Boston College Law Review

Volume 13
Issue 3 *Number 3*

Article 4

2-1-1972

Federal Hazardous Substances Legislation: Effects on Consumer Protection and Manufacturers' Liability

Richard E. Bird

STUDENT COMMENTS

FEDERAL HAZARDOUS SUBSTANCES LEGISLATION: EFFECTS ON CONSUMER PROTECTION AND MANUFACTURERS' LIABILITY

In the United States, on an average, more than one child dies each day as a result of accidental poisoning.[1] As shocking as this statistic seems, however, it belies the extent of the problem, since an estimated two and one-half million children swallow poisonous substances each year[2] and, of this figure, eighty-five percent are children under five years of age.[3] While many of these incidents involve medicines,[4] some of which are intended to be orally consumed, a significant number of poisonings result from the accidental ingestion of common household cleaning aids.[5] Because they contain hazardous ingredients which can cause death or serious bodily injury,[6] and because they are usually stored in a casual manner in most homes, cleaning products represent a substantial danger to small children.

The danger has increased as advances in manufacturing techniques and applied chemistry have introduced a variety of household cleaning products which contain new and more hazardous substances. In an attempt to meet this problem, Congress in 1927 enacted the Federal Caustic Poisons Act.[7] However, neither this legislation, nor common law theories of manufacturers' liability then current were sufficient to abate the growing number of accidental poisonings by household products containing hazardous substances. To deal more effectively with the problem, Congress in 1960 introduced the Federal Hazardous Substances Labeling Act[8] and, in 1970, the Poison Prevention Packaging Act.[9]

This comment will examine the common law and early state and federal legislative attempts to deal with the problem of accidental poisonings of children. The inadequacies of these early efforts will be noted to indicate the reasons which prompted congressional enactment of the Labeling Act. That Act, subsequent amendments which pur-

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[1] 116 Cong. Rec. 20246 (daily ed. Dec. 16, 1970) (remarks of Senator Pearson).

[2] Id.

[3] Id.

[4] Accidental ingestions of medicines account for 50% of all accidental poisonings. 116 Cong. Rec. 14294 (1970) (remarks of Senator Moss).

[5] Household cleaning aids include products such as furniture polish, liquid drain cleaner, detergent, silver polish, turpentine and a wide variety of cleaners of a similar nature found in the home.

[6] A case history which illustrates the serious consequences of the accidental ingestion of household products containing hazardous substances is cited in 106 Cong. Rec. 6631 (1960) (remarks of Senator Magnuson).

[7] Act of Mar. 4, 1927, ch. 489, §§ 1-10, 12, 44 Stat. 1406-10.

[8] 15 U.S.C. §§ 1261 et seq. (1970).

[9] Pub. L. No. 91-601, 84 Stat. 1670 (Dec. 30, 1970).

ported to remedy the Act's deficiencies, and the Packaging Act will be analyzed. Finally, the overall effectiveness of these later acts in preventing the accidental poisoning of children will be assessed.

I. The Problem: Its Scope and Common Law Remedies

Although the problem of accidental poisonings is not new, its scope was first revealed by statistical analysis developed in 1957. In that year, the National Clearinghouse for Poison Control Centers (Clearinghouse), established under the auspices of the Department of Health, Education, and Welfare (HEW), collected and tabulated data from various Poison Control Centers located in the larger metropolitan areas of the country.[10] The information processed by the Clearinghouse documented the magnitude of the problem and provided a variety of additional relevant statistics.[11] Although the data from the first years of operation were sparse, information compiled by the agency revealed widespread accidental poisoning among children.[12] More detailed statistics from later years showed that while accidental overdoses of medicine caused more poisonings than did accidental ingestion of household products, the latter were responsible for a higher death rate.[13] This fact indicated that cleaning products containing hazardous substances were more lethal than medicines and, consequently, presented a greater danger to young children.[14]

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[10] In 1957 there were 29 centers representing 19 states. U.S. Bureau of Health Services, Dep't of Health, Education, and Welfare, Bull. July-August 1967, National Clearinghouse for Poison Control Centers, Statistical Observations 1 (1967).

[11] In addition to statistics concerning accidental ingestions and resulting deaths, the Clearinghouse provides data tabulating the most frequently ingested products, the duration of hospitalization after ingestion, and various case studies of accidental poisoning. Id.

[12] Statistics showed that deaths among children due to accidental poisonings from 1957-1960 were categorized as follows:

Year	*Deaths due to drugs*	*Deaths due to hazardous household substances*
1957	156	374
1958	150	422
1959	180	456
1960	211	445

U.S. Bureau of Health Services, Dep't of Health, Education, and Welfare, Bull. Sept.-Oct. 1968, National Clearinghouse for Poison Control Centers, Tabulations of 1967 Case Reports 6 (1968).

[13] Id. at 2.

[14] Although the number of deaths due to accidental ingestion of hazardous substances is significantly high, the scope of this problem is obscured because not all cases of accidental poisonings are reported to the Clearinghouse. Although many cases are treated by doctors, not all injuries and ingestions come to the attention of the Clearinghouse. Since Poison Control Centers are not located in every state, the statistics available reflect only a fraction of the actual number of ingestions. While the Clearinghouse statistics indicate approximately 60,000 ingestions in 1965, estimates of the actual number of ingestions are much higher. U.S. Bureau of Health Services, Dep't of Health, Education, and Welfare, Bull. May-June 1966, National Clearinghouse for Poison Control Centers, Statistical Analysis of Accidental Poisoning 5 (1966). Some sources estimate as many as two and one-half million ingestions per year. See text accompanying note 2 supra.

The common law governing products liability was unable to deal effectively with the problem since (a) the law imposed no meaningful duty on manufacturers to reduce the risk of accidental poisoning, and (b) injured consumers or the parents of injured children were provided no viable remedy. Initially, the courts employed the doctrine of privity to determine products liability: the manufacturer was liable only to the immediate purchaser of his product with whom he had a contractual relationship.[15] In effect, the privity rule meant that manufacturers were liable only to retailers and not to consumers, since the latter rarely, if ever, purchased directly from the manufacturer.

Gradually, the restriction imposed by the doctrine of privity was eroded by the development of various exceptions to the rule. The first of these dealt with certain limited products, such as drugs, which were inherently dangerous and, if improperly prepared, became ultrahazardous to the user.[16] The courts reasoned that since death or severe bodily injury inevitably resulted from negligence in the manufacturing of such products, and since the weight of such negligence was more likely to fall on the consumer, the manufacturer should be held liable, despite the absence of privity.[17] This same reasoning led to exceptions involving other inherently dangerous products.[18]

The courts soon realized that there was no valid reason for restricting an injured consumer's right of recovery to situations involving a limited class of inherently dangerous products. Serious injury could result from any type of product which was defective due to a manufacturer's negligence. For this reason, the courts imposed a duty upon all manufacturers to employ reasonable care in the production and inspection of all goods, which, although not inherently dangerous if properly constructed, constituted a menace to life if improperly produced.[19] In this way, consumers were able to sue the manufacturer of a defective product for injuries resulting from his negligence.

Despite these early advances in the common law, which permitted direct legal action against manufacturers, plaintiffs had considerable difficulty in establishing manufacturers' liability. To recover, the consumer had to prove both that the manufacturer had been negligent and that the negligence was the proximate cause of the injury. However, since a product defect was not conclusive proof of negligence, and,

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[15] Winterbottom v. Wright, 152 Eng. Rep. 402 (Ex. 1842).

[16] Thomas v. Winchester, 6 N.Y. 397, 455 (Ct. App. 1852). In this case, a dealer in drugs had mislabeled as harmless extract of dandelion a lethal drug later sold to a consumer.

[17] [A]n act of negligence of a manufacturer or vendor which is imminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life is actionable by third parties who suffer from the negligence.

The third party referred to by the court was the consumer. Huset v. J.I. Case Threshing Mach. Co., 120 F. 865, 870 (8th Cir. 1903).

[18] Wellington v. Downer Kerosene Oil Co., 104 Mass. 64 (1870).

[19] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (Ct. App. 1916).

since it was otherwise difficult to establish fault on the part of a manufacturer, the possibility of recovery was slight. Because of consumers' difficulty in sustaining the burden of proof, courts began to apply the doctrine of strict liability, even absent privity, with respect to certain products. Thus, a manufacturer was held liable for injury caused by defects in his product, notwithstanding the consumer's inability to prove that the defect was caused by the manufacturer's negligence.[20] The courts first applied the doctrine of strict liability in cases dealing with food and drink.[21] Gradually, the doctrine was applied to products designed for intimate bodily use, such as hair dye, soap, and permanent wave solutions.[22] Ultimately, it was expanded to include all defective products.[23]

Notwithstanding this advance in the common law, a person injured due to the accidental ingestion of a hazardous household product still had no basis for recovery. Under the doctrine of strict liability, the consumer had to prove that the product was defective. However, most injuries from ingestion of cleaning agents involved products which had been properly fabricated. The dangerous chemicals contained in such products did not constitute a defect; rather, they were necessary if the product was to clean properly. Thus, there was usually no basis for imposing strict liability in situations involving accidental poisonings.

To accord consumers a measure of protection in such cases, courts in some jurisdictions imposed upon manufacturers the duty to warn consumers of the hazardous nature of their products. In *Cunningham v. C.R. Pease Home Furnishing Co.*,[24] the mother of the plaintiff purchased a stove-blacking compound from the defendant who had represented that it was safe to use on a hot stove. Unknown to the mother or her daughter, the product contained naphtha, a highly flammable substance. When the compound was applied to a hot stove it ignited and seriously injured the daughter. The court held that the manufacturer-seller was liable because he had misrepresented the dangerous

20 W. Prosser, Law of Torts 672 (4th ed. 1971).

21 For an analysis of these cases, see Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1103-10 (1960).

22 Id. at 1111.

23 Acknowledging the inequity of only applying "strict liability" in food cases, and noting the expanded application of the doctrine by other courts, the Supreme Court of New Jersey stated that it saw "no rational basis for differentiating between a fly in a bottle of beverage and a defective automobile." Henningsen v. Bloomfield Motors Inc., 32 N.J. 358, 383, 161 A.2d 69, 83 (1960). *Henningsen* further alleviated the consumer's problem of establishing a privity relationship by holding that the manufacturer's warranty extended not only to the immediate purchaser, but also to the members of his family and to anyone using the product with his permission. For discussion relating to strict liability for defective products see Freedman, "Defect" in the Product: The Necessary Basis for Products Liability in Tort and in Warranty, 33 Tenn. L. Rev. 323 (1966); Traynor, The Ways and Meanings of Defective Products and Strict Liability, 32 Tenn. L. Rev. 363 (1965); Keeton, Products Liability—Liability Without Fault and the Requirement of a Defect, 41 Texas L. Rev. 855 (1963).

24 74 N.H. 435, 69 A. 120 (1908).

nature of his product in order to induce a sale. The court reasoned that although under the doctrine of caveat emptor the seller was not bound to reveal any defects in his product, if he tried to induce a sale by any representation, it had to be a truthful one. If the mother or daughter in *Cunningham* had known that the product contained naphtha or if they had been warned of the dangers connected with the use of the compound, the accident might have been avoided. It should be noted, however, that the decision did not require sellers to reveal, as a matter of course, the substances contained in their products, even when the substances made the products hazardous in normal use.

Subsequent decisions expanded the duty from one of mere truthful representation of the qualities of a product, to an affirmative duty to warn of the dangers accompanying its use. In *Proctor and Gamble Mfg. Co. v. Superior Court of Marin County*,[25] the petitioner sought to restrain the California Superior Court from enforcing an order compelling the petitioner to furnish certain information regarding one of its products. The injured plaintiff in the lower court action had claimed that the petitioner's product, "Cheer," had caused acute dermatitis, resulting in permanent disfigurement of her hands. Plaintiff alleged that the petitioner had failed in its duty to warn of the danger connected with the use of the product. It was argued that this duty should be imposed since the manufacturer knew of over a hundred similar complaints regarding another of its products, "Tide," and, because "Tide" and "Cheer" contained the same elements, Proctor and Gamble knew or should have known of the dangerous effects of "Cheer." Further, if the manufacturer knew of these dangers and did not warn the plaintiff, then it had failed to perform its required duty and was thus liable for the plaintiff's injuries. In support of her arguments, the plaintiff alleged that the petitioner had in its files the affidavits of 117 people injured by "Tide." These files were the documents which the Superior Court had ordered the defendant-petitioner to produce. The appellate court held that the supporting affidavits were based on hearsay and could not be subpoenaed. However, by way of dicta, the court stated that if the manufacturer knew or should have known of the dangers of his product, he had a duty to warn a purchaser of these dangers.[26]

Although courts began to hold that manufacturers had a duty to warn of known dangers accompanying the normal use of their products, the common law was not definite as to what constituted an adequate warning. In *Bender v. William Cooper and Nephew Inc.*,[27] the court indicated that it was unnecessary for a manufacturer explicitly to spell out an unequivocal warning, and that instructions for use would fulfill the duty to warn if they sufficiently indicated that the product was dangerous in some way. In *Bender*, the plaintiff, a

[25] 124 Cal. App. 2d 157, 268 P.2d 199 (1954).
[26] Id. at 162, 268 P.2d at 202.
[27] 323 Ill. App. 96, 55 N.E.2d 94 (1944).

well-educated person, had purchased defendant's disinfectant for use in cleaning dog kennels. Although the label on the container stated that the product was safe and nonirritating, other instructions on the label cautioned the purchaser to dilute the substance before using it. When the plaintiff poured the liquid into a can, it splashed into her eyes and injured her. The plaintiff contended that the label was misleading and the warning inadequate because neither gave any indication that the product was harmful if it came into contact with the eyes. The court reasoned that, since the plaintiff was an educated person, she should have been able to conclude from the instructions regarding the dilution of the substance that it was a type of product that should be kept from contact with the eyes. Therefore, the court found that the plaintiff had received adequate warning as to the attendant dangers of the disinfectant, notwithstanding the other section of the label which indicated that the product was safe and nonirritating.

The result in *Bender* showed that the court was not willing to impose strict labeling requirements on the manufacturer. The consumer had to deduce from the nature of the product, and the accompanying instructions for its use, whether the product was dangerous and, if so, what the possible extent of that danger might be. This reasoning ignored the likely possibility that the consumer could misinterpret the instructions and conclude that the product was safe. In this way, decisions like *Bender* offered no solution to the problem of accidental poisoning due to hazardous household substances, since there was no requirement of an unequivocal warning which would alert consumers to the hazardous nature of the cleaning product.

Shaw v. Calgon[28] presents another example of an "adequate warning" at common law. In *Shaw* the plaintiff accidentally used one of the defendant's products, "Calgonite," diluted with water, to clean venetian blinds instead of using "Calgon," a weaker cleaning agent produced by the same manufacturer. "Calgonite" was a dishwashing solvent which could be used as a household cleanser. However, the label cautioned that care should be taken to avoid contact with the skin. The plaintiff contended that the manufacturer was negligent in failing to give a sufficient warning as to the dangers attending the use of "Calgonite" since neither an antidote nor a list of the chemical elements in the product was provided. The plaintiff further alleged that if instructions for an antidote had been printed on the package, she would have been able to administer some type of appropriate first aid to mitigate the severity of the chemical burns received. The court held that there was no authority for the plaintiff's contention that the label had to include an antidote and an enumeration of the chemical contents of the product. The court reasoned that since detergents were not inherently dangerous and since they were used in a variety of situations without harmful results, instructions for use and a warning

[28] 35 N.J. Super. 319, 114 A.2d 278 (1955).

to use care fulfilled the manufacturer's duty to warn the consumer of the nature of the product.

The *Shaw* court was reluctant to establish requirements for an adequate warning, concluding that such a determination was a prerogative which clearly belonged to the legislature. The court realized that if it were to determine the specific requirements of an adequate warning, and other courts did the same, the result would be varying and conflicting requirements. In addition, if a court presumed to determine the specifications for all labels on hazardous household substances, it would be exercising a legislative function.

Even where courts were willing to impose liability for failure to provide adequate warning, such liability did not obtain when the intervening negligence of the user was determined to be the proximate cause of the injury, rather than the negligent failure of the manufacturer to give adequate warning. In *Boyd v. Frenchee*,[29] a nineteen month old child died as a result of consuming a small amount of fabric cleaner produced by the defendant. The parents of the deceased child, residents of Pennsylvania, brought an action against the manufacturer for the wrongful death of the child. The parents alleged that the manufacturer negligently failed to warn of the dangers contained in the product because the label on the cleaning substance failed to indicate that ingestion of a small amount of the fluid would cause death. This allegation of insufficient warning was based on a Pennsylvania statute which required that all products containing poisonous substances had to bear a label alerting purchasers to the poisonous nature of the product.[30] The court determined that the legislative intent of the statute was to regulate the sale of poisonous substances by pharmacies and not to control the sale of cleaning substances. Moreover, the court concluded that the actual cause of death was not the absence of cautionary labeling, but the fact that the child ingested the product. The court held that the manufacturer had a duty to warn of the dangers surrounding the "intended use" of the product and that he could not be held liable when the product was not used in the intended manner.[31]

Notwithstanding the holding in *Boyd*, decisions in other jurisdictions held that manufacturers were liable for failure to give adequate warning to consumers despite the intervening negligence of a child. In *Spruill v. Boyle-Midway, Inc.*,[32] the mother of the deceased child and the administrator of the child's estate brought suit against the manufacturer of a furniture polish. As a result of ingestion of the polish, the child had contracted chemical pneumonia and died. The plaintiffs alleged that the manufacturer was liable for failing to provide an adequate warning. The label stated that the product was combustible and that it should not be used near fire. In smaller print, the label cautioned

[29] 37 F. Supp. 306 (E.D.N.Y. 1941).
[30] 35 Pub. Stat. Pa. § 901 (1917), as quoted in 37 F. Supp. at 307.
[31] Id. at 310.
[32] 308 F.2d 79 (4th Cir. 1962).

that the polish contained petroleum distillates and that it "may be harmful if swallowed, especially by children."[33]

The court held that the mother's negligent failure to keep the product out of the child's reach barred her recovery. However, the court further held that the child's injury was due to the manufacturer's negligence in providing an insufficient warning of danger and permitted the administrator of the child's estate to recover against the manufacturer. The court was unwilling to consider the child's action a bar to recovery. The manufacturer contended that he was liable only for injuries resulting from the intended use of the product and that the proximate cause of death was the child's misuse of the product. The court stated that "intended use" was simply another way of expressing "reasonably foreseeable use." The court concluded that, considering the nature of the home environment into which the product was introduced, it was reasonably forseeable that a child might swallow the polish. In addition, the court concluded that the manufacturer had to give an adequate warning of reasonably foreseeable risks which would catch the attention of a prudent man and warn him of the nature and extent of the dangers associated with the product.

Spruill was a significant departure from the trend illustrated in the prior cases. In *Bender*, a label which contained no affirmative statement of the dangers surrounding the use of the product, but merely instructed the purchaser to dilute the substance in water before using, was held to be an adequate warning. In *Boyd*, the court held that a manufacturer only had to warn of dangers surrounding the "intended use" of the product, but did not have to warn of those dangers beyond the scope of intended use, such as ingestion by a child. *Spruill* extended the meaning of "intended use" to "reasonable foreseeability" and held that accidental ingestion by a child was a reasonably foreseeable harm for which the manufacturer had a duty to warn.

Although the decision in *Spruill* offered substantial assistance to consumers, the rationale of that case was not accepted in many jurisdictions. This lack of uniformity was a major deficiency in the common law treatment of accidental poisoning due to hazardous household products since such poisoning was an interstate problem amenable to a uniform, interstate solution. Action at the federal level was necessary to solve the problem. Prior to 1960, however, the legislation in this area was inadequate. The Federal Caustic Poisons Act[34] (hereinafter the Poisons Act), enacted in 1927, was the only federal statute to confront directly the problem of poisonous substances contained in household products.[35] This statute listed twelve chemicals defined as

[33] Id. at 82.

[34] Act of Mar. 4, 1927, ch. 489, §§ 1-10, 12, 44 Stat. 1406-10.

[35] The only other Federal statutes dealing with hazardous substances were the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 135 (1970), which dealt with industrial poisons; and the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 et seq. (1970). However, neither Act addressed the problem of hazardous substances contained in household products.

dangerous, caustic or corrosive substances,[36] and required that products containing these elements be labeled as poison.[37] If this labeling requirement was not met, the package was declared misbranded and subject to seizure by the federal government in a process of libel for condemnation.[38] However, the Act was soon outdated. Rapid development in 1927 of manufacturing and applied chemistry resulted in many new dangerous chemicals in a wide variety of new cleaning products. By 1960 the twelve substances enumerated in the Poisons Act represented only a fraction of the hazardous substances contained in cleaning products on the market.[39]

State legislation in this area was equally inadequate to deal effectively with a problem that required interstate solutions. By 1960 only eight states had enacted statutes requiring cautionary labeling on household products containing hazardous substances.[40] These state statutes, while similar in many respects, did not provide uniform regulation of such substances. The Connecticut statute,[41] the most effective in dealing with the problem of accidental poisonings, defined hazardous substances and sought to regulate hazardous household products.[42] In addition, the statute clearly defined the labeling requirements designed unequivocally to alert consumers to the dangers presented by the product.[43] The Connecticut Act was clear, concise and thorough, and was limited to dangerous chemical substances commonly found in detergents and other household cleaning agents. On the other hand, the Vermont statute was a general act not designed exclusively to solve the problem of accidental poisonings caused by common household products. The statute dealt with food, drugs and cosmetics in addition to hazardous household products.[44] As a result, the labeling requirements were inadequate to alert purchasers to the specific dangers presented by cleaning agents. The Kansas statute[45] failed to define hazardous substances and omitted any specifications for labeling requirements, stating only that a warning was necessary.[46] Since the statute merely required a warning, it added nothing to the common law duty to warn. Therefore, Kansas courts still faced the problem of

[36] The 12 substances defined as poison were: hydrochloric acid, sulphuric acid, nitric acid, carbolic acid, oxalic acid, salt of oxalic acid, acetic acid, hypochlorous acid, potassium hydroxide, sodium hydroxide, silver nitrate, and ammonia water. Act of Mar. 4, 1927, ch. 489, § 2(a)(1)-(12), 44 Stat. 1406.

[37] Id. § 2(b)(3), 44 Stat. 1406.

[38] Id. § 4, 44 Stat. 1408.

[39] 106 Cong. Rec. 5536 (1960) (remarks of Senator Bush).

[40] The eight states were Colorado, Connecticut, Illinois, Indiana, Kansas, Ohio, Texas, and Vermont. Id.

[41] Conn. Gen. Stat. Ann. ch. 348 §§ 19-301 et seq. (1958).

[42] Conn. Gen. Stat. Ann. ch. 348 § 19-302 (1958).

[43] Conn. Gen. Stat. Ann. ch. 348 § 19-303 (1958).

[44] Vt. Stat. Ann. ch. 82 § 4051 (1959).

[45] Kan. Stat. Ann. ch. 65 §§ 2701 et seq. (1963).

[46] Kan. Stat. Ann. ch. 65 § 2703 (1963).

determining whether or not a particular warning adequately alerted the consumer to the dangers accompanying use of the product.

While the state statutes concerning hazardous substances generally defined the substances covered and indicated some labeling requirements, they differed substantially as to precisely what words were required on the label, and what constituted an adequate warning. In addition, although the definition of hazardous substances was essentially the same, in all but the Kansas statute, the methods used to determine which products were covered by the definition were indefinite and varied from state to state.[47] Since these statutes provided no distinct differentiation between "hazardous" and "non-hazardous," a substance might be considered highly toxic according to one state's testing method, toxic according to a different state, and not hazardous according to another. Thus, manufacturers producing for an interstate market, subjected to varying jurisdictional requirements, might comply with one state statute, but fail to comply with another. Compliance with all the varying statutes was a practical impossibility.

By 1960, then, federal and state legislation and the common law had been proven ineffective in solving the problem of accidental poisoning caused by hazardous substances in household products. The federal Poisons Act was outdated and failed to encompass all the hazardous chemicals present in various cleaning agents available to consumers. State legislation was also ineffective because only eight states had enacted statutes directed at the problem of accidental poisoning, and these varied widely. The common law of products liability, as it had developed by 1960, also failed to afford the consumer adequate protection from the dangers accompanying the use of hazardous household products. Finally, a manufacturer's duty to warn was usually limited to a duty to warn of reasonably foreseeable injuries, and most courts concluded that accidental ingestion by a child was not reasonably foreseeable.[48] Strict liability of manufacturers usually did not obtain in cases dealing with accidental poisoning since that theory of liability was predicated on the fact that the product was defective and since the injuries in such cases were rarely attributable to a product defect.

II. The Federal Hazardous Substances Labeling Act

In response to the failure of the statutory and common law to deal effectively with the problem of accidental poisonings, Congress in 1960 passed the Federal Hazardous Substances Labeling Act[49] (hereinafter the Labeling Act). This Act represented the first congressional attempt to deal specifically with the problem of hazardous substances contained

[47] Compare Conn. Gen. Stat. Ann. ch. 348 § 19-301 (1958), with Kan. Stat. Ann. ch. 65 § 2701 (1963).

[48] See text at notes 29-33 supra.

[49] 15 U.S.C. §§ 1261 et seq. (1970).

in common household cleaning products. Several factors convinced Congress that a comprehensive federal statute was the best method to abate the growing number of accidental ingestions of hazardous household cleaning agents. Recognizing the inadequacy of existing legislation, Congress realized that federal regulation was necessary to control the plethora of new cleaning products on the market, many of which contained hazardous chemicals.[50] Furthermore, effective advertising techniques, which created wide demand for such products, insured the increased introduction of hazardous substances into the home. It was clear that, absent the compulsion of a federal act, manufacturers would not label their product as poisonous out of fear that sales would decline due to consumer reluctance to bring a deadly product into the home. Since manufacturers did not disclose the chemical elements of their product nor provide an unequivocal warning, consumers were not aware of the inherent dangers contained in household cleansers.[51] This unawareness resulted in an increasing number of accidental ingestions and deaths among children.[52]

Thus, faced with increased numbers of unlabeled dangerous products entering the consumer's home, Congress enacted the Labeling Act. In general, the Act required that cautionary labeling be provided on the product package to warn prospective buyers of dangers accompanying the use of the product.[53] In addition, the label had to provide physicians with necessary information regarding chemical contents and had to include suggested antidotes for dealing with an accidental ingestion.[54] In this way, cautionary labeling would alert parents to the harmful nature of the product and prompt them to keep the substance out of the reach of children.

The Act met the recognized need for uniform national legislation to regulate effectively and fairly the labeling of products containing hazardous substances. This uniformity was essential since divergent state standards had adversely affected the consumer as well as the manufacturer. To meet the divergent and inadequate definitional standards existing among the various states, Section 1(f)(1)(A) of the Labeling Act established a uniform definition of hazardous substances:

> Any substance or mixture of substances which (i) is toxic, (ii) is corrosive, (iii) is an irritant, (iv) is a strong sensitizer, (v) is flammable, or (vi) generates pressure through decomposition, heat, or other means, may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable

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[50] Approximately 300,000 hazardous household substances were unlabeled when the Labeling Act was enacted. 106 Cong. Rec. 5536 (1960) (remarks of Senator Bush).

[51] Id. at 5537.

[52] Id. at 5536-37.

[53] 15 U.S.C. § 1261(p)(1) (1970).

[54] 15 U.S.C. § 1261(p)(1) (1970).

handling or use, including reasonably foreseeable ingestion by children.[55]

This definition treated directly the problem of accidental poisonings by focusing the application of the Act primarily on cleaning agents commonly found in most homes. The scope of the Act was narrowed to these substances by section 1(f)(2), which excluded certain products such as food, drugs, cosmetics and economic poisons.[56] However, the Act was not strictly limited to cleaning agents, but encompassed any household product which met the definitional requirements of a hazardous substance. In addition, section 1 circumvented the inadequacies of state legislation by drawing a distinct line between a hazardous and nonhazardous substance. This was accomplished by providing specific methods for determining whether a substance was "toxic, corrosive, an irritant, a strong sensitizer, flammable, or generated pressure."[57]

Section 1(f)(1)(A) further limited the definition of a hazardous substance to products which caused substantial personal injury or substantial illness.[58] This qualification was intended to insure the effectiveness of cautionary labeling. Congress realized that if every product causing some slight injury or discomfort, such as common facial soap or shampoo, were required to bear cautionary labeling, the purchaser would soon become anesthetized to any warning at all.[59] Adequate identification of truly hazardous substances could be achieved only by limiting cautionary labeling to substances which caused substantial injury.

The definition also directly focused upon the problem of the reasonable foreseeability of accidental ingestions of hazardous household products by children. The Act stated that a hazardous substance was any substance which "may cause substantial personal injury . . . during or as a proximate result of any customary or reasonably foreseeable handling or use, *including reasonably foreseeable ingestion by children.*"[60] This clause eliminated the problem of determining whether manufacturers could reasonably have foreseen accidental ingestion of the product by a young child. Manufacturers could no longer escape

[55] 15 U.S.C. § 1261(f)(1)(A) (1970).

[56] The term "hazardous substance" shall not apply to economic poisons subject to the Federal Insecticide, Fungicide, and Rodenticide Act, nor to foods, drugs and cosmetics subject to the Federal Food, Drug, and Cosmetic Act, nor to substances intended for use as fuels when stored in containers and used in the heating, cooking, or refrigeration system of a house.
15 U.S.C. § 1261(f)(2) (1970).

[57] 15 U.S.C. § 1261(g)-(m) (1970). Detailed regulations and testing procedures for determining hazardous substances are provided in 21 C.F.R. §§ 191.10-16 (1971). However, these methods of determining which substances are hazardous are criticized as being inadequate in Zapp, The Federal Hazardous Substances Labeling Act, 17 Food Drug Cosm. L.J. 104 (1962).

[58] 15 U.S.C. § 1261(f)(1)(A) (1970).

[59] H.R. Rep. No. 1861, 86th Cong. 2d Sess., to accompany S. 1283, reprinted in 2 U.S. Code, Cong. & Ad. News 2833, 2837 (1960).

[60] 15 U.S.C. § 1261(f)(1)(A) (1970).

liability by arguing that the proximate cause of the injury was not inadequate warning, but the ingestion of the substance by the child. The imposition of strict liability was supported by statistics on deaths resulting from poisoning by accidental ingestion which showed that it was reasonably foreseeable that children will ingest household substances.[61] Such liability was further justified by the fact that household cleaning products are used in every home and are usually within easy reach of children. Given the natural propensities of young children to taste any substance, it is foreseeable that, absent parental awareness of attendant dangers, children may be poisoned by the hazardous substances contained in common household cleaning products.

Section 2 of the Labeling Act[62] gave the Secretary of HEW two important powers which enabled him to deal effectively with the problem of accidental poisoning caused by hazardous household products. First, section 2(a)(1) authorized the Secretary to declare any substance hazardous whenever he determined that the objectives of the Act would be better served by such a declaration, even though the substance was not included in the technical definitions of the Act. In this manner, even if a product did not meet the toxicity requirements of the Act,[63] the manufacturer could be required to provide the cautionary labeling necessary for a toxic substance. This power enabled the Secretary to eliminate the uncertainty between hazardous and nonhazardous substances and thereby insure the efficacy of the Act. If a substance did not fit the specifications for a hazardous substance but caused frequent and substantial injuries, the Secretary could determine that such a substance came under the purview of the Act. Thus, doubt as to the applicability of the Act was resolved without recourse to adjudication in the courts. Second, under section 2(b), the Secretary was authorized to impose additional labeling requirements on products which presented a special hazard to consumers. Such an imposition would obtain whenever he determined that the Act's general labeling requirements were insufficient to protect consumers from the inherent dangers of a particular product. The additional labeling was intended

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[61] See note 12 supra.

[62] Section 2(a)(1) defines the Secretary's powers as follows:

> Whenever in the judgment of the Secretary such action will promote the objectives of this chapter by avoiding or resolving uncertainty as to its application, the Secretary may by regulation declare to be a hazardous substance, for the purpose of this chapter, any substance or mixture of substances which he finds meets the requirements of [section 1(f)(1)(A)] of this title.

15 U.S.C. § 1262(a)(1) (1970).

Subsection (b) provides, in relevant part, that:

> If the Secretary finds that the requirements of [section 1(p)(1)] are not adequate for the protection of the public health and safety in view of the special hazard presented by any particular hazardous substance, he may by regulation establish such reasonable variations or additional label requirements as he finds necessary for the protection of the public health and safety. . . .

15 U.S.C. § 1262(b) (1970).

[63] These requirements are provided in 15 U.S.C. § 1261(g), (h)(1) (1970).

to apprise the consumer of the true extent of the danger inherent in the use of ultrahazardous household products.

Although Section 2 of the Labeling Act seemed to place arbitrary power in the hands of the Secretary of HEW, such measures were necessary if the consumer were to be protected. Available data showed that certain frequently used products, despite low toxicity under Labeling Act requirements, were hazardous "as a matter of historical fact"[64] and that the public would be better protected if additional labeling apprised them of the real danger. The power vested in the Secretary was also justified by the "substantial injury" clause of section 1. This section categorized as hazardous a substance which could cause substantial injury, even though its chemical composition fell below the toxicity specifications of the definitional section of the Labeling Act.[65] If the Secretary were not given this far-reaching power of regulation, many dangerous substances which often cause injury would appear on the market without cautionary labeling. However, the power of the Secretary of HEW under section 2 was not unlimited; certain administrative procedures had to be followed before a substance could be classified as hazardous or ultrahazardous.[66] Further, there had to be considerable evidence, derived from medical knowledge and from data processed by the Poison Control Centers, that a product was one which caused an inordinate number of injuries and that it was highly dangerous to human life.[67]

The Labeling Act also provided guidelines for determining what constituted an adequate warning to the consumer. Section 1(p) enumerated the necessary elements of an adequate warning.[68] These

[64] Kerosene is one such substance. According to the definition contained in the Labeling Act, kerosene is only slightly toxic. However, this substance has caused a high number of accidents. It has been argued that kerosene manufacturers should be required to provide additional cautionary labeling because the injuries caused are more like those resulting from products defined as highly toxic. Zapp, supra note 57, at 111.

[65] 15 U.S.C. § 1261 (g), (h)(1) (1970).

[66] These administrative procedures are provided in 21 C.F.R. § 191.201 (1971). Generally, the Secretary of HEW must first publish his proposal to classify a particular product as ultrahazardous in the Federal Register. Comments may then be submitted by those manufacturers who will be adversely affected by the proposal. Whenever valid objections have been submitted by manufacturers, a public hearing must be held and the proposed regulations are suspended pending the resolution of the hearing.

[67] The type of information required and examples of substances declared hazardous are provided in 21 C.F.R. § 191.7 (1971).

[68] In relevant part, section 1(p) required:

> (A) the name and place of business of the manufacturer, packer, distributor or seller; (B) the common or usual name or the chemical name (if there be no common or usual name) of the hazardous substance or of each component which contributes substantially to its hazard . . . (C) the signal word "DANGER" on substances which are extremely flammable, corrosive, or highly toxic; (D) the signal word "WARNING" or "CAUTION" on all other hazardous substances; (E) an affirmative statement of the principal hazard or hazards, such as "Flammable," "Vapor Harmful," "Causes Burns," "Absorbed Through Skin," or similar wording descriptive of the hazard; (F) precautionary measures describing the action to be followed or avoided . . . (G) instruction, when necessary or

requirements served a twofold purpose: (a) manufacturers knew what was expected of them in terms of adequacy of warning, thus avoiding the dilemma of varying labeling requirements in state statutes and common law decisions; and (b) consumers were apprised of the inherent dangers of the product and were provided with an antidote in case of an accidental ingestion. Finally, the Act provided for the seizure of nonconforming packages and imposed penalties on offending manufacturers.[69] The use of a package which was not properly labeled subjected the manufacturer to a fine and permitted the Secretary of HEW to seize the products so packaged by filing a libel of information in federal district court.[70] These penalties seemed adequate to deter manufacturers from placing improperly labeled products on the market.

III. Effectiveness of the Labeling Act

A. *Post-Act Statistics*

Unfortunately, the Labeling Act was not completely successful in solving the problem of accidental poisonings caused by household products containing hazardous substances. Properly labeled products containing such substances and complying with the Labeling Act were introduced into interstate commerce, despite the extremely dangerous nature of their contents. The effectiveness of the Labeling Act was frustrated by admittance of these products into the marketplace. In the years immediately following the promulgation of the Act, statistics compiled by the National Clearinghouse for Poison Control Centers revealed that accidental ingestions among children under five years of age were increasing.[71] Although this fact was partly attributable to increased efficiency in reporting poisonings and to increased public awareness of the Poison Control Centers, an increase in the actual rate of ingestions was doubtless a contributing factor, even in the wake of cautionary labeling.

One important statistic however, indicated that the Labeling Act

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appropriate, for first-aid treatment; (H) the word "poison" for any hazardous substance which is defined as "highly toxic" by subsection (h) of this section; (I) instructions for handling and storage of packages which require special care in handling or storage; and (J) the statement . . . "Keep out of the reach of children" or its practical equivalent. . . .

15 U.S.C. § 1261(p)(1) (1970).

[69] 15 U.S.C. §§ 1264, 1265, 1267 (1970).

[70] 15 U.S.C. § 1265(a) (1970).

[71] Ingestion statistics for 1962-1965:

Year	*Number of Ingestions*
1962	40,775
1963	46,954
1964	56,097
1965	63,352

U.S. Bureau of Health Services, Dep't of Health, Education, and Welfare, Bull. May-June 1966, National Clearinghouse for Poison Control Centers, Statistical Analysis of Accidental Poisoning 5 (1966).

was somewhat effective. The total number of poisonings attributable to cleaning and polishing agents was reduced by approximately two and one half percent in a three year period from 1962 to 1965.[72] In addition, the number of deaths caused by products containing hazardous substances, exclusive of medicines, reflected a similar decline.[73] Section 1(p) of the Act, which required a listing of the chemical elements and an inclusion of an antidote, probably contributed to the decline in deaths because physicians were able to administer first aid more rapidly and more effectively. The cautionary labeling itself increased parents' awareness of the inherent danger of various substances, and consequently, they were probably more careful in the use and storage of products.

Despite these advances, however, detergents, bleaches, polishes and disinfectants were among the most frequently ingested products containing hazardous chemicals.[74] In addition, 1965 statistics revealed that poisonings caused by cleaning and polishing agents required more extensive hospitalization than was necessary in cases involving accidental overdoses of medicine,[75] indicating that hazardous household substances continued to be more lethal than medicines. While improved

[72] Percentage of total poisonings attributable to cleaning and polishing agents for 1962-1965:

Year	*Percentage*
1962	17.4%
1963	16.0%
1964	15.9%
1965	14.7%

Id.

[73] Deaths due to nonmedicinal substances, 1962-1966:

Year	*Number of deaths*
1962	425
1963	454
1964	388
1965	379
1966	345

U.S. Bureau of Health Services, Dep't of Health, Education, and Welfare, Bull. Sept.-Oct. 1968, National Clearinghouse for Poison Control Centers, Tabulations of 1967 Case Reports 6 (1968).

[74] The most frequently ingested product was aspirin, which accounted for 24% of total ingestions. Soap and detergents, the second highest category, accounted for only 4% of the total ingestions. Of the 10 categories of products most frequently ingested, five categories represented products regulated by the Labeling Act and together accounted for 14% of all accidental ingestions. U.S. Bureau of Health Services, Dep't of Health, Education, and Welfare, Bull. Sept.-Oct. 1967, National Clearinghouse for Poison Control Centers, Survey of Products Most Frequently Named in Ingestion Accidents 1 (1967).

[75] For example, 4.2% of cleaning agent ingestions required 2 to 3 days of hospitalization, while only 2.7% of medicinal ingestions required a comparable period of hospitalization. In addition, 4.0% of cleaning agent ingestions required 4 or more days of hospitalization while only 0.7% of medicinal ingestions required the same duration of hospitalization. U.S. Bureau of Health Services, Dep't of Health, Education, and Welfare, Bull. May-June 1966, National Clearinghouse for Poison Control Centers, Statistical Analysis of Accidental Poisoning 8 (1966).

labeling had reduced the total number of poisonings, it could not mitigate the extremely lethal nature of substances contained in the products.

B. *Judicial Application of the Act*

Due to the paucity of cases dealing with hazardous household substances, it is difficult to appraise the effect of the Labeling Act on the common law liability of the manufacturer. However, the cases that do exist present some insight as to how the courts utilized the statute. In *Wilmington Chemical Corporation v. Celebrezze*,[76] a federal district court upheld the power of the Secretary of HEW to require additional labeling under Section 2 of the Labeling Act. The plaintiff's product, a water repellant substance, had been labeled in accordance with the provisions of the Act. However, because of information which attributed one death and several injuries to the product, the Secretary required the inclusion of additional cautionary labeling on the water proofing compound. The manufacturer brought an action to determine whether the Secretary of HEW had the power to require the additional labeling.

In upholding the Secretary's right to require additional labeling, the court reasoned that, since the prime purpose of the Labeling Act was to protect the public, the Secretary had a duty to pursue that purpose to its fulfillment, even to the extent of requiring additional labeling on a package previously approved. The court was unwilling to substitute its own judgment for that of an administrative agency possessing expertise in such matters and authorized to determine labeling requirements. However, the court cautioned that such determinations would not be upheld if it were shown that the agency had clearly abused its discretionary power. This caveat indicated that the Secretary was still required to follow the basic requirements of the Labeling Act, and was empowered only to prescribe specifications commensurate with the degree of danger presented by a particular product.

In *U.S. v. 7 Cases, Cracker Balls*,[77] the Secretary of HEW filed a libel of information pursuant to the Labeling Act against the manufacturer of cracker balls, small fireworks about the size of a pencil eraser. The government alleged that, since the cracker balls resembled candy, it was reasonably foreseeable that a child would ingest them. The government argued that, accordingly, the cracker balls should be subjected to the labeling requirements of the Act. The court held that, because cracker balls were flammable and generated pressure through decompression, they came under Section 1(f)(A) of the Labeling Act and were a hazardous substance requiring a cautionary label. Referring again to section 1(f)(A) the court reasoned that the product could cause "substantial personal injury as a proximate result of a

[76] 229 F. Supp. 168 (N.D. Ill. 1964).
[77] 253 F. Supp. 771 (S.D. Tex. 1966).

reasonably foreseeable use." Although this case dealt with a toy rather than a household cleaning product, the opinion indicated that the Labeling Act was useful in determining the tort liability of a manufacturer of a hazardous substance. The court noted that the Act provided a specific statutory standard for determining whether a substance was hazardous and whether the resulting injury was reasonably foreseeable.

In *Courtney v. American Oil Co.*,[78] however, a state court strictly construed the Labeling Act regarding the issue of reasonable foreseeability. In that case, a gasoline station manager had sold an unmarked container of gasoline to two children. Following the sale, one of the children was injured when his playmate ignited the gasoline. The father of the injured boy brought an action against the manufacturer, alleging that the product was a hazardous substance and that it had been sold without the cautionary labeling prescribed by the Labeling Act. The court held that, at most, violation of the Labeling Act constituted negligence, but that absent more compelling evidence, it was not the proximate cause of the injuries sustained. Strictly construing the Act, the court held that the intentional lighting of the gasoline was not a "reasonably foreseeable use" under the Act, and that the defendant was therefore not liable for the resulting harm. The court was unwilling to expand the purview of the Act beyond the precise language of section 1(f)(A), which provided that reasonably foreseeable use included "reasonable foreseeable *ingestion* by children."[79]

It is submitted that although *Courtney* dealt with an injury to a child resulting from the ignition of a substance, rather than the ingestion of one, there is little substantive difference between the two types of misuse. Both seem to fall within the scope of "reasonably foreseeable use" as that phrase is used in the Labeling Act. The Act's contemplation of "reasonably foreseeable ingestion by children" should not restrict the meaning of the phrase "reasonably foreseeable use" to ingestion alone; rather, it should more reasonably encompass all general acts of misuse by children whenever those are foreseeable.

A conclusion similar to that in *Courtney* was reached by another state court in *Steagall v. Dot Manufacturing Corp.*[80] This case involved a cook at an institution who had purchased a drain solvent produced by the defendant. The cook was seriously burned when he accidentally overturned a bottle of the drain solvent which had been placed uncapped on a high shelf by an unidentified third person. The cook sued the manufacturer, alleging that the container was unsafe and that the manufacturer had negligently failed to provide an adequate warning of the highly corrosive nature of the product. The court concluded that, although the violation of the Labeling Act constituted negligence per se, no liability attached because there was no

[78] 220 So. 2d 675 (Fla. 1968).
[79] 15 U.S.C. § 1261(f)(1)(A) (1970) (emphasis added).
[80] 223 Tenn. 428, 446 S.W.2d 515 (1969).

causal connection between the injury and the negligence. The court reasoned that the intervening negligence of the third person was sufficient to break the causal connection between the manufacturer's failure to warn and the plaintiff's injuries.

Cases such as *Courtney* and *Steagall* indicated that the Labeling Act was inadequate to protect consumers against the dangers of hazardous household products. In *Steagall*, despite the language of the Labeling Act, proximate cause and contributory negligence remained formidable barriers to recovery, as in earlier common law. *Courtney* illustrated the possible strict interpretation courts were likely to impose on the statutory language of "reasonably foreseeable ingestion." Moreover, in no case did a court use the Act to extend the manufacturer's obligation beyond a mere duty to warn. Since hazardous household substances were seldom defective, courts were reluctant to impose strict liability for injuries connected with the product where there was compliance with the Act's labeling requirements. Consequently, once the manufacturer had affixed a cautionary label to a product, his duty was discharged. If a child accidentally ingested the properly labeled product, the manufacturer was not held liable. Manifestly, additional regulation was necessary to reduce the number of injuries to children caused by ingestion of hazardous household substances.

IV. Subsequent Legislation Designed to Supplement the Labeling Act

A. *The 1966 Amendment to the Labeling Act*

Not only was the Act of no use in expanding a manufacturer's liability, it also had little or no effect in mitigating the dangers inherent in certain ultrahazardous substances. Congress realized that some products, though in reality too dangerous for consumer use, were legally marketable so long as they were properly labeled. Certain household products contained substances which enhanced cleaning ability but which rendered the product ultrahazardous in normal use. Such products could not be made safe merely by requiring cautionary labeling.[81] A warning could not prevent the accidental splashing of a powerful cleaning fluid into the user's eyes, nor could it prevent the inhalation of harmful fumes emitted by some cleaning agents. If a product was so lethal that a few teaspoonsful could cause death to a child, the required warning would not make the product any less deadly. Therefore, Congress decided that a more reasonable solution to the problem was an outright banning of such substances. In this way, harmful products would be prevented from entering interstate commerce and the danger which they created would be entirely removed.

[81] One such product, a water proofing agent, had a flash point so low that only a professional could use it safely. As a result of this extremely high flammability, many consumers were seriously burned. 112 Cong. Rec. 9525 (1966) (remarks of Senator Magnuson).

It was this reasoning which led to enactment of the 1966 Amendment to the Hazardous Substances Labeling Act.[82] Under this statute, the Secretary of HEW was authorized to ban any product which could not be made adequately safe for consumer use by proper cautionary labeling. Once the Secretary made such a determination, the banned product was not permitted on the market. The application of the provision was not limited exclusively to hazardous household products, but also included toys and any articles intended for use by children.[83] The rationale for enacting the statute was to protect the public health and welfare from products which could not be used safely in the home, even when they were properly labeled. In this way, the Amendment added to the manufacturer's duty to warn another obligation, that of refraining from the manufacture of unusually hazardous household products.

The Amendment represented a necessary and effective supplement to the Labeling Act. That Act was based on the premise that lack of adequate warning and resultant parental unawareness of the potential danger of cleaning products were the major causes of accidental misuse among young children.[84] However, in enacting the Labeling Act, Congress had failed to appreciate the fact that no matter how well informed parents were, accidental ingestion and other misuse would result. Since children under five years of age cannot read cautionary labeling, a mere warning was insufficient; the effectiveness of the Labeling Act could be assured only if parents read the warning and carefully guarded the hazardous product. Statistics indicated that reliance on parental care was unsound because accidental ingestions increased after the promulgation of the Labeling Act.[85] Most accidental poisonings occurred not because parents were unaware of the lethal aspects of the product, but because children can gain easy access to such a product no matter how safely it is stored. Thus, if the purpose of the Labeling Act was to prevent accidental misuse of harmful substances, the Amendment was a logical and effective approach, since it permitted

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[82] The Amendment provides that:

> The term "banned hazardous substance" means (A) any toy, or other article intended for use by children, which is a hazardous substance, or which bears or contains a hazardous substance in such manner as to be susceptible of access by a child to whom such toy or other article is entrusted; or (B) any hazardous substance intended, or packaged in a form suitable, for use in the household, which the Secretary by regulation classifies as a "banned hazardous substance" on the basis of a finding that, notwithstanding such cautionary labeling as is or may be required under this chapter for that substance, the degree or nature of the hazard involved in the presence or use of such substance in households is such that the objective of the protection of the public health and safety can be adequately served only by keeping such substance, when so intended or packaged, out of the channels of interstate commerce. . . .

15 U.S.C. § 1261(q)(1) (1970), amending 15 U.S.C. § 1261 (1964).

[83] 15 U.S.C. § 1261(q)(1)(A) (1970).

[84] 106 Cong. Rec. 5537 (1960) (remarks of Senator Bush).

[85] See note 71 supra.

the Secretary of HEW to prohibit the sale of substances which had caused serious injury or death in an inordinate number of cases.

A recent development illustrates the efficacy of the powers granted to the Secretary of HEW under the Amendment. Using these powers, the Secretary moved to ban carbon tetrachloride as a hazardous substance.[86] In support of this declaration, HEW presented exhaustive data on the dangers present in and attendant upon the use of carbon tetrachloride. The most significant finding was that products containing the substance emitted deadly fumes.[87] This danger was compounded by the fact that the substance was used in many household cleaning agents, and was therefore present in many homes. Cautionary labeling was wholly ineffective to protect the public in this situation because the product could be extremely lethal even when used in the prescribed manner. Consequently, the Secretary of HEW determined that the only way to protect the public health and to insure the safety of consumers was to prohibit the substance from the market. Accordingly, the Secretary declared carbon tetrachloride to be a banned hazardous substance and thus excluded it from interstate commerce.[88]

Clearly, the most effective method of protecting consumers from products containing hazardous substances is an outright banning of those products. However, since many of them are useful, a solution short of extensive banning is preferable. Furthermore, the fact that the Secretary only twice invoked the power of the Amendment indicated his reluctance to take such drastic action except in the most extraordinary circumstances.[89]

B. *The Poison Prevention Packaging Act*

In an attempt to provide a viable alternative to extensive banning, and to expand the protection of young children as regards accidental poisoning, the Poison Prevention Packaging Act[90] (hereinafter the Packaging Act) was enacted. The need for additional protective measures was emphasized by the persistent increase in accidental poisonings caused by hazardous household substances. Statistics provided by the National Clearinghouse for Poison Control Centers indicated that, by 1969, accidental ingestions and accompanying deaths remained at a high level.[91] Detergents and disinfectants were still

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[86] 35 Fed. Reg. 13198 (1970).

[87] This finding was based on 23 documented cases, some involving multiple poisonings, which had accounted for 15 deaths and 21 serious poisonings. Id. at 13202.

[88] Id. at 13204. See also 21 C.F.R. § 191.9(a)(2) (1971).

[89] Only two hazardous household substances have been banned by the Secretary under the Amendment: carbon tetrachloride and extremely flammable waterproofing compounds. 21 C.F.R. § 191.9 (1971).

[90] Pub. L. No. 91-601, 84 Stat. 1670 (Dec. 30, 1970).

[91] In 1969, 76,155 cases of accidental ingestions were reported among children under five years of age. U.S. Bureau of Health Services, Dep't of Health, Education, and Welfare, Bull. Sept.-Oct. 1970, National Clearinghouse for Poison Control Centers, Tabulations of 1969 Reports 5 (1970).

among the ten most frequently ingested products containing hazardous substances, with bleach and polish ranking high in the group.[92]

In seeking a solution which would effectively counter the accelerating trend of accidental poisonings, Congress explored the possibility of utilizing various types of safety packaging which would make it difficult or impossible for children to open packages containing harmful substances. Test results offered convincing evidence that specially designed containers could significantly reduce the number of accidental poisonings among children under five years of age.[93] Other tests indicated that accidental poisonings due to medicines and hazardous household products could be reduced by as much as ninety percent.[94] By reducing the number of such accidents, safety containers provided a viable alternative to banning since they effectively diminished the danger accompanying use of some necessary but hazardous substances. Safety packaging of products such as aspirin, barbiturates and other medicines would obviate the need to eliminate extremely useful products. Although household cleaning products are not absolutely necessary, and are of less social importance than medicine, they do serve a valid purpose and should be preserved if possible.

Although Congress realized the need for safety containers, there was disagreement as to how extensive safety packaging legislation should be.[95] The dispute centered upon the need for having some products available in nonsafety packages. Since most products were available in more than one package size, the Senate proposed that a nonsafety container should be marketed in only one size, for the aged and the handicapped who might otherwise be unable to open the package, with all other sizes packaged in safety containers.[96] However, the House of Representatives disagreed, feeling that a single, one size safety package was sufficient to achieve the intended results of the Packaging Act—the protection of children.[97] In joint conference the proponents of the Senate version of the bill argued that manufacturers, concerned with effective and economical marketing, would devote little advertising money toward safety packaging if safety containers were required for only one size of their product. As a result, consumers would remain unaware of the availibility of safety containers. In addition, economy-minded housewives who normally purchase large sizes

92 Products which could be classified as household cleaning aids accounted for 18.1% of total ingestions among children under five years of age, while aspirin accounted for 19% of that total. Id. at 2.

93 The tests, conducted in Canada, extended over a period of 1½ years and resulted in a decline in accidental poisonings from 2,000 per year to 3 per year. Madigan General Hospital in Washington state reported a 97% reduction in accidental poisonings after the introduction of safety packaging in that area. 115 Cong. Rec. 12279 (1969) (remarks of Senator Moss).

94 116 Cong. Rec. 14294 (1970) (remarks of Senator Moss).

95 H.R. Rep. No. 1642, 91st Cong., 2d Sess., to accompany S.2162, reprinted in 3 U.S. Code Cong. & Ad. News 5326, 5327-28 (1970).

96 Id. at 5328.

97 Id.

of a product would not be attracted to standard-sized safety packages, and retailers would probably not allocate large areas of shelf space to the standard-sized safety package, since more room would be needed for the numerous nonsafety containers. Furthermore, if only one size were available, retailers would not stock a large inventory of the safety containers. Consequently, the most readily available containers of a multisized product would not be in safety packaging. Congress finally adopted the Senate version of the bill.[98]

Under the Packaging Act, safety packaging requirements cut across product lines and included food, drugs, economic poisons and fuels as well as common household cleaners.[99] In order to clarify what products required safety packaging, the Act encompassed any product which contained substances defined as hazardous according to the specifications of the Labeling Act.[100] The "special packaging" required for these products was defined as "packaging that is designed to be significantly difficult for children under five years of age to open."[101] The Act authorized the Secretary of HEW, in consultation with various technical advisors, to establish specifications for the packaging of any household substance, provided that "the degree or nature of the hazard to children in the availability of such substance, by reason of its packaging, is such that special packaging is required to protect children from serious personal injury."[102] In addition to requiring "special packaging," the Act also permitted the Secretary to prohibit the packaging of a product containing a hazardous substance in a container or fashion especially attractive to children.[103] The rationale behind this provision was based on the fact that many cleaning fluids were contained in bottles which resembled soft drinks and which often had a pleasant fruit odor, attracting small children and causing them to swallow the liquid.[104]

While the ostensible purpose of the Packaging Act was to extend consumer protection and to reduce accidental poisonings among young children, the actual result may be to the contrary. It is submitted that

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[98] Section 4(a) of the Act provides:

> For the purpose of making any household substance which is subject to a standard established under section 3 readily available to elderly or handicapped persons unable to use such substances when packaged in compliance with such standard, the manufacturer or packer, as the case may be, may package any household substance, subject to such a standard, in packaging of a single size which does not comply with such standard. . . .

Pub. L. No. 91-601 § 4, 84 Stat. 1670 (Dec. 30, 1970).

[99] Pub. L. No. 91-601 § 2(2), 84 Stat. 1670 (Dec. 30, 1970).

[100] Pub. L. No. 91-601 § 2(2)(A), 84 Stat. 1670 (Dec. 30, 1970).

[101] Section 2(4) further qualifies the definition of "special packaging" as meaning that which is ". . . not difficult for normal adults to use properly, but does not mean packaging which all such children cannot open. . . ." Pub. L. No. 91-601 § 2(4), 84 Stat. 1670 (Dec. 30, 1970).

[102] Pub. L. No. 91-601 § 3(a)(1), 84 Stat. 1670 (Dec. 30, 1970).

[103] Pub. L. No. 91-601 § 3(d), 84 Stat. 1670 (Dec. 30, 1970).

[104] Consumer Reports, Sept. 1971, at 530.

the most effective means of protecting children from accidental poisonings due to hazardous household substances was the 1966 Amendment to the Labeling Act, which permitted the Secretary of HEW to ban certain ultrahazardous substances. Although the Packaging Act did not abrogate the Amendment, and although the Secretary retained his power to ban ultrahazardous substances, the Packaging Act substantially limited this power. In order to authorize a ban under the Amendment, the Secretary had to demonstrate that the product was so dangerous that it could not be made safe by any means other than prohibition. However, under the Packaging Act, although a product may be extremely dangerous, it cannot be banned if it can be made safe through "child-proof" safety packaging. Thus, HEW may only conditionally ban a product until it is packaged in adequate safety containers.

Such a result occurred when the Secretary of HEW proposed a ban on certain ultrahazardous liquid drain cleaners.[105] The Secretary proposed that the drain cleaners, due to their ultrahazardous nature, would be banned unless marketed in safety packages. To avoid the financial losses attendant upon such a ban, manufacturers elected to use safety packaging and continued to market their product.[106] Because of the restriction imposed by the Packaging Act, the Secretary of HEW could not fully utilize his Amendment power to permanently ban this ultrahazardous product.

It is submitted that such results under the Packaging Act are unfortunate since the real strength of the 1966 Amendment lay in its power to compel manufacturers to produce a *safe* product, rather than a *safely packaged* product. A safely packaged product can still cause serious injury if ingested or otherwise misused. More extensive application of the power to ban would compel manufacturers of household cleaning products to use available nonhazardous chemicals as a base for their products, rather than toxic or corrosive ones.[107]

V. Conclusion

The Federal Hazardous Substances Labeling Act has been law for a decade, the 1966 Amendment for half as long, and the Poison Prevention Packaging Act for only a year. The cumulative impact of these statutes has been ineffective to alleviate significantly the problem of accidental poisoning among young children. The number of injuries and deaths due to the accidental ingestion of hazardous household cleaning substances remains substantially unchanged since 1960, when the Labeling Act was enacted. Cautionary labeling, as provided by

105 The proposed ban was directed at drain cleaners containing 10% or more of sodium and/or potassium hydroxide. 35 Fed. Reg. 17746 (1970).

106 Drano, one of the drain solvents in question, is now marketed in the required safety package. Consumer Reports, Sept. 1971, at 531.

107 Consumer Reports, Sept., 1971, at 530. Consumer Reports indicates that substitute chemicals are available for certain products and that they could provide a viable alternative to hazardous chemicals.

the Labeling Act, cannot solve the problem because regardless of the adequacy of the warning, parents will continue to be careless with hazardous household cleaning aids. Although Congress amended the Labeling Act to permit the Secretary of HEW to ban ultrahazardous substances, the power was not used extensively nor effectively. Furthermore, enactment of the Poison Prevention Packaging Act diminished the effectiveness of the Amendment by providing an alternative to prohibition. Safety packaging is only a limited solution to the problem of accidental poisoning and is no more effective than cautionary labeling, because parental carelessness will still allow children to obtain access to the hazardous substance.

To achieve the proposed goal of the Labeling Act and the Packaging Act—the protection of children from accidental poisoning—the power to ban products containing ultrahazardous substances must be fully restored to the Secretary of HEW. To accomplish this end, it may be necessary to amend the Packaging Act with a provision permitting the Secretary of HEW to ban all ultrahazardous substances, notwithstanding the use of safety packaging.

RICHARD E. BIRD