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A New Private Action in Products Liability: Swenson v. Emerson Electric Co.

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A NEW PRIVATE ACTION IN PRODUCTS LIABILITY: *SWENSON V. EMERSON ELECTRIC CO.*

By the late 1960's, statistics revealed that a total of twenty million people were injured or killed annually in consumer product-related accidents.[1] Congress reacted by establishing a committee to investigate the adequacy of consumer protection against unreasonable risks caused by hazardous household products.[2] This committee concluded that producers of hazardous products are in the best position to safeguard consumers against injury, but found that many producers lacked motivation to engage in meaningful self-regulation.[3] Consequently, they recommended the creation of a federal regulatory agency.

Congress responded by enacting the Consumer Product Safety Act (CPSA),[4] and by establishing the Consumer Product Safety Commission (Commission). Under provisions of the CPSA, the Commission requires importers, manufacturers, and distributors of consumer products to report immediately to the Commission instances in which a product fails to comply with a safety rule or has a defect that could create a substantial product hazard.[5] Ideally, these reports allow the Commission to take remedial actions to minimize the dangers of the hazardous product. Through the early alert, the Commission can begin to investigate the hazards before they reach epidemic proportions. The Commission intended to provide ". . . a fence around the top of the cliff rather than providing an ambulance in the valley below."[6]

However, the system of voluntary hazard reporting has not been successful due to the lack of compliance by industry.[7] The Commission surmises that noncompliance may be more the result of ignorance than of intent.[8] Nonetheless, the Commission has emphasized that failure to comply with reporting requirements could adversely affect the delinquent companies.[9] In addition to civil and criminal penalties the Commission can seek pursuant to the CPSA,[10] recent court decisions have recognized a private cause of action. A

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[1] NATIONAL COMM. ON PRODUCT SAFETY. FINAL REPORT 1 (1970).

[2] Pub. L. No. 90-146, 81 Stat. 466 (1967); *see also* S.J. Res. 33, 90th Cong., 1st Sess., 113 CONG. REC. 31,282-83 (1967) [resolution establishing the National Commission on Product Safety (NCPS)].

[3] The NCPS observed that producers owe the public a duty to eliminate unnecessary risks of injury and are in the best position to know how to design, construct, and prescribe uses of products to achieve that goal. NCPS FINAL REPORT. *supra* note 1, at 4.

[4] Pub. L. No. 92-573, 86 Stat. 1207 (1972) (codified at 15 U.S.C. §§ 2051-2083 (1976 & Supp. V 1981, 1982).

[5] *See infra* notes 17 and 22.

[6] 2 NATIONAL COMM'N ON PRODUCT SAFETY HEARINGS 145 (1970) (statement of Thomas F. Lambert, Jr.).

[7] In STATEMENT OF ENFORCEMENT POLICY ON PRODUCT HAZARD REPORTS. 49 Fed. Reg. 13, 820 (April 6, 1984), the Commission noted that of the 25 most serious hazard files it opened in 1983, only five were reported pursuant to provisions of 16 C.F.R. § 1115.1.

[8] *See* Babij, "Industry Fails to Report Products Hazards," *Trial*, Oct. 1984, p. 62.

[9] *Id.* at 62.

[10] *See In re* Honeywell, CPSC Docket No. 83-2 (March 1983).

private cause of action puts authority in the Commission's warning to delinquent companies. This analysis of *Swenson v. Emerson Electric Co.*,[11] will describe the parameters of that private cause of action.

THE FACTS

Edward Swenson acquired a Mark I Glasscote water heater designed, manufactured, and distributed by A.O. Smith Corporation in September of 1977.[12] The water heater incorporated thermostatic gas control valves manufactured by Emerson Electric Company. Swenson had the water heater installed in his residence. On September 10, 1979, he attempted to relight the pilot light on the heater when an explosion and flash fire occurred.[13] The explosion and fire ultimately caused his death.

Edward Swenson's wife, Janet Swenson brought this products liability suit against A.O. Smith and Emerson Electric Company.[15]

On June 14, 1983, Mrs. Swenson moved for leave to file a second amended complaint to include a claim for damages under the CPSA.[16] The new claim sought to establish liability for damages based upon the companies' alleged intentional failure to report to the Commission a defect in their product which they had a reasonable basis to believe presented a substantial product hazard in violation of 15 U.S.C. Section 2064(b)(1982).[17]

Defendants opposed the motion on the grounds that Mrs. Swenson had no cause of action under the CPSA and that the claim under the Act was barred by the statute of limitations. The trial court granted plaintiff leave to amend her complaint, but certified the issues.[18] The court of appeals affirmed the trial

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[11] 374 N.W.2d 690 (Minn. 1985).

[12] *Swenson*, 374 N.W.2d at 693. Unless stated otherwise, the facts are derived from the Minnesota Supreme Court opinion.

[13] Plaintiff Janet Swenson averred that the explosion was caused by an accumulation of LP gas due to a defective water heater valve manufactured by the Emerson Electric Company. *Id.* at 693.

[14] The plaintiff's complaint alleged negligence in design and manufacture of the water heater, negligent failure to warn of the defect, breach of the implied warranties of merchantability and fitness, and strict liability. Plaintiff also sought punitive damages alleging that defendants acted with willful indifference to the rights and safety of others. *Id.* at 693.

[15] Mr. Swenson died on September 21, 1979. Mrs. Swenson commenced the action on April 10, 1981 and thereafter amended her complaint for the first time on March 17, 1982. *Id.* at 693.

[16] 15 U.S.C. § 2051 *et seq.* (1982).

[17] Every manufacturer of a consumer product distributed in commerce, and every distributor and retailer of such product, who obtains information which reasonably supports the conclusion that such product —

1. fails to comply with an applicable consumer product safety rule; or
2. contains a defect which could create a substantial product hazard described in subsection (a)(2) of this section, shall immediately inform the Commission of such failure to comply or of such defect, unless such manufacturer, distributor, or retailer has actual knowledge that the Commission has been adequately informed of such defect or failure to comply.

15 U.S.C. § 2064(b).

[18] 1. Does Section 23 of the CPSA, 15 U.S.C. § 2072, provide a private right of action for violation of the non-binding interpretive regulation issued by the Commission at [sic] C.F.R. Part 1115?

2. Does the Section 23 claim asserted in plaintiff's second amended complaint arise out of the "same

court.[19] The Minnesota Supreme Court granted review since the CPSA issue was one of first impression, and ultimately affirmed the decision of the court of appeals. Minnesota thereby joined an expanding, but limited, number of jurisdictions in providing a private cause of action for injured consumers under the CPSA.[20]

Key issues and party contentions are for the most part similar in all actions of this type. Every court which has found such a cause of action[21] has been forced to dismantle several well based defensive pleadings. For a plaintiff to succeed in bringing this new action, he must present persuasive reasoning on the issues confronted in *Swenson.* The following is a discussion of those issues.

JURISDICTION

As an initial matter, the statutory language of Section 2072,[22] providing that an injured party may sue in any federal district court for violation of the CPSA, had to be interpreted to determine whether it was intended to be a grant of exclusive federal jurisdiction. Previously, disputes regarding private claims under the CPSA were handled in federal district courts.[23] Since Mrs. Swenson funneled her claim through the Minnesota courts, she had to persuade the court that concurrent jurisdiction existed.

Concluding that state and federal courts possess concurrent jurisdiction over private causes of action under the CPSA, the court stood by case precedent, congressional intent and logic.[24]

In considering the propriety of state court jurisdiction, the court began

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transaction or occurrence" that is the subject of plaintiff's original claims, within the meaning of Rule 15.03 of the Minnesota Rules of Civil Procedure, so that plaintiff's untimely filing of the Amended claim is made timely by application of the Minnesota Relation-Back Doctrine?

Swenson v. The Emerson Electric Co., 356 N.W.2d 313, 316 (Minn. App. 1984).

[19] *Id.* at 319.

[20] Young v. Robertshaw Controls Co., 560 F. Supp. 288 (N.D. N.Y. 1983); Butcher v. Robertshaw Controls Co., 550 F. Supp. 692 (D. Md. 1981); Drake v. Lochinar Water Heater, Inc., 618 F. Supp. 549 (D. Minn. 1985) (this decision was certified to the Eighth Circuit Court of Appeals on April 26, 1985); Wilson v. Robertshaw Controls Co., 600 F. Supp. 671, 673-75 (N.D. Ind. 1985); Payne v. A.O. Smith Corp., 578 F. Supp. 733, 738 (S.D. Ohio 1983).

[21] Two jurisdictions have ruled that no private cause of action exists under the Act. *See* Kahn v. Sears Roebuck and Co., 607 F. Supp. 957 (N.D. Ga. 1985) and Morris v. Coleco, Indus., 587 F. Supp. 8 (E.D. Va. 1984).

[22] The CPSA provides a private cause of action at 15 U.S.C. § 2072(a)(1982):

> Any person who shall sustain injury by reason of any knowing (including willful) violation of a consumer product safety rule, or any other rule or order issued by the Commission may sue any person who knowingly (including willfully) violated any such rule or order in any district court of the United States in the district in which the defendant resides or is found or has an agent, . . .

[23] *See supra* note 20.

[24] "The presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by clear incompatibility between state-court jurisdiction and federal interests." Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 477-79 (1981).

with the presumption that Minnesota state courts enjoy concurrent jurisdiction. Then, reviewing Section 2072, the court found no explicit grant of exclusive jurisdiction to the federal courts. A review of the legislative history of the CPSA did not reveal any consideration of the jurisdictional issue.[25] Finally, the *Swenson* court believed it unlikely that Congress intended federal courts to have exclusive jurisdiction in this type of action. They reasoned that actions under the CPSA would also be asserting claims of state common law violations.[26]

These factors lead to the conclusion that state and federal courts have concurrent jurisdiction over private causes of action under the Act. More importantly, the plaintiff cleared the first hurdle.

TIMELINESS OF THE CLAIM

Prior to considering whether the Act provided for a private cause of action, the court had to consider whether the plaintiff commenced the claim within the required limitations period. Unlike similar cases such as *Butcher v. Robertshow Controls Co.*,[27] and *Young v. Robertshow Controls Co.*,[28] Mrs. Swenson sought to *amend* her complaint to include an action under the CPSA. Her amendment came more than three years after the death of her husband.[29] Since the CPSA contains no limitations period, the plaintiff had to overcome several obstacles.

First, it was necessary to determine the appropriate statute of limitations. Second, if the amended complaint was untimely, then it would have been barred unless the court found that it related back to the original complaint.[30]

In dispensing with the first question, the *Swenson* court noted that their task was to borrow an analogous statute of limitations from Minnesota law[31] since the action under the CPSA would arise from the same occurrences that give rise to liability under state common law.[32] Because the court was cogni-

[25] *See* H.R. REP. No. 92-1153, 92d Cong., 2d Sess. 46-49 (1972); S. REP. NO. 92-835, 92d Cong., 2d Sess., 1972 U.S. CODE CONG. & AD. NEWS 4573; CONF. REP. NO. 92-1593, 92d Cong., 2d Sess.; 1972 U.S. CODE CONG. & AD. NEWS 4596.

[26] The Minnesota Supreme Court's belief held correct for Mrs. Swenson's claim. *Swenson*, 374 N.W.2d at 693.

[27] This particular holding was never reached before by any other courts handling private claims under the CPSA. *See supra* note 20.

[28] *See supra* note 20.

[29] Mr. Swenson died on September 21, 1979 and Mrs. Swenson sought a second amendment on June 14, 1983. *Id.*

[30] Pursuant to MINN. R. CIV. P. 15.03., which provides: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth in the original pleading, the amendment relates back to the date of the original pleading." This rule parallels FED. R. CIV. P. 15(c) thus, an action in federal court would be similarly faced with this issue of relation back.

[31] The Court's reasoning was taken from DelCostello v. International Bd. of Teamsters, 462 U.S. 151, 158 (1983).

[32] *Swenson*, 374 N.W.2d at 693.

zant of the fact that state legislatures do not draft their limitation periods with national interests in mind,[33] the court would not apply Minnesota law in a manner that would frustrate the CPSA and its national policy.[34]

The court's decision[35] to apply an analogous state statute resulted in application of the Minnesota wrongful death statute.[36] That statute provides that actions must be commenced within three years after the date of death.[37] Mrs. Swenson's amended claim under the CPSA would have been barred had the court not found that it related back[38] to the date of the original complaint.[39] Defense counsel posed several arguments to the contrary.

A.O. Smith and Emerson Electric argued that the amended claim under the CPSA is so different from the other claims advanced by Mrs. Swenson in her original complaint[40] that the amended claim did not provide the defendants with sufficient notification.[41] The defendants further pointed out that the amended claim involved their understanding of, and compliance with, Commission rules. These issues require an examination of the relationship between defendants and the Commission, not the relationship between defendants and the decedent.[42]

In the final analysis, the court did not find these defensive arguments persuasive. Instead, they ruled that the defendants had sufficient notice from the original complaint.[43] Meshing the claim requirements with the actual notice of the accident and injury[44] given to the defendants, the court held that the plaintiff's late assertion overcame the limitations period. More specifically, the court stated that the CPSA claim requires proof that (1) the water heater was defective; (2) the defect created a hazard; (3) the defendant knew of the defect;

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[33]Occidental Life Ins. Co. v. EEOC, 432 U.S. 355, 367 (1977) [quoting Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 465 (1975)].

[34]As noted by several intellectuals, Congress enacted the CPSA in response to the need for a legal remedy designed to *prevent* injury due to defective products, rather than just provide compensation after an injury had already occurred. Comment, *Consumer Product Safety Act & Private Causes of Action for Personal Injury: What does a Consumer Gain?*, 30 BAYLOR L. REV. 115 (1978). *See also* Martel, *The Consumer Product Safety Act And Its Relation to Private Products Litigation*, 10 FORUM 337 (1974).

[35]The trial court and the court of appeals both reached the same conclusion. *Swenson*, 374 N.W. 2d at 695.

[36]MINN. STAT. § 573.02, subd. 1 (1984).

[37]*Swenson*, 374 N.W.2d at 693.

[38]*See supra* note 30.

[39]*Swenson*, 374 N.W.2d at 697.

[40]*See supra* note 15. *Id.* at 693.

[41]This is the classic argument of relation back and is similar in all jurisdictions, federal or state.

[42]*Swenson*, 374 N.W.2d at 696.

[43]Since the defendants had sufficient notice, it meant they had a reasonable time and a fair opportunity to prepare an adequate defense. *Id.* at 696.

[44]The trial court found that the amended claim related back to the explosion [accident] and therefore was not barred by the statute. The court of appeals affirmed finding that the "negligent failure" to provide (warning of a product defect) claim is directly related to the alleged violation of the Act. Because defendants had notice of the *conduct asserted* in the amendment it related back. *Id.* at 696.

and (4) the defendant knowingly violated the CPSA[45] by failing to notify the Commission of a known substantial product hazard.[46] The court felt that the amended claim only alleged that defendants failed to report the defect to the Commission. The court held that knowledge of this allegation was not essential to the preparation of an adequate defense.[47]

Although limitation periods are usually more clear, the fact that no period has been included in the CPSA should alert future parties to a potential battleground. Formation of arguments should be based upon the major objectives of Congress in adopting the CPSA.

INTERPRETATIVE OR SUBSTANTIVE RULE

The private cause of action under the CPSA is peculiar because it lies not for a violation of rules and regulations of the CPSA itself, but for a violation of rules and regulations of the Commission.

The CPSA provides a federal private cause of action for any person injured by a knowing violation of a Commission rule.[48] Commission rules[49] define the terms of the reporting requirement placed upon manufacturers, distributors or retailers who obtain information of a substantial product hazard.[50] The *Swenson* court recognized that the Commission promulgated the rule in question as an interpretive rule rather than a substantive rule.[51] In other words, the Commission issued the rule as an interpretation of 15 U.S.C. § 2064(b).[52] The Commission characterizes a violation of a substantive rule as a violation of the CPSA.[53] Contrarily, the Commission viewed a violation of an interpretative rule as not necessarily a violation of law. A violation of an interpretive rule is a violation of the law under which it was issued *only* if the rule reasonably interprets the law.[54]

Therefore, the major issue presented in *Swenson* was whether the alleged violation of the interpretive rule[55] states a private cause of action under Section 2072[56] of the Act.[57] After a lengthy discussion, the court ruled affirmatively for

[45] 15 U.S.C. § 2072(a)(1982); *supra*, note 22.

[46] *Swenson*, 374 N.W.2d at 697.

[47] *Id.* at 697.

[48] *See supra* note 22.

[49] *See supra* note 17.

[50] 15 U.S.C. § 2064(a)(2) defines "substantial product hazard" as: "a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public."

[51] *See*, 43 Fed. Reg. 34,988 (1978), codified at 16 C.F.R. §§ 1115.1-.22 (1985).

[52] 43 Fed. Reg. 34,988, 34,990 (1978).

[53] *Id.*

[54] *Id.*

[55] *See supra* note 17.

[56] *See supra* note 22.

[57] The trial court and the court of appeals in *Swenson* ruled that based on the plain language of section 2072

the plaintiff. They based the holding upon the plain language of Section 2072, the relevant federal precedent and general principles of federal administrative law.[58] An understanding of the court's three tiered analysis is essential for success in subsequent actions under the CPSA.

Utilizing the finding in *CPSC v. GTE Sylvania, Inc.*,[59] the court viewed its first task in interpreting the CPSA as examining the language of the statute for clearly expressed legislative intent contrary to allowing a private cause of action.[60] The court found that the legislative history of the CPSA reflects no attempt to define "rule" in Section 2072 as used in the phrase "any other *rule* or order issued by the Commission."[61] Because the definition of "rule" in the federal Administrative Procedure Act[62] includes interpretive rules, the court had another reason to hold that a violation of an interpretive rule issued by the Commission gives rise to a private right of action under the *plain language* of Section 2072.[63]

Next, the court supported its conclusion with other federal court decisions on this issue. *Butcher v. Robertshaw Controls Co.*[64] involved a suit over injury sustained by the explosion of a water heater. The plaintiff there also asserted a claim under the CPSA. Bolstering their own conclusion, the *Swenson* court cited *Butcher* for the authority that the Commission is permitted to promulgate two types of rules under the CPSA, consumer product safety rules and administrative rules.[65] According to *Butcher*, consumer product safety rules are designed to prohibit the manufacture and sale of dangerous products, whereas administrative rules aid the Commission in the promulgation of consumer product safety rules mandating disclosure of product defects.[66] Concluding that Congress did not limit the private cause of action to violations of consumer product safety rules, *Butcher* held that a violation of a disclosure rule was also actionable under Section 2072.[67]

Young v. Robertshaw Controls Co. also involved a plaintiff seeking to

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and general principles of federal administrative laws, it allowed a private cause of action. *Swenson*, 356 N.W.2d 313, 319.

[58] *Swenson*, 374 N.W.2d at 700.

[59] 447 U.S. 102, 108 (1980).

[60] The Supreme Court said in CPSC v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980) that absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

[61] *Swenson*, 374 N.W.2d at 693; *see*, S. REP. NO. 92-835, 92d Cong., 2d Sess.; 1972 U.S. CODE CONG. & AD. NEWS 4573; CONF. REP. NO. 92-1593, 92d Cong., 2d Sess., 1972 U.S. CODE CONG. & AD. NEWS 4596, 4650.

[62] 5 U.S.C. § 551 (4) (1982).

[63] *Swenson*, 374 N.W.2d at 699 (emphasis added).

[64] *See supra* note 20.

[65] *Butcher*, 550 F. Supp. at 695-96.

[66] *Id.* at 696.

[67] *Id.* at 698-99.

recover damages for the death of her husband as a result of the explosion of a water heater in their home.[68] The *Swenson* court cited *Young* for the proposition that the substantial product hazard reporting regulation interprets the manufacturer's statutory duty to disclose substantial product hazards.[69] Therefore, *Young* held that the reporting rule fit the language "any other rule or order of the Commission," and that its violation was actionable under Section 2072.[70]

The court in *Swenson* correctly noted that the majority of federal case law has been decided in the same manner.[71] *Morris v. Coleco,*[72] on the other hand, held that no private action under Section 2072 for an asserted violation of Section 2064 exists. The *Swenson* court distinguished the *Morris* decision. *Morris* did not involve an alleged violation of the interpretive rule explaining Section 2064. Rather, *Morris* involved an alleged violation of the CPSA itself. Section 2072 does not have language allowing a private action for violation of the CPSA but only for violation of rules promulgated under the statute.[73]

The defendants launched one more set of defensive arguments.[74] They argued that recognition of such a cause of action is contrary to fundamental principles of administrative law and would lead to absurd results.[75] Their arguments hinged on the court's opinion that interpretive rules did not create binding obligations.

Initially, the court held that the distinction between legislative and interpretive rules in federal administrative law is the scope of review used by the courts in assessing their validity.[76] The *Swenson* court viewed legislative rules as having the force and effect of law. The validity of legislative rules are tested

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[68] 560 F. Supp. 288.

[69] *Id.*, 560 F. Supp. at 292-93.

[70] *Id.* at 293.

[71] *See supra* note 20.

[72] *See supra* note 21.

[73] This is the same logic the *Swenson* court utilized to dispense with *Morris. Swenson,* 374 N.W.2d at 700.

[74] Defendants argued that interpretive rules do not have the force and effect of law and are therefore not binding regulations that can be violated. They also argued that allowing private parties to sue for damages for violation of interpretive rules would improperly convert interpretive rules into substantive binding rules. They reasoned that allowance of a private cause of action would be illogical because private litigants could enforce a Commission rule that the Commission itself could not enforce. Finally, they contended that since an interpretive rule is not binding, violation of an interpretive rule is really a violation only of the statute the rule interprets. *Id.*

[75] *Id.*

[76] Legislative rules are said to have the 'force and effect of law' — i.e. they are as binding on the courts as any statute enacted by Congress . . . 'A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.' Legislative rules are valid so long as they are reasonably related to the purposes of the enabling legislation, promulgated in compliance with statutory procedures, and not arbitrary or capricious. Interpretive rules, in contrast, have only persuasive force. Such rules are entitled to varying degrees of deference or weight, but a reviewing court ordinarily is free to substitute its own view of the relevant statute. Production Tool Corp. v. Employment and Training Admin., 688 F.2d 1161, 1165 (7th Cir. 1982).

under a deferential scope of review.[77] The interpretive rules, on the other hand, can be authoritative if they survive closer scrutiny.[78]

In *Swenson*, the court applied close scrutiny and held that (1) the rule should represent a long-standing position of the agency;[79] (2) the rule should be a permissible gloss on the statute in light of the statute's language, structure and legislative history;[80] (3) and the rule cannot contradict the plain meaning of the statute.[81] The court found adequate support for giving the rule[82] authoritative effect. First, the court noted that notice and comment procedures, not required for promulgation of interpretive rules, were followed.[83] The court also noted the Commission's evident thoroughness in its consideration of the rule.[84]

Lastly, the court held that the rule is a reasonable interpretation of the CPSA in light of the language of the disclosure provision and the structure and purposes of the CPSA.[85] The purpose of the CPSA, according to the court, is to protect consumers from unreasonable risk of injury due to consumer products.[86] Since the disclosure requirement is the source of the information needed by the Commission to identify dangerous consumer products, the *Swenson* court ruled that it is crucial to the attainment of the CPSA's purpose. Moreover, the court found the short time limits for filing the initial reports[88] were reasonable in light of the Commission's need to protect the public as soon

[77]Legislative rules receive more deference from the courts because they are the product of an exercise of delegated power to make law through rules. 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 7:8 (2d ed. 1979).

[78]Interpretive rules are not promulgated pursuant to delegated legislative power and their promulgation need not follow the Administrative Procedure Act's notice and comment procedure, therefore courts evaluate their validity under stricter standards than when reviewing legislative rules. 5 U.S.C. § 553(b)(A); New Jersey v. Dept. of Health and Human Serv., 670 F.2d 1262, 1281 (3d Cir. 1981); *Swenson*, 374 N.W.2d at 702.

[79]General Electric Co. v. Gilbert, 429 U.S. 125, 140-46 (1976) (*reh'g denied* in 429 U.S. 1079) (1977).

[80]Whirlpool Corp. v. Marshall, 445 U.S. 1, 11 (1980).

[81]Fmali Herb, Inc. v. Heckler, 715 F.2d 1385 (9th Cir. 1983).

[82]This is the interpretive rule at issue in *Swenson*.

[83]The reporting regulation was published as a proposed rule in 1977. 42 Fed. Reg. 46,720 (1977). The Commission followed notice and comment procedures and held two public hearings on the rule before issuing it as an interpretive rule in 1978. 43 Fed. Reg. 34,988 (1978).

[84]*See* 43 Fed. Reg. 34,988-98 (1979) where the Commission summarized the views of proponents and opponents to the proposed interpretive regulations and carefully explained its reasoning for adopting the rule in its present form.

[85]*Swenson*, 374 N.W.2d at 702.

[86]H.R. REP. NO. 92-1153, 92d Cong. 2d Sess. 21 (1972).

[87]The Commission must establish and maintain an Injury Information Clearinghouse for collection and analysis of injury data. The CPSA requires manufacturers, distributors, and retailers to report to the Commission any information they obtain which reasonably supports the conclusion that a consumer product contains a defect which could create a substantial product hazard. If the Commission determines that the product defect reported presents a substantial product hazard it can require the manufacturer, distributor, or retailer to notify the general public, or consumer of the defect; order the defect be repaired; order the product replaced with a safe product; or order a refund of the purchase price of the product. 15 U.S.C. § 2053(a)(1), 2064(b)-(d) (1982).

[88]Manufacturers have a ten day time period to conduct a reasonably expeditious investigation to evaluate the reportability of a death or grievous bodily injury or other information. If they find information that reasonably supports the conclusion that their product contains a defect which could create a substantial product hazard, they have 24 hours to report to the Commission. 16 C.F.R. 1115.13(c), 1115.14(c), (e).

as possible. This ruling is consistent with the mandate of *Whirlpool Corp. v. Marshall,*[89] that safety legislation is to be liberally construed to effectuate the congressional purpose.

The *Swenson* and *Butcher*[90] decisions regarding interpretive rules have been criticized.[91] It has been contended that in promulgating the interpretive regulation regarding the reporting provisions, the Commission noted a distinction between the substantive rules and the interpretive regulations.[92] In particular, critics argue that the court ignores the fact that the CPSA does not speak of general interpretive regulations.[93] In addition, critics point to Section 15 of the Act which does not authorize Commission rules or orders relating to the reporting of information to the Commission other than those specified, but rather contains specific statutory penalties for failure to report.[94]

Opponents of the *Butcher* ruling accuse the court of ignoring the fact that 15 U.S.C. § 2072 does not create a cause of action for a violation of the CPSA itself.[95] They therefore assert that *Morris*[96] held correctly in finding that it could hardly have been Congress' intent to create a cause of action for a violation of the Commission's interpretation of the CPSA.[97] In the critic's view, as well as the *Morris* court's, the better interpretation of 15 U.S.C. § 2072 limits the private cause of action to a violation of specific Commission rules and orders which are described in detail in the Act.[98]

It is apparent that courts are not subscribing to this line of reasoning. In *Wilson v. Robertshaw Controls Co.,* another case involving injury due to a water heater explosion, the court was not persuaded that Section 2072 should be construed in the restrictive manner suggested by the critics.[99] They held that Section 2072 by its express terms provides a plaintiff with a private remedy thereby concluding that the interpretive rule has met the close scrutiny test.

OTHER OBJECTIONS

Defendants have presented the "floodgates" argument, contending that to permit a private cause of action under the Act would federalize the law of

[89] *Marshall,* 445 U.S. at 11.

[90] *See supra* note 20.

[91] Sisk, *Product Safety Rules: A Theory for Recovery?* 27 FOR THE DEF. 28-32, May (1985).

[92] 43 Fed. Reg. 34,990 (1978).

[93] Sisk, *supra* note 91, at 31.

[94] *Id.* at 31.

[95] *Id.*

[96] *See supra* note 21.

[97] Judge Warner's opinion in Morris v. Coleco Industries, 587 F. Supp. 8, 9 (E.D. Va. 1984) held that it would be illogical that Congress would have supposed that a failure to disclose a mishap to the Commission might proximately cause an injury.

[98] Sisk, *supra* note 91, at 32.

[99] 600 F. Supp. (N.D. Ind. 1985).

products liability by giving every plaintiff who alleges noncompliance with a Commission rule a federal forum.[100] However, the *Butcher*[101] court felt this is precisely the result Congress intended. That finding does have factual support. Congress made express findings that control by state and local governments of unreasonable risks of injury associated with consumer products may be burdensome to manufacturers.[102] Further, they found that regulation of consumer products is necessary to carry out the protection of the public against unreasonable risks of injury.[103]

It is of further interest to note that plaintiffs have persuaded courts to include them in a class that benefits from an agency relationship existing between the Commission and all the members of the consuming public in the United States.[104] In this fashion plaintiffs have successfully argued that a fraud [failure to report a known defect] worked upon an agent [the Commission] by a third person is deemed to have been worked upon the principal.[105] Defensive arguments are parallel to the lack of standing arguments in taxpayer suits,[106] namely that the plaintiff unjustly seeks to litigate what is fundamentally a generalized injury shared equally by all members of the general public.[107] The *Butcher* court defeated this argument by holding: (1) the plaintiffs sued to recover for a specific injury not a generalized one; (2) their injuries had a substantial nexus to the acts or omission of the defendants; and (3) given that the court held a private cause of action existed, the plaintiffs had an explicit legislative grant of standing to sue.[108]

CONCLUSION

Complete and timely reporting of all information suggesting potential product hazards is seen as the crucial element to present and future effectiveness of the Commission.[109] To the extent that *Swenson v. Emerson Electric* is the precursor of future trends in products liability law, timely and complete reporting under Section 15 takes on new importance.[110] By any conservative estimate, only a small fraction of this data is currently being reported to the

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[100] Butcher v. Robertshaw Controls Co., 550 F. Supp. 692, 700 (D. Md. 1981).

[101] *Id.*

[102] 15 U.S.C. § 2051(a)(4).

[103] 15 U.S.C. § 2051(a)(6).

[104] *Butcher*, 550 F. Supp. at 702.

[105] *See* RESTATEMENT (SECOND) OF AGENCY. § 315 (1957); 3 AM. JUR. 2d *Agency* 290 and n. 5 (1962).

[106] *See, e.g.*, Frothingham v. Mellon, 262 U.S. 447 (1923) (suit by taxpayer to restrain expenditures).

[107] *Butcher*, 550 F. Supp. at 702.

[108] *Id.*

[109] Statler, *Reporting Guidelines Under Section 15 of the Consumer Product Safety Act*, 7 J. OF PROD. LIAB. 88-106 (1984).

[110] For instance, courts may be more inclined to enter an interlocutory order granting leave for plaintiffs to amend their complaint to add a products liability cause of action under Section 23 of the CPSA as was done in Payne v. A.O. Smith, 578 F. Supp. 733 (S.D. Ohio 1983).

Commission. Although few products liability defense lawyers have had to litigate an action brought under the CPSA, it appears certain that if strict reporting procedures are not initiated, litigation is inescapable. A reassessment of reporting procedures must occur. These procedures should be perceived not only as an obligation under the law, but also as a means to ward off private civil suits instigated under the CPSA.

The deregulatory efforts of the Reagan administration has led to the budgetary cuts of the Commission. Perhaps this upsurge and promotion of private causes of action is the Commission's way of dealing with less money in its pocket. The holding in *Swenson* makes it possible to force compliance with consumer products safety regulations without the expenditure of taxpayer's dollars and without any government activity.

The Commission has formed alliances with other organizations to help reach their goals of protecting an unsuspecting public.[111] Its information is open to the public, and more importantly, to the trial attorneys of the American Trial Lawyers Association Products Liability-Exchange. This cooperative relationship involves the sharing of information which the organizations have gathered in an effort to promote the goals of each organization. The Commission's information may become an invaluable tool for plaintiff's lawyers and consumer advocates.[112] This information could be devastating for defendants. It is relevant to note that already, plaintiff's attorneys in products cases are being urged to include a count or amend existing complaints to alleging a cause of action based on the CPSA.[113] It cannot be denied that the evolution of warnings by manufacturers, distributors and retailers in product liability suits has undergone a new and unfamiliar twist.

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[111] *See* Babij, *Industry Fails to Report Products Hazards*, 20 TRIAL 62 (Oct. 1984).

[112] *See* Statler, *CPSC: Only a Beginning*, 16 TRIAL 77-81 (Nov. 1980).

[113] *See* Comment, *The Impact of Restrictive Disclosure Provisions on Freedom of Information Act Requests: An Analysis of Section 6(b)(1) of the Consumer Product Safety Act*. 64 MINN. L. REV. 1021-1059 (1980).

