evidence in tort suits. Thus, by adopting Section 25(a) of the Act, Congress enacted into law a guideline for the judicial use of the new consumer product safety standards that is in accord with the treatment given by the courts to custom, voluntary standards, statutes, and regulations—the precursors of consumer product safety standards.

III. CONCLUSION

The Consumer Product Safety Act is the culmination of many years of consumer frustration over unsafe consumer products posing unreasonable risks of injury. Marketplace forces failed to solve the serious problems of hazardous consumer products, and governmental intervention in the form of the Consumer Product Safety Commission became necessary. The consumer product safety standards which will be issued under the Act, with the active participation of consumers as well as producers, should vastly improve the level of product safety in the United States. Even with effective standards, however, some injuries associated with consumer products are inevitable. If the courts permit consumer product safety standards to play an appropriate role in the resolution of private tort claims, then the Consumer Product Safety Act will well-serve the public both in the marketplace and in the courts.


97. Id. at 9.