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CPSA Amendment: Consumers Taken for a Ride?

*Elliot Klayman**
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A 1981 amendment to the Consumer Product Safety Act exempts fixed site amusement rides from the ambit of the Act. That exemption, this Article asserts, is largely a result of industry lobbying rather than logic or consistency and will have deleterious effects upon those consumers the Act originally was designed to protect.

I. INTRODUCTION

LIKE MANY OTHER federal agencies, the Consumer Product Safety Commission (CPSC) was scrutinized by Congress during consideration of the Omnibus Budget Reconciliation Act of 1981.¹ Although the CPSC was ultimately reauthorized, its budget was sharply reduced,² and its powers and procedures were drastically altered.³ Most of the 1981 amendments reflect the current anti-regulatory mood.⁴ One amendment, an addition to the jurisdic-

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1. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, 703-25.

2. For fiscal year 1981, Congress authorized an appropriation of \$65,000,000 to implement the Consumer Product Safety Commission's responsibilities. Congress reduced the CPSC's authorization to \$33,000,000 for fiscal year 1982, about a 50% reduction from the amount authorized for fiscal year 1981. The Commission's fiscal year 1983 authorization is \$35,000,000. 15 U.S.C. § 2081(a)(7)-(a)(9) (Supp. V 1981).

3. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35 tit. XII A §§ 1201-15, 95 Stat. 357, 703-25 (to be codified as amended in scattered sections of 15 U.S.C.). Certain amendments restrict the CPSC's authority to set standards. Changes to 15 U.S.C. § 2056 eliminate the Commission's authority to promulgate design standards, 15 U.S.C. § 2056(a)(1)(A) (Supp. V 1981), and require the Commission to rely upon voluntary safety standards whenever adequate. *Id.* § 2056(b) (Supp. V 1981). A new section of the Act authorizes a legislative veto of Commission rules. *Id.* § 2083 (Supp. V 1981).

4. See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XII A, §§ 1201-15, 95 Stat. 357, 703-25 (to be codified as amended in scattered sections of 15 U.S.C.).

tional section of the Consumer Product Safety Act⁵ (CPSA or the Act), is particularly noteworthy, since it is inconsistent with the spirit of both the original Act and the other 1981 amendments.⁶ That amendment redefines the term "consumer product" to include movable amusement rides but to exclude permanently situated amusement rides.⁷ As a result of this curious bifurcation, the CPSC's jurisdiction⁸ over a particular amusement ride depends on whether the ride is permanently affixed to its location. Consequently, two identical amusement rides, both produced by the same manufacturer, may be regulated differently. A movable ride is within the CPSC's jurisdiction, while a ride permanently affixed to its location lies beyond that jurisdiction.

This Article examines the historical background of CPSC regulatory activity prior to the 1981 amendment, including Commission-initiated litigation under the Act.⁹ It then takes note of the amusement ride industry's response prior to the enactment of the amendment.¹⁰ Finally, the Article examines counterarguments to those offered by the amusement ride industry in support of the amendment,¹¹ and concludes that Congress, responding to the lobbying efforts of the amusement ride industry,¹² enacted an illogical provision which does not offer adequate protection to amusement park riders.

5. Consumer Product Safety Act, Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified at 15 U.S.C. §§ 2051-81 (1976)). See *infra* notes 13-16 and accompanying text.

6. See *supra* notes 3-4.

7. 15 U.S.C. § 2052(a)(1) (Supp. V 1981). For the text of the amendment, see *infra* text accompanying note 60.

8. The CPSC has jurisdiction over consumer products as defined in 15 U.S.C. § 2052 (1976 & Supp. V 1981). The CPSC may, for example: research, investigate, and test consumer products, *id.* § 2054 (1976 & Supp. V 1981); promulgate consumer product safety standards and rules to eliminate unreasonable risks of injury, *id.* §§ 2056-57 (1976 & Supp. V 1981); seek judicial remedies to protect consumers against imminently hazardous consumer products, *id.* § 2061 (1976 & Supp. V 1981); order a manufacturer or distributor to give public notice of substantial product hazards and, in appropriate cases, to elect to repair, replace, or refund the purchase price of products presenting substantial hazards, *id.* § 2064 (1976 & Supp. V 1981); inspect and require recordkeeping, *id.* § 2065 (1976); and purchase consumer products at cost, *id.* § 2076(f) (1976). The CPSA establishes both civil, *id.* § 2069 (1976 & Supp. V 1981), and criminal, *id.* § 2070 (1976), penalties, and provides for injunctive remedies and seizure of certain consumer products. *Id.* § 2071 (1976). Additionally, individuals have a right to sue to enforce the Act, *id.* § 2073 (1976 & Supp. V 1981), and to recover damages for injuries resulting from violations of the CPSA. *Id.* § 2072 (1976 & Supp. V 1981).

9. See *infra* notes 17-51 and accompanying text.

10. See *infra* notes 52-61 and accompanying text.

11. See *infra* notes 62-93 and accompanying text.

12. See *infra* notes 52-57, 61 and accompanying text.

II. HISTORICAL BACKGROUND

The CPSA was enacted in 1972, during a period of consumer consciousness and activism. It was designed to protect consumers against unreasonable risks of injury from consumer products. As originally enacted, the CPSA defined "consumer product" as:

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

. . .¹³

The Act exempts a series of enumerated products from its definition of consumer products.¹⁴ Other products lie outside the Commission's jurisdiction altogether because they are regulated by other government agencies.¹⁵ Subject to these restrictions, the Commission has expressed its intention to interpret "consumer product" broadly.¹⁶

When its monitoring mechanisms revealed a significant number of amusement ride-related injuries and deaths,¹⁷ the CPSC began to formulate a regulatory response. Anticipating controversy over its characterization of amusement rides as consumer products, the Commission issued an Advisory Opinion in 1974, which concluded that the Commission's jurisdiction extended to amusement rides, since they were used by consumers "in recreation" and were not subject to other federal regulation.¹⁸

Three years later, the Commission learned that a defect in the

13. 15 U.S.C. § 2052(a)(1) (1976) (emphasis added).

14. *Id.* § 2052(a)(1)(A)-(I) (1976). See *infra* note 62.

15. 15 U.S.C. § 2080 (1976).

16. 1 CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 313.15 (1982), citing Consumer Prod. Safety Comm'n Adv. Op. No. 55 (Dec. 12, 1973). The Commission has noted that it will assume jurisdiction over items which are used as consumer products, even though that is not their predominant use. *Id.* Some of the products considered by the Commission to be consumer products include aerosol containers, batteries, emergency lighting, fly catchers, front-end loaders, pet turtles, racing sulkies, snow machines and water purifiers. *Id.* ¶ 313.60-781.

17. Data gathered primarily by the National Electronic Injury Surveillance System (NEISS), which collects injury data from hospital emergency rooms, indicated 7-10 deaths and over 6000 injuries each year. Columbus Dispatch, Feb. 14, 1982, at C-1, col. 1. *But see* notes 53-54 and accompanying text. The Commission estimated that there were 1293 injuries from amusement rides between July 1, 1980 and June 30, 1981 which required emergency room treatment. 3 CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 41,010 (1982). See *also infra* note 95.

18. [1972-1975 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 42,001 (Dec. 5, 1974).

"Zipper" amusement ride caused its lap safety bars to disengage when the doors on its cages accidentally unlatched.¹⁹ This defect allegedly resulted in four deaths and two serious injuries.²⁰ The Commission subsequently issued a warning about the hazard to the public.²¹ In addition, the Commission, in *Consumer Product Safety Commission v. Chance Manufacturing Co.*,²² sought an order enjoining the ride's operation on the basis that the ride was an imminently hazardous consumer product.²³ The ride's manufacturer contended that amusement rides were not within the CPSC's jurisdiction since they were not controlled by consumers and thus were not consumer products.²⁴

The court disagreed. After examining the legislative history of the CPSA,²⁵ the court found that the "history of the Act nowhere suggests that Congress intended to import a 'control' requirement into the definition of the term 'consumer product.'"²⁶ It concluded that the use of the ride in recreation made the ride subject to CPSC jurisdiction.²⁷

Having won the first battle over its authority to regulate amusement rides, the Commission increased its activity in the area. In the Final Report on the 1979 Amusement Ride Pilot Program (Final Report), the CPSC staff recommended that an amusement ride information program be established.²⁸ The

19. *Consumer Prod. Safety Comm'n v. Chance Mfg. Co.*, 441 F. Supp. 228 (D.D.C. 1977). The 21-ton Zipper consisted of a boom that rotated in a 360° arc. Twelve cars were affixed to the boom at equidistant points, each having the capacity to hold two or three persons. The cars moved along the boom and rotated through the arc. *Id.* at 230-31. See also [1977-1979 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 43,748 (Sept. 1977).

20. 441 F. Supp. at 231; [1977-1979 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 43,748.

21. [1977-1979 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 43,748. In its warning, the Commission asked consumers not to ride the Zipper and noted that it was studying the defect for ways to correct it. The Commission also stated that it was planning to seek an injunction against the ride's operation. *Id.*

22. 441 F. Supp. 228 (D.D.C. 1977).

23. See 15 U.S.C. § 2061(a), (6)(1) (1976).

24. 441 F. Supp. at 232.

25. The court noted that the congressional intent was that the term "consumer product" be construed broadly. "Congress provided that the Commission's jurisdiction as to a particular product would depend directly on the extent to which consumers were exposed to the risks associated with the product." *Id.* at 231.

26. *Id.* at 233.

27. *Id.* at 233-34. The court did not decide the issue of whether the ride was an imminent safety hazard. *Id.* at 234.

28. [1979-1981 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 44,968 (May, 1980).

Commission approved the program²⁹ which requested the states to monitor amusement rides and submit their findings for national distribution.³⁰ The Final Report announced the results of a CPSC field survey of twenty-two amusement parks and carnivals and concluded that the "continued occurrence of serious amusement ride accidents indicates a need for action in this area. . . ."³¹ The survey revealed that only twelve of the twenty-two parks and carnivals studied implemented safety programs with specific procedures, assigned personnel, and regular recordkeeping. The others used less formal programs, with no written procedures.³² The Final Report expressed uncertainty as to the adequacy of these safety practices and recommended that state and local agencies conduct more effective inspections. It also recommended increased CPSC cooperation with the states, but did not rule out the possibility of direct Commission action such as mandatory standards.³³ Although amusement industry officials were quick to oppose federal intervention, they were generally willing to cooperate with the Commission in developing voluntary standards.³⁴

Meanwhile, another federal court faced the amusement ride issue and reached a conclusion contrary to *Chance*.³⁵ In *Walt Disney Productions v. Consumer Product Safety Commission*,³⁶ the plaintiff sought to block a CPSC inspection of an aerial tramway called the Skyride.³⁷ The court held that the Skyride was not a "consumer product" because the language and history of the Act supported "an interpretation limiting the term 'consumer product' to products that might customarily be owned and/or operated by consumers."³⁸ The court's decision was partially based on a provision of the CPSA³⁹ which allows the Commission to obtain a sample, at cost, of any product produced in the United States.⁴⁰

29. *Id.* ¶ 45,034 (July, 1980).

30. *Id.* ¶ 44,968 (May, 1980).

31. *Id.* at 31,003.

32. *Id.* at 31,004.

33. *Id.* at 31,003.

34. *Id.* at 31,004.

35. 441 F. Supp. 228 (D.D.C. 1977). See *supra* notes 19-27 and accompanying text.

36. [1977-1979 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 75,230 (D.C. Cal. April 17, 1979), *rev'd on other grounds*, No. 79-3435 (9th Cir. 1979).

37. *Id.* The Commission demanded that Disney provide information in conjunction with the Commission's investigation of tramways manufactured by Von Roll, Ltd., a Swiss corporation. *Id.*

38. *Id.* at 60,559.

39. 15 U.S.C. § 2076(f) (1976).

40. [1977-1979 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 75,230 at

The court reasoned that Congress could not have intended to provide free samples of something as complex, expensive, and permanent as the Skyride.⁴¹

The spuriousness of the *Walt Disney* reasoning was demonstrated in *State Fair of Texas v. Consumer Product Safety Commission*.⁴² That case arose when an official of the Texas State Fair refused to admit CPSC inspectors after four gondolas collided and fell from an aerial tramway, killing one rider.⁴³ In response to *Walt Disney*, the court noted that the CPSA authorizes sampling, but does not require it, and that it would be feasible to acquire component parts of an aerial tramway for sampling purposes.⁴⁴ The court also rejected the argument that the tramway should be excluded from the definition of "consumer product" because of its size. It noted that if bulk were the criterion, Congress would have had no reason specifically to exempt aircraft from CPSA jurisdiction.⁴⁵ *State Fair*, like *Chance*, held that "use" by consumers, not "control," was the test for determining whether an item is a consumer product.⁴⁶

*Robert K. Bell Enterprises v. Consumer Product Safety Commission*⁴⁷ was the only other case to decide the issue of whether an amusement ride is a consumer product. The Tenth Circuit adopted the reasoning of *Walt Disney*, that the Act's sampling provisions implied that rides were not consumer products.⁴⁸ The court in *Bell* also noted that the "use" requirement in the definition of consumer product implied that a consumer must exercise control over that product in order for it to be characterized as a consumer product under the Act.⁴⁹

Before Congress rendered the issue moot, four federal courts

60,559. Products imported into the United States may be obtained by the Commission free of charge. 15 U.S.C. § 2066(b) (1976).

41. [1977-1979 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 75,230 at 60,559. The court reasoned that a customer who purchases a ride on the tramway only purchases the right to occupy the installation, and hence the only consumer product purchased is the ticket. "The ride apparatus as a whole is not produced 'for the personal use, consumption or enjoyment of a consumer' so it is not a consumer product." *Id.*

42. 481 F. Supp. 1070 (N.D. Tex. 1979), *aff'd*, 650 F.2d 1324 (5th Cir. 1981).

43. 650 F.2d 1324, 1326 (5th Cir. 1981).

44. 481 F. Supp. 1070, 1078 (N.D. Tex. 1979).

45. *Id.* at 1077.

46. *Id.* On appeal, the Fifth Circuit upheld the lower court's decision that the tramway was a consumer product. 650 F.2d 1324 (5th Cir. 1981). Judge Ainsworth dissented. *Id.* at 1335.

47. 645 F.2d 26 (10th Cir. 1981).

48. *Id.* at 28-30.

49. *Id.* at 29. The court also reasoned that "personal use or enjoyment" was intended

had addressed the question of CPSC jurisdiction over amusement rides. The decisions were evenly split, with *Chance* and *State Fair* holding amusement rides to be consumer products, and *Walt Disney* and *Bell* holding the contrary. It therefore seemed appropriate for the U.S. Supreme Court to perform its traditional function of resolving conflicts among the circuits.⁵⁰ Meanwhile, the Commission continued to gather data on amusement ride injuries, as recommended in the Final Report.⁵¹

III. INDUSTRY AND CONGRESSIONAL RESPONSE

Concerned with the prospect of increasing federal regulation and potential negative publicity arising from CPSC investigation of park operators, the International Association of Amusement Parks and Attractions (IAAPA), a trade group representing about 500 amusement parks, opened a Washington office in August, 1980.⁵² When the CPSC's reauthorization was debated before the House Energy and Commerce Subcommittee on Health and Environment,⁵³ John R. Graff, the IAAPA director of government relations, testified. Graff informed the subcommittee that CPSC figures on amusement ride-related injuries were misleading and offered IAAPA statistics to support his position.⁵⁴ He urged the subcommittee to exempt amusement rides from CPSC jurisdiction altogether and reiterated the control/use rationale upon which *Bell* was based.⁵⁵ He noted the CPSC's lack of competence in inspecting amusement rides,⁵⁶ and claimed that industry self-regulation and state regulation were sufficient to assure rider safety.⁵⁷

to modify the first phrase in the definition of consumer product rather than establish an independent basis for jurisdiction. *Id.* at 28.

50. The Supreme Court granted certiorari to the Fifth Circuit in *State Fair*, 454 U.S. 1026 (1981), but vacated the judgment as moot because of the CPSC amendment. *Id.*

51. See *supra* notes 28-34 and accompanying text.

52. Columbus Dispatch, *supra* note 17.

53. *Consumer Product Safety Commission Reauthorization: Hearings on H.R. 2271 and H.R. 2201 Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *Hearings*].

54. Graff noted that IAAPA figures indicated that approximately 170 million riders take billions of rides annually, and only 2500 riders are injured. *Id.* at 231. Graff also pointed out that NEISS figures included injuries sustained by people using playground equipment and home riding toys as well as amusement rides, and that according to CPSC figures, more people are injured each year due to informal basketball (11,013 annually) and billiards (5571 annually) than from amusement-related accidents. *Id.* at 230. *But see infra* note 17 & *supra* note 95.

55. *Hearings* at 229; see *supra* notes 47-49 and accompanying text.

56. *Hearings* at 231.

57. *Id.*

Shortly after the hearings, Rep. Thomas A. Luken, D-Ohio, introduced an amendment excluding all amusement rides from CPSC jurisdiction.⁵⁸ When some committee members objected to the exclusion of traveling carnival rides,⁵⁹ the amendment was re-written and eventually passed as follows:

Such term ["consumer product"] includes any mechanical device which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, which is customarily controlled or directed by an individual who is employed for that purpose and who is not a consumer with respect to such device, *and which is not permanently fixed to a site. Such term does not include such a device which is permanently fixed to a site.*⁶⁰

IV. THE COUNTERARGUMENT

The amendment's distinction between fixed site and nonfixed site amusement rides is illogical and inconsistent with the scheme of the CPSA. Furthermore, such distinction cannot be justified by arguments that industry self-regulation and local regulation are sufficient to ensure the safe operation of rides located at fixed site amusement parks. It is likely, therefore, that the amendment's passage can largely be attributed to the effective lobbying campaign of the amusement park industry.⁶¹

58. See Columbus Dispatch, *supra* note 17. A large amusement park is located in Congressman Luken's district. His amendment was strongly backed by Rep. William E. Dannemeyer (R-Cal.), whose district includes Disneyland. *Id.*

59. *Id.*

60. 15 U.S.C. § 2052(a)(1) (Supp. V 1981) (emphasis added).

61. The IAAPA is typical of today's "associational" lobby, through which economic interest groups, often composed of market competitors, pursue a common interest by passing laws or blocking the passage of unfavorable legislation. E. LANE, *LOBBYING AND THE LAW* 6 (1964). As a counterbalance to economic interest lobbies, public interest lobbies have emerged to represent the interests of consumers and other noneconomic interest groups. See, e.g., J. BERRY, *LOBBYING FOR THE PEOPLE* (1977); D. DE KIEFFER, *HOW TO LOBBY CONGRESS* (1981). The "no-holds-barred fight" which often results allows a full presentation of ideas and helps to neutralize extreme views. See *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 144-45 (1961), in which the Supreme Court recognized the legitimacy of lobbying activities and the "no-holds-barred fight."

Nevertheless, despite the positive attributes of lobbying, the pressure exerted by a lobbyist group may cause legislators to effect illogical legislation when such pressure is not counterbalanced by that of an opposing lobby. This may explain the passage of the 1981 amendment to the CPSA. No public interest lobby existed to argue against the proposals of the IAAPA. See generally *Hearings*, *supra* note 53.

Moreover, under pressure from the executive branch to eliminate the CPSC altogether or incorporate it within the Commerce Department, supporters of the continued vitality of the Commission may have worked out an "agreement" so that the CPSC would remain

A. *Incongruity of Amendment*

The amendment to the CPSA is incongruous in two respects. First, it simply does not mesh structurally with the rest of the definitional subsection. That subsection begins with a general definition of "consumer product" and lists several categorical exceptions, lettered (A) through (I). It concludes with this conspicuously narrow amendment on amusement rides, which is inserted after subparagraph (I) with no letter identifying a new subparagraph.⁶² The ad hoc placement of the amended language indi-

independent in exchange for giving up authority over fixed site amusement rides. Cleveland Plain Dealer, Nov. 15, 1982, at 1, col. 1.

62. The statute reads as follows:

§ 2052 Definitions

(a) For purposes of this chapter:

(1) The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include—

(A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer,

(B) tobacco and tobacco products,

(C) motor vehicles or motor vehicle equipment (as defined by sections 102(3) and (4) of the National Traffic and Motor Vehicle Safety Act of 1966),

(D) pesticides (as defined by the Federal Insecticide, Fungicide, and Rodenticide Act),

(E) any article which, if sold by the manufacturer, producer, or importer, would be subject to the tax imposed by section 4181 of the Internal Revenue Code of 1954 (determined without regard to any exemptions from such tax provided by section 4182 or 4221, or any other provision of such Code), or any component of any such article,

(F) aircraft, aircraft engines, propellers, or appliances (as defined in section 101 of the Federal Aviation Act of 1958),

(G) boats which could be subjected to safety regulation under the Federal Boat Safety Act of 1971; vessels, and appurtenances to vessels (other than such boats), which could be subjected to safety regulation under title 52 of the Revised Statutes or other marine safety statutes administered by the department in which the Coast Guard is operating; and equipment (including associated equipment, as defined in section 3(8) of the Federal Boat Safety Act of 1971) to the extent that a risk of injury associated with the use of such equipment on boats or vessels could be eliminated or reduced by actions taken under any statute referred to in this subparagraph,

(H) drugs, devices, or cosmetics (as such terms are defined in sections 201(g), (h), and (i) of the Federal Food, Drug, and Cosmetic Act), or

(I) food. The term "food", as used in this subparagraph means all "food", as defined in section 201(f) of the Federal Food, Drug, and Cosmetic Act, including poultry and poultry products (as defined in sections 4(e) and (f) of the Poultry Producers Inspection Act), meat, meat food products (as defined in section 1(j) of the Federal Meat Inspection Act), and eggs and egg products (as defined in section 4 of the Egg Products Inspection Act).

Such term includes any mechanical device which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, which is customarily controlled

cates that the amusement ride provision was an afterthought, inconsistent with the overall scheme of the Act.

Although the amendment attempts to clarify the Act's classification of an amusement ride, the amendment represents a departure from accepted judicial and administrative approaches to defining consumer products.⁶³ Instead of allowing the judiciary to employ a deliberative, common law approach to the amusement ride issue, the trade association's lobby, unfettered by a counterlobby, was able to effect an exception for all fixed site rides. The rulemaking expertise of the CPSC was also thereby discarded.

Under the CPSA there are other instances when the same type of product may be classified differently. The reason for the distinction in those cases, however, is based upon the customary usage of the product—consumer versus industrial.⁶⁴ The status of amusement rides as consumer products now depends neither upon their nature nor upon their use, but rather upon the permanency of their location. Yet a defective ride presents an unreasonable risk of injury to patrons, whether it is located at a traveling carnival or at an amusement park. Of the eighty hazardous Zippers that were in operation in 1977, a substantial number were located at permanent amusement parks.⁶⁵ All Zippers were manufactured

or directed by an individual who is employed for that purpose and who is not a consumer with respect to such device, and which is not permanently fixed to a site. Such term does not include such a device which is permanently fixed to a site. Except for the regulation under this chapter or the Federal Hazardous Substances Act of fireworks devices or any substance intended for use as a component of any such device, the Commission shall have no authority under the functions transferred pursuant to section 2079 of this title to regulate any product or article described in subparagraph (E) of this paragraph or described, without regard to quantity, in section 845(a)(5) of Title 18. See sections 2079(d) and 2080 of this title, for other limitations on Commission's authority to regulate certain consumer products.

15 U.S.C. § 2052 (1976 & Supp. V 1981) (emphasis added).

It is interesting to note that the enumerated exceptions, other than (A), the general exception, and (B), the tobacco exception, are all regulated by other Federal Acts. *Id.* § 2052(a)(1) (1976 & Supp. V 1981).

63. See *supra* notes 16–51 and accompanying text.

64. For example, CB base station antennae manufactured for use in the home are classified as consumer products but those designed for nonconsumer purposes, such as those customarily used by police or cab companies, are characterized as commercial products outside of CPSC jurisdiction. See 47 Fed. Reg. 36,202 (1982) (to be codified at 16 C.F.R. § 1204.1(c)). Similarly, some heavy-duty commercial mowers, not customarily used by consumers, are not within CPSC jurisdiction. See 16 C.F.R. § 1205.1 (1982).

65. See [1977–1979 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 43,748 (Sept. 1977). More than half the Zippers, however, were located in traveling fairs and carnivals.

by one company.⁶⁶ Under the 1981 amendment, however, only those Zippers not located at fixed sites would be subject to federal regulation. The distinction created by the 1981 amendment also means that while a patron injured on a ride at a non-fixed site may take advantage of CPSA civil remedies,⁶⁷ a patron injured on the same ride at a fixed location may not. The amendment may have been politically expedient, but it is coordinated with neither the text nor the purpose of the original Act.

B. *Inadequacy of Self-Regulation*

The IAAPA based its claim that consumers are safe without CPSC scrutiny of fixed site amusement park rides partly upon the effectiveness of self-regulation by amusement parks.⁶⁸ Prior to the enactment of the CPSA, the National Commission on Product Safety⁶⁹ (NCPS) found that self-regulation by product manufacturers was an unrealistic solution to the product hazard problem.⁷⁰ Congress incorporated this finding into the scheme of the CPSA by emphasizing mandatory safety standards.⁷¹ There is no indication that the basis for the NCPS finding has changed. Furthermore, there is no reason to believe that amusement park operators are more capable of self-regulation than ride manufacturers.

Undoubtedly, there is tremendous pressure on amusement parks, especially the major theme parks, to monitor carefully the condition of their rides. A serious accident is likely to result in decreased attendance and increased insurance rates. Nevertheless, while park owners have an interest in self-regulation, the case

66. Chance Manufacturing Co. produced 93 Zippers. Consumer Prod. Safety Comm'n v. Chance Mfg. Co., 441 F. Supp. 228, 230 (D.D.C. 1977).

67. See 15 U.S.C. § 2072 (1976 & Supp. V 1981). The statute enables an injured plaintiff to sue knowing (including willful) violators of any consumer product safety rule or order when the amount in controversy exceeds \$10,000. In the discretion of the court, such plaintiff can also recover attorneys' fees and reasonable expert witnesses' fees. Moreover, "[t]he remedies . . . shall be in addition to and not in lieu of any other remedies provided by common law or under Federal or State Law." *Id.* § 2072(c) (1976 & Supp. V 1981).

68. *Hearings, supra* note 53, at 231.

69. The National Commission on Product Safety was established by Act of Nov. 20, 1967, Pub. L. No. 90-146, 81 Stat. 449. It was created to study the nature of hazardous products and the adequacy of existing remedies and regulations. In 1970, it submitted its final report, recommending, inter alia, the establishment of a Consumer Product Safety Commission. NATIONAL COMM'N ON PROD. SAFETY, FINAL REPORT PRESENTED TO THE PRESIDENT AND CONGRESS (1970), reprinted in [1975-1977 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶¶ 401-418 (June 30, 1970).

70. *Id.* at 2667-82.

71. Consumer Product Safety Act, Pub. L. No. 92-573, § 7, 86 Stat. 1207, 1212-15 (1972).

for CPSC regulation of all amusement rides is strong. The CPSC has long been concerned about the potential for serious accidents at amusement parks.⁷² Even the large, well known theme parks have not been immune from CPSC scrutiny. *Walt Disney*,⁷³ for example, involved perhaps the best known and most respected fixed location amusement parks in the world. In another action, which was eventually settled out of court, the Commission issued a complaint against the Marriott Corporation after eleven incidents of brake failure on a roller coaster at its Great America theme park in California resulted in several collisions, serious injuries to riders, and one death.⁷⁴ The park operator allegedly had known of the defect for three years before the Commission intervened and forced a modification of the ride.⁷⁵ State authorities had failed to remedy the hazard during that time. Under the new amendment, the Commission has no jurisdiction over this type of situation. Similarly, had the 1981 amendment been in effect in 1977, the many Zipper rides located at fixed site amusement parks⁷⁶ would have been immune from CPSC scrutiny. Although aware of the serious risk to which the ride subjected unknowing riders, the Commission would have been powerless to intervene.⁷⁷

By legislatively establishing that some amusement rides are

72. *But see supra* notes 31-32 and accompanying text, discussing the Final Report of the 1979 Amusement Ride Pilot Program. The Final Report's survey of twenty-two parks and fairs indicated "uncertainty as to the thoroughness and adequacy of safety practices in the industry especially among traveling shows." [1979-1981 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 44,968, at 31,004. The implication is that while the CPSC was concerned with amusement ride safety in general, it was particularly concerned with rides located in traveling shows.

73. [1977-1979 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 75,230 (D.C. Cal. April 17, 1979). It should be noted, however, that the Walt Disney case arose from a proposed CPSC inspection; no accident had actually occurred at the Disney amusement parks.

74. For a discussion of the case, see [1979-1981 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 45,122 (Jan. 1981). *See also id.* ¶ 45,309 (April, 1981) (case settled by payment of fine).

75. *Id.* ¶ 45,122.

76. *See supra* note 65 and accompanying text.

77. While NEISS compiles data on amusement ride injuries, the data are not categorized into injuries occurring at traveling fairs and injuries resulting from accidents at fixed site amusement parks. The NEISS figures, therefore, do not offer a basis for analysis of the adequacy of amusement park self-regulation. A report submitted to the CPSC in September, 1980, however, details the results of a study of death certificates received by the CPSC in 1978 and 1979. The report notes that 14 of the 18 reported amusement ride-related deaths resulted from accidents at amusement parks rather than at carnivals or fairgrounds (the report considers these numbers to be underestimates of the true number of deaths, especially since the 1979 figures were incomplete). P. Durham, B. Paramore, C. Sawyer, H. Tobey, Hazard and Human Factors Analysis of Injuries Associated With Amusement

not consumer products, regardless of their use, Congress has committed a grave injustice upon park-going consumers. The potential deterrent value of federal inspection and sanctions has been eliminated. Furthermore, in those instances in which operators fail properly to maintain their rides, legal response may now be limited to lawsuits after the fact. The elimination of federal monitoring and regulation of such rides leaves patrons dependent upon the effectiveness of state and local regulation.

C. *Inadequacy of State and Local Regulation*

In enacting the CPSA, Congress found "control by State and local governments of unreasonable risks of injury associated with consumer products . . ." to be inadequate.⁷⁸ One purpose of the CPSA was "to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations"⁷⁹ and the consequent burden to manufacturers.⁸⁰ To facilitate this purpose, the Act included a provision preempting state regulation which did not conform to federal standards.⁸¹ By leaving regulation of fixed site rides to state and local governments, the amusement ride amendment ignores the stated congressional intent behind enactment of the CPSA.

The response of the states to the dangers of amusement park rides has been less than adequate. Fewer than a dozen states currently regulate fixed amusement park rides.⁸² For example, Ohio is the site of numerous small amusement parks and several major theme parks. Ironically, Ohio law provides for the regulation of traveling carnival rides, but not fixed location rides.⁸³ Florida,

Rides: Submitted to the U.S. Consumer Product Safety Comm'n 18-23 (Sept. 1980) [hereinafter cited as Hazard Report].

78. 15 U.S.C. § 2051(a)(4) (1976).

79. *Id.* § 2051(b)(3).

80. *Id.* § 2051(a)(4).

81. *Id.* § 2075.

82. ALASKA STAT. §§ 05.20.010-20.120 (1981); ARK. STAT. ANN. § 82-745 (Supp. 1981); CAL. LAB. CODE § 7902; CAL. ADM. CODE §§ 343, 344.10 (West 1971 & Supp. 1982); CONN. GEN. STAT. ANN. §§ 29-129 to -143(a) (West 1975 & Supp. 1982); HAWAII REV. STAT. §§ 397-1 to -12 (Supp. 1981); IOWA CODE ANN. §§ 88A.1-13 (West 1972 & Supp. 1982-83); MD. ANN. CODE art. 89, §§ 65-81 (1979 & Supp. 1981); MO. REV. STAT. § 291.060 (Vernon 1965); N.J. STAT. ANN. §§ 5:3-31 to -54 (West Supp. 1981-82); OR. REV. STAT. §§ 460.310-410 (1981); WIS. STAT. ANN. § 101.12 (West 1973 & Supp. 1981-82).

83. OHIO REV. CODE ANN. § 1711.11(H) (Baldwin 1978). Even this limited inspection program is under threat since the Ohio Department of Agriculture, which is responsible for licensing traveling rides, announced that due to budgetary problems it would reduce the number of annual inspections from two or three to one per season. Columbus Dispatch,

Texas, and Virginia, each with well known parks, do not regulate the safety of amusement parks at all. Since there are at least 663 fixed location amusement rides throughout the United States,⁸⁴ the claim by amusement park operators that state legislation is adequate to address the problem amounts to a clear overstatement. The lack of state regulation leaves the burden of ride regulation to more localized levels of government, the regulatory activities of which are generally confined to building code inspections.⁸⁵ Even if the building inspectors have authority to inspect, they normally lack the expertise to discover defects in amusement rides. Moreover, the widespread lack of building code enforcement is well known.⁸⁶ Courts have not assisted enforcement and, in fact, have been accused of encouraging delay by granting offenders additional time to comply and by issuing lenient sentences.⁸⁷

Differences exist among the various states regulating fixed site rides. Better protection of the park-going public is provided in those states with comprehensive legislation regulating amusement rides.⁸⁸ These states have enacted detailed provisions giving administrative agencies the power to license and inspect rides, suspend operation of unsafe rides, and promulgate and enforce safety rules and regulations. Of course, even in these states, enforcement

supra note 17; see also Cleveland Plain Dealer, *supra* note 61. For other state regulations covering only nonfixed-type amusement rides, see MASS. GEN. LAWS ANN. ch. 140, § 205A (West Supp. 1982-83); N.H. REV. STAT. ANN. §§ 321-A:1-9 (Supp. 1981); (New Hampshire does provide for extensive regulation of aerial tramways at ski slopes and resorts. *Id.* §§ 225-A:1-26); N.Y. LAB. LAW § 202-b (McKinney 1965).

84. Hazard Report, *supra* note 77 at 6, citing data from the 1977 United States Census of Service Industries.

85. See generally C. RHYNE, SURVEY OF THE LAW OF BUILDING CODES (1960); R. SANDERSON, CODES AND CODE ADMINISTRATION (1969).

86. Cf. Rivkin, *Courting Change: Using Litigation to Reform Local Building Codes*, 26 RUTGERS L. REV. 774, 779 (1973). But see *supra* notes 33-34 and accompanying text, discussing the Final Report of the 1979 Amusement Ride Pilot Program. That Report noted that "state and local agencies can conduct more effective on-site inspections of amusement rides to detect and correct problems resulting from poor maintenance, inspection, transportation, or operation than can the Commission." [1979-1981 Transfer Binder] CONSUMER PROD. SAFETY GUIDE (CCH) ¶ 44,968 (May, 1980) at 31,003.

87. Cf. Note, *Enforcement of Municipal Housing Codes*, 78 HARV. L. REV. 801, 830-31 (1965) (discussing the slowness of court proceedings, the insufficiency of enforcement agency staffing, and the unsympathetic attitude of the judiciary as hindrances to enforcement).

88. ALASKA STAT. §§ 05.20.010-120 (1981); ARK. STAT. ANN. §§ 82-745 to -747 (Supp. 1981); IOWA CODE ANN. §§ 88A.1-13 (West 1972 & Supp. 1982-83); MD. ANN. CODE art. 89, §§ 65-81 (1979 & Supp. 1981); N.J. STAT. ANN. §§ 5:3-31 to -54 (West Supp. 1982-83); OR. REV. STAT. §§ 460.310-410 (1981).

must be adequate for regulations to be effective. The current financial crisis facing many states may hamper their ability to inspect amusement rides.⁸⁹ The remainder of the regulating states adopt a narrower approach, either by restricting the scope of regulations,⁹⁰ or by regulating amusement rides as an incident to other purposes.⁹¹ These statutes obviously cannot be as effective in protecting riders, since their coverage is limited.

Additionally, those states which do have comprehensive regulations may promulgate rules which conflict with those of other states, thereby burdening manufacturers of amusement rides with a diversity of regulations. This was one of the problems that the CPSA, as originally enacted, was designed to avoid.⁹² To date, only a few states have enacted comprehensive regulatory legislation over amusement rides.⁹³ However, as injuries mount and criticism grows, other states will undoubtedly follow the lead. Ironically, amusement ride manufacturers may eventually come to prefer the uniform regulation of the CPSC over the multifarious requirements of the several states.

V. CONCLUSION

As originally enacted, the CPSA was a consumer-oriented piece of legislation enacted by Congress in response to greater consumer consciousness. It was intended to provide protection to the consumer by granting broad regulatory powers to an administrative agency designed to be responsive to consumer needs. The recent amendment to the definitional portion of the CPSA indicates a retreat from this purpose and a lack of faith in the administrative and judicial processes.

Congress has adopted a fundamentally inconsistent approach with respect to one consumer product under the CPSA. The extraordinary treatment of amusement rides in the 1981 amendment

89. See *e.g.*, *supra* note 83 and accompanying text.

90. Connecticut provides for yearly inspection of only those rides located in West Haven. CONN. GEN. STAT. ANN. § 29-132 (West 1975). Throughout the rest of the state, inspection is required only before receiving a license to provide amusement. *Id.* § 29-133 to -142. Wisconsin confines its approval and inspection to newly installed rides. WIS. STAT. ANN. § 101.12 (West 1973 & Supp. 1981-82). California covers only aerial tramways. CAL. LAB. CODE §§ 7900-7913 (West 1971 & Supp. 1982).

91. HAWAII REV. STAT. §§ 397-1 to -12 (Supp. 1981) (covers mainly boiler and elevator safety law); MO. REV. STAT. § 291.060 (Vernon 1965) (designed to protect labor).

92. See *supra* notes 78-80 and accompanying text.

93. See *supra* note 88 and accompanying text.

highlights the influence that industry lobbies may wield.⁹⁴ This should serve as a warning to lawyers and consumers that Congress can act illogically and to the detriment of the public when amending consumer protection legislation.⁹⁵

94. Acting Chairman of the CPSC for 1981, David Pittle, has said that "Congress 'disgracefully' bowed to heavy lobbying by the amusement park owners." *Cleveland Plain Dealer*, *supra* note 61.

95. According to CPSC figures based on NEISS estimates, *see supra* note 17, the number of accidents from amusement rides has increased from approximately 10,000 in 1980 to approximately 14,000 in 1981. Consumer Prod. Safety Comm'n Internal Memorandum, April 14, 1982 at 4; *Cleveland Plain Dealer*, *supra* note 61. NEISS estimates, however, do not categorize these figures into accidents from fixed site rides and accidents from nonfixed site rides. Moreover, the inclusion of mechanical bulls in the term "consumer product" distorts these figures somewhat, since such amusements are not traditionally found at fixed site amusement parks, and they account for a significant number of the accidents. Even excluding mechanical bulls, however, the number of amusement ride accidents has increased 61% since the enactment of the CPSA amendment. Consumer Prod. Safety Comm'n Internal Memorandum at 4.