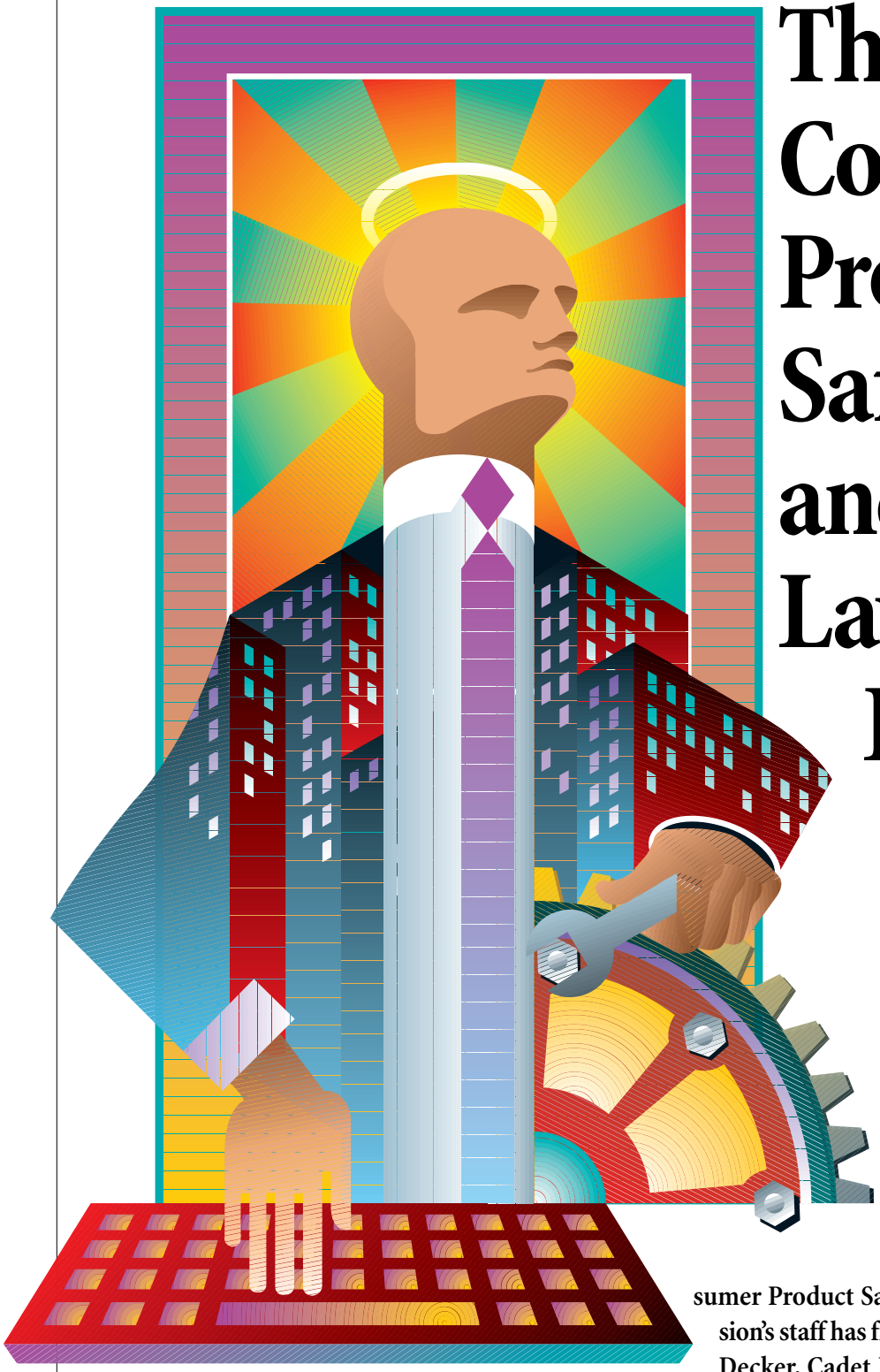

The Consumer Product Safety Act and Common Law Product Liability

by Eric H. Singer

The Consumer Product Safety Commission has stepped up its enforcement activity considerably in the last two years. Under section 15 of the Consumer Product Safety Act, 15 U.S.C. §2064, the Commission's staff has filed separate complaints against Black & Decker, Cadet Manufacturing, and Central Sprinkler Co., seeking the recall of millions of allegedly defective consumer products. Still, at the end of the day, the number of both cases and issues actually litigated under section 15 remains minuscule. No complaint based on §15 in the Commission's history, moreover, has ever reached the federal courts for authoritative review under the Administrative Procedure Act. The number of basic substantive law questions that *could* emerge is, correspondingly, enormous.

The discussion that follows explores three such §15 questions that surfaced in the *Central Sprinkler* case, but that were not litigated: (1) the proper requirements of "indeterminate defect" theory; (2) the viability of the "state-of-the-art" defense; and (3) the existence of component manufacturer liability based on the "substantial participation" standard. The theme underlying each of these questions is the uncertain relationship between §15, on the one hand, and common law product liability principles, on the other. First, a brief overview of the concept of "defect" under CPSA §15 is called for.

The Meaning of "Defect" under Section 15

Section 15(d) of the CPSA authorizes the Commission to bring special administrative proceedings against manufacturers, distributors, or retailers of consumer products to seek, and compel, a product recall. Section 15(d) provides, in part:

> If the Commission determines (after… a hearing [under the Administrative Procedure Act]) that a [consumer] product distributed in commerce presents a *substantial product hazard* and that action under this subsection is in the public interest, it may order the manufacturer or any distributor or retailer of such product to take [remedial]… actions.

15 U.S.C. §2064(d) (emphasis added); *see also*, section 15(c) of the CPSA, 15 U.S.C. §2064 (c) (authorizing the Commission to order firms to provide public notice). Section 15(a)(2) of the CPSA defines "substantial product hazard" as "a product defect which… creates a substantial risk of injury to the public."

Neither the CPSA nor implementing regulations define "product defect" or "defect." However, the Commission's interpretive regulations adopted in 1978 provide "guidance" and five examples of what the Commission believes "defect" means under the CPSA. *See* 43 Fed.Reg. 34998 (Aug. 7, 1978), codified at 16 C.F.R. Part 1115. Two of those examples illustrate warning or labeling defects, one a manufacturing defect, and one a design defect. 16 C.F.R. §1115.4(a)-(d). The fifth example apparently mirrors the common law "malfunction" or "indeterminate defect" theory analogous to the *res ipsa loquitor* inference of negligence. See *Prosser & Keeton on the Law of Torts*, at 255 n.43 (5th ed. 1984). This fifth interpretive example, at 16 C.F.R. §1115.4(e), states:

> An exhaust fan for home garages is advertised as activating when carbon monoxide fumes reach a dangerous level but does not exhaust when fumes have reached the dangerous level. Although the cause of the failure to exhaust is not known, the exhaust fan is defective because users rely on the fan to remove the fumes and the fan does not do so.

Indeterminate Defect: What is the Commission's Burden?

The complaint of the Commission enforcement staff ("complaint counsel") in *Central Sprinkler* was founded on a "malfunction inference of defect" theory. It did not point to a specific defect in design, manufacture, or warning in the firm's "Omega" brand fire sprinklers; it simply alleged that the Omegas were defective because they failed to operate as intended in significant percentages, implying a defect. 63 Fed.Reg. 11656-57 (March 10, 1998). Accompanying the complaint was a list of documentary evidence (later submitted *in camera*) that thousands of Omega fire sprinklers removed from service from properties around the country and tested in independent laboratories failed to operate properly 30 to 40 percent of the time.

Central moved to dismiss the Commission complaint, in part, for failure to provide a factual basis for the allegation that the Omegas were defective. At this posture in the proceedings, the administrative law judge ruled that complaint counsel had no duty to identify the specific cause of the alleged defect with Omegas. Then, however, the ALJ went much further (and the case settled not long after with no further briefings):

> Even at hearing, Complaint Counsel has no duty to provide an explanation of how it is that the sprinklers malfunction. It is sufficient only to demonstrate that they *do* have a significant failure rate. Assuming that Complaint Counsel can demonstrate this, it would be Central's responsibility to figure out why it is happening, not that of the CPSC.

In the Matter of Central Sprinkler Corp., CPSC Docket No. 98-2, "Order on Motion to Dismiss for Lack of Jurisdiction and for Insufficient Pleadings," at 16 (May 15, 1998).

If example (e) in the interpretive regulations is meant to embody the common law theory of indeterminate defect, however, the ALJ misconstrued the parties' burdens. For under an indeterminate defect theory, now crystallized in section 3 of the *Restatement (Third) of Torts: Products Liability*, although a plaintiff may be relieved of the burden of isolating the defect, to make a *prima facie* case the plaintiff must *also* exclude reasonable alternatives or intervening explanations for the malfunction. To paraphrase section 3, one can infer that a product defect existed at the time of a sale without specifically proving a defect when the incident harming the plaintiff was of a kind that ordinarily occurs as a result of product defect *and* was not solely the result of causes *other* than the product defect. This rule has long been part of federal and state case law, including decisions that pre-date the Commission's interpretive example (e). See, *e.g.*, *Lindsay v. McDonnell Douglas Aircraft Corp.*, 460 F.2d 631, 637-38 (8th Cir. 1972) (Death on the High Seas Act); *Stewart v. Ford Motor Co.*, 553 F.2d 130, 137 (D.C.Cir. 1977) (applying District of Columbia law). In both common law *and* federal product liability law, malfunction alone has never been suf-

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ficient to prove defect. See, *e.g.*, *United States v. General Motors Corp.*, 656 F.Supp. 1555, 1570, 1576 n.49 (D.D.C 1987), *aff'd*, 841 F.2d 400 (D.C.Cir. 1988) (National Traffic and Motor Vehicle Safety Act; government established *prima facie* "malfunction defect" by ruling out driver age, experience, climatic variations, and normal adverse road conditions). The few private law decisions dealing with automatic fire sprinklers like the Omega also just happen to support the general rule as well. See, *e.g.*, *Lee's Hawaiian Islanders, Inc. v. Safety First Products, Inc.*, 195 N.J.Super. 493, 480 A.2d 927, 932 (1984) (summary judgment reversed because trial judge's view that triggering failure of sprinkler created ineluctable inference of defect overlooked that a jury could have considered other causes like improper maintenance and installer negligence). CPSC complaint counsel in *Central Sprinkler* could have met the proper *prima facie* burden had the ALJ so required, but shifting the burden of production onto the respondent so quickly, as the ALJ seemed prepared to do, was premature.

After all this, of course, the question is whether example (e) in the interpretive regulations really *is* delimited by common law meaning. The Commission would probably argue for the more generous view the ALJ seemed to adopt in *Central Sprinkler* on the ground that CPSA §15 is a distinct remedial provision. Cf., *United States v. General Motors Corp.*, 518 F.2d 420, 434 (D.C.Cir. 1975) (asserting that the meaning of "defect" under the National Traffic and Motor Vehicle Safety Act is not coterminous with the common law meaning.) Such an argument could prove questionable for at least two reasons, however.

First, the term "defect" in the CPSA is not simply a word, but a common law term of art. Absent an obvious intent to the contrary, the presumption is that Congress uses common law terms in their common law sense. *Gilbert v. United States*, 370 U.S. 650, 655 (1962). Indeed, the discussion prefacing the Commission's final interpretive rules on §15 states that "the Commission interprets the term defect… to include the broadest meaning found in Federal and State statutes and judicial pronouncements." 43 Fed.Reg. 34988, 34991, *supra.* It is difficult to understand how the Commission could enjoy the benefits of the "broadest meaning found in Federal and State statutes and judicial pronouncements" but at the same time refuse to accept the burdens of indeterminate defect theory, which is meant to be an exceptional theory at that. See Schwartz, "The Restatement (Third) of Torts: Products Liability: A Guide to its Highlights," 34 Tort & Ins.L.J. 85, 91 (1998).

Second, another CPSA provision *already* recognizes the Commission's need to seek and possibly obtain swift remedial action—

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unencumbered by the requirement of proving any defect whatsoever, whether directly *or* circumstantially. Section 12 of the CPSA, 15 U.S.C. §2061(a), authorizes the Commission to pursue an "imminently hazardous consumer product" action in federal district court against the product and/or its manufacturer where the product "presents imminent and unreasonable risk of death, serious illness, or severe personal injury."

Is "State-of-the-Art" a Permissible Defense?

In *Central Sprinkler*, the respondents alleged that "Omega sprinkler heads have conformed to the then-existing state of the art" at all times. *In the Matter of Central Sprinkler*, "Answer and Affirmative Defense of Respondents Central Sprinkler Company and Central Sprinkler Corporation," at 6 (March 26, 1998). But can a manufacturer avail itself of the same affirmative defenses under a §15 "substantial hazard" proceeding as it can under the common law, including state of the art? (For simplicity's sake, let us assume that "state-of-the-art" is a defense to a design defect claim in which the defendant asserts that no reasonable alternative design could have been practically adopted at the time of sale that would have rendered the product safer.) Although *Central Sprinkler* in no way answered this question, no prior or subsequent case litigated before the Commission appears even to have raised it.

Neither the CPSA itself nor the §15 interpretive rules specifically prescribe or suggest the defenses available to a manufacturer in CPSC proceedings. The Commission's rules of practice for adjudicative proceedings simply require that the respondent's answer contain a "concise statement of the factual or legal defenses to each allegation of the complaint." 16 C.F.R. §1025.12. One could predict, however, that the Commission would be loath to interpret the CPSA as *requiring* that this defense be available. If successfully employed, the defense could leave the Commission with an uncomfortable political choice: either proceed against possibly blameless distributors and retailers of the consumer product in question instead of the manufacturer, as §15 formally allows, or do nothing and leave the public uncompensated and exposed to what the Commission alleges is a substantial product hazard. Even worse, this choice may not exist, for distributors and retailers perhaps could defeat the charge of "defect" using the same successful defense.

The Commission could argue, further, that this is exactly the kind of choice a remedial statute like the CPSA should be construed to avoid. Seeking ostensibly to maximize consumer protection, to spread risk among producers, and to discourage marketing of defective products, even a small minority of *state* jurisdictions reject state-of-the-art evidence as irrelevant and inadmissible for common law strict liability claims. See *In re Hawaii Federal Asbestos Cases*, 699 F.Supp. 233, 234-37 (D.Hawaii 1988) (construing Hawaii law), *aff'd*, 960 F.2d 806 (9th Cir. 1992); *Sternhagen v. Dow Co.*, 282 Mont. 168, 935 P.2d 1139, 1143-47 (1997). Why, then, should the Commission be precluded from ordering a manufacturer to recall a product in the public interest and on the same public policy grounds if, in fact, the product poses a substantial hazard in the present day (although its maker could have made it no safer at the time of sale)?

Are there any counter-arguments? One, already discussed above, is that because "defect" is a common law term, it should impliedly allow for all common law defenses recognized in most jurisdictions, absent a clear legislative intent to the contrary—an intent not found in the CPSA. Indeed, at least one federal district court, in the safety and health context no less, seems to have been influenced by a "weak" version of the "state-of-the-art" defense that General Motor vehicles' rear brake lock-up problems were no worse than those of its competitors. See *United States v. General Motors*, *supra*, 656 F.Supp. at 1577.

A second argument would be that when Congress wants to impose *truly* strict product liability, precluding defenses like the state-of-the-art, it knows how to do so, and in CPSA §15 it did not do so. For example, section 15 of the Federal Hazardous Substances Act, another statute which the Commission administers, authorizes the Commission to initiate proceedings to order a recall of a children's product that is, by regulation, a "banned hazardous substance"—"*whether or not it was such at the time of its sale*." 15 U.S.C. §1274(a) & (b) (emphasis added).

A third argument would be a showing that the settled practice of the Commission enforcement staff has been to entertain and honor state-of-the-art defense claims, where meritorious, in informal negotiations with manufacturers on corrective actions regarding their products, and that such policy really amounts to a rule that should be binding on the agency. Cf., *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C.Cir. 1986) (mine operator argued published enforcement policy was binding on agency so as to preclude citation and civil penalty). How persuasive this or any other "defense" on behalf of the state-of-the-art defense will prove remains to be seen.

Component Supplier Liability

Lastly, *Central Sprinkler* raised, albeit hypothetically, new issues regarding the liability of component suppliers under section 15 of the CPSA. The Commission could have considered proceeding against, or joining as respondents, the supplier/manufacturers of the Omega sprinkler's elastomeric, metal, or grease *component parts*, all of which were believed to play a role in the Omega's alleged failure.

Clearly, under §15 the Commission can seek a recall order against a firm that sells a product component where the component *itself* is defective and poses a substantial risk of injury. Section 2 of the CPSA defines "consumer product" to include any "any article, or component part thereof," and CPSA §15(a)(2) incorporates that definition by reference. The overlap between this statutory rule and common law principles is exact and easy: Section 5(a) of the Third Restatement also makes component manufacturers subject to liability where the component is defective and causes harm to persons or property.

A more difficult question is whether CPSA §15 contains any room for section 5(b) of the Third Restatement. The latter provides that sellers of the component product (although not in and of itself defective) may be liable when they participate substantially in the integration of the component into the design of the ultimate product, when the integration of the component causes the product to be defective, and when the defect in the product in turn causes harm to persons or property. Nothing in the CPSA, its legislative history, the interpretive rules, or any other sources suggests that §15 "imports" this "substantial participation" standard. Thus, the supplier or seller who does, in fact, substantially participate in the integration of his component into the design of a consequently defective product appears to fall through §15's cracks: as the supplier of a *non-defective component*, the firm has no liability. As the *non-manufacturer* (not to mention non-distributor or retailer) of the final product that is defective as a result of the integration of the component part, the firm is, again, free from potential liability.

From a policy perspective, this result may be, understandably, indefensible to the Commission. Is it, however, unjustifiable as a matter of legal interpretation? It would appear not. If the term "defect" in §15 is a vessel capable of holding common law meanings, burdens, and defenses, it does not easily accommodate the judge-made "substantial participation" rule, a rule that deals not with the concept of defect *per se,* but with assignment of responsibility among multiple defendants. The remaining portions of the CPSA that might be relevant leave little room for maneuver. For example, the CPSA defines the term "manufacturer" not as "any person who assembles, produces, or substantially participates in the integration of components into the design of, a consumer product," but, tautologically, as "any person who manufactures… a consumer product." 15 U.S.C. §2052(a)(4); *compare* section 102(5) of NTMVSA, as amended. 49 U.S.C. §30102(a)(5)(A) ("'manufacturer' means any person engaged in the manufacturing or assembling of motor vehicles or motor vehicle safety equipment…").

Under section 15 of the CPSA, moreover, the Commission remains able to proceed against the manufacturer of the allegedly defective *final* consumer product (although this may prove no solace to the Commission if the manufacturer is judgment proof), and it remains able to reach component manufacturers where their own components are defective *per se*. It appears that Congress simply did not provide for the "substantial participation" test—either because it did not wish to, or, more likely, because at the time of the CPSA's enactment in 1972 and years after, the test itself was undeveloped in the common law. See *Restatement (Second) of Torts* §402A, caveat, comment q (expressing no opinion on whether §402A strict liability applies to suppliers of components to be assembled in final product); Keeton, *supra*, at 705-06 (not specifying substantial participation test for component manufacturer liability). Amending the statute or proposing new interpretive regulations on this point may be the more democratic method by which to consider changing §15 so that it agrees with common law principles.

Conclusion

As the three issues discussed here demonstrate, the relationship between section 15 of the Consumer Product Safety Act and common law principles is less than perfectly clear. Certainly, section 15 is not a clone; few doubt that the Commission retains some flexibility to deviate from strictly common law norms. At the same time, section 15 is undeniably rooted in common law concepts. Although many of the consequent uncertainties remain unlitigated, greater awareness of them could have a bearing on negotiations between the Commission and those counseling the targets of its investigations.