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TESTIMONY OF DONALD L. MAYS

SENIOR DIRECTOR, PRODUCT SAFETY & CONSUMER
SCIENCES

CONSUMERS UNION

On

"Defective Products: Will Criminal Penalties Ensure Corporate
Accountability?"

Before the SENATE JUDICIARY COMMITTEE

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Consumers Union

Headquarters Office

101 Truman Avenue
Yonkers, New York 10703-1057
(914) 378-2029
(914) 378-2992 (fax)

Washington Office

1666 Connecticut Ave, NW #310
Washington, DC 20009
(202) 462-6262
(202) 265-9548 (fax)

West Coast Office

1535 Mission Street
San Francisco, CA 94103-2512
(415) 461-6747
(415) 431-0906 (fax)

South West Office

1300 Guadalupe, Suite 100
Austin, TX 78701-1643
(512) 477-4431
(512) 477-8934 (fax)

Good morning, Chairman Specter, and other members of the Committee. I am Donald Mays, Senior Director of Product Safety and Consumer Sciences for Consumers Union, publisher of *Consumer Reports*® magazine.¹ Thank you for providing me the chance to come before you today to discuss ways to improve the quality and safety of the consumer marketplace and support all efforts that will help achieve this important goal.

The ultimate question before the Committee today is whether or not criminal penalties will ensure corporate accountability. Will the threat of jail time serve as an effective deterrent in preventing dangerous products from reaching the hands of consumers? Will it force manufacturers to think twice? Would such legislation have prevented Ford/Firestone?

Based on my experiences, I believe that legislation targeted at marketplace accountability is critically important. Individuals in companies who knowingly allow dangerously defective (*i.e.* likely to cause death or serious bodily injury) products to be introduced into interstate commerce should be held accountable. In addition, knowledgeable employees who fail to pass along this information to responsible government agencies should be held criminally responsible.

My 29-year career has focused on product safety and performance testing for manufacturers and retailers as well as for consumers. I believe I bring a unique perspective of someone who understands the competitive pressures of getting new products to the market as quickly and as economically as possible. And from a consumer perspective, I understand the need to trust that all the products in the marketplace are produced with a high degree of integrity and safety.

My breadth of experience includes work in laboratories and factories both here and abroad. It has exposed me to countless examples of suppliers that fail to diligently

¹ Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* and *ConsumerReports.org* with more than 6.2 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

build safety into their products. What's more disturbing are the cases I have seen where manufacturers and retailers have continued to sell unsafe products despite the emergence of a clear hazard pattern that results in serious bodily injury.

For four years, I served as the Technical Director of the Good Housekeeping Institute, where I managed testing programs and administered the Good Housekeeping Seal. In this position, I oversaw testing for investigative reports on product performance and safety, and to substantiate claims made for products advertised in the magazine. During my tenure at Good Housekeeping, our projects uncovered many unsafe products, including substandard bicycle helmets and flammable Halloween costumes. Where we found unsafe products, we collaborated with the U.S. Consumer Product Safety Commission (CPSC) to spur recalls of the products we found to be dangerous.

As a former Vice President of Intertek Group, an international testing and safety certification organization, I was responsible for creating a business unit that worked with global retailers and manufacturers. In this role, I assisted clients in developing safety testing and quality assurance programs both domestically and abroad. I focused a lot of my resources in Chinese laboratories and factories that supply products to the American market. I educated manufacturers and retailers about voluntary and mandatory product performance and safety standards. In addition, I taught manufacturers how to take product safety to the next level by analyzing how a consumer is likely to use a product (known as a "human factors analysis"), and determining how foreseeable use could impact product safety. Because a consumer's use of a product often is determined by product design, and the clarity of the instructions, these elements are a part of any safety analysis.

Finally, I also serve on the Board of Directors of the International Consumer Products Health and Safety Organization, and I am an active member of the Executive Committee on Consumer Products for the ASTM-International, a leading standards-setting organization. I work collaboratively with manufacturers, retailers, testing labs, and consumers who write and approve industry safety standards.

Many Hazards are Avoidable

Many hazards associated with products are avoidable through the use of proactive steps, and as a result, many harms resulting from product use cannot be termed “mere accidents.” Manufacturers have a choice. Those manufacturers that care the most about safety can subject product prototypes to premarket testing – especially products for use by and with children. During testing, products can be evaluated by experts that will take into account likely real-world use of a product by consumers. Individual product testing can enable manufacturers to exceed voluntary standards when they are found to fall short. At minimum, where a voluntary safety standard exists, manufacturers should comply with these minimum safeguards.

Consumers Union Product Safety Initiative

For the past 70 years, Consumers Union has been testing and reporting on products and services in order to arm consumers with the information they need to protect themselves in the marketplace. Our mission is to work for a fair, just and safe marketplace for all consumers. In my current role at Consumers Union, I oversee the organization’s product safety initiative. The goal of this project is to reduce the number of unsafe products in the marketplace. The research and testing programs I direct are designed to identify and decrease product defects – either inherent in a product’s design, or due to defects that occur during the manufacturing process. Understanding product defects and consumer behavior is critical because it allows us to work proactively to anticipate and to help prevent injuries and fatalities. Our independent testing often uncovers deficiencies in product designs that, in some cases, may imperil the user. When we find products that we deem unsafe, we rate those products “Not Acceptable,” our lowest and most serious product rating. We contact the manufacturers of products we rate “Not Acceptable” to alert them of our findings and to urge them to take swift and immediate action to remove their dangerous product from the market. Reactions from manufacturers have been mixed, ranging from a quick recall of a defective product to ignoring the safety problems that we brought to their attention.²

² One example of a success story is that of the Combi Avatar child safety seat. Last Spring, we rated this seat “Not Acceptable” because it catastrophically failed in our crash tests. Within a few weeks of

Consumers Face Increased Risks from Defective Products

We are very concerned that current trends may increase the risk that unsafe products will make their way to the marketplace -- and remain on the market even after safety hazards are uncovered. As the world's large, powerful retailers squeeze manufacturers to reduce prices, we have seen evidence that quality and safety can also be reduced. Today, more than ever, pressure from major retailers has created a "speed to market" mantra that can leave little time and few resources for the product safety testing and quality assurance process. Off-shore design and manufacturing is too often conducted by companies who have inadequate knowledge of American voluntary and mandatory safety standards. In addition, sometimes foreign manufacturers lack an understanding of how consumers will use the products they produce because use of the product is not prevalent in the country. For example, the manufacture of gas grills is moving rapidly from the U.S. to China where the concept of grilling food on a gas heated cooking grid is unfamiliar. We believe that a recent result is the manufacture of substandard and sometimes dangerous gas grills; since 2004, there have been one dozen product safety recalls on gas grills -- in all cases the defective products or components were made outside of the U.S. Over a similar two-year period just 10 years ago, when most gas grills were U.S. made, there were no recalls.

The CPSC itself has identified a disturbing trend, and has documented that from 1991 to 2002, the number of older adults (75 and older) treated in US hospital emergency rooms for products-related injuries increased 73%. This increase is almost three times the group's increase in population. Many of the injuries were related to common household products such as yard and garden equipment, ladders, step stools, and personal use items. As the population ages, it is even more important that manufacturers work to reverse this recent trend with products that are not defective and unreasonably dangerous when used by the elderly.

discussing our findings with the manufacturer, Combi instituted a recall of the seats and replaced the defective parts.

Lack of Compliance with Voluntary Safety Standards

The March 2006 issue of *Consumer Reports* features an article on furniture tipover, a problem that results in 8,000 to 10,000 serious injuries each year, mostly to young children. Although ASTM-International publishes a safety standard to prevent furniture tipover injuries, many of the products CU tested do not comply. In fact, since the CPSC requested that ASTM develop an industry safety standard, the numbers of annual fatalities associated with falling furniture have actually increased by 50 percent. In today's highly competitive marketplace, there is often little incentive for manufacturers to meet voluntary safety standards.

Inadequate Enforcement Authority and Activity by Federal Agencies

CU is concerned that the Government agencies responsible for keeping unsafe products off the market are underfunded and understaffed. For example, the staffing level of the CPSC has been steadily dwindling. The budget for fiscal 2007 culminates a two-year reduction of full-time positions from 471 to 420 -- a total loss of 51 employees. Limited resources and funding will force scaling back of the CPSC's work on important programs such as residential fire prevention and child drowning prevention. Under-budgeting and staffing cutbacks will clearly result in reduced enforcement of safety statutes. Without adequate policing, unsafe products could easily infiltrate the marketplace.

Inadequacy of Civil Penalties

The use of civil penalties to penalize suppliers for selling or failing to report unsafe products is often an ineffective deterrent. The \$750,000 civil penalty levied against Wal-Mart in 2003 for failing to report safety hazards with fitness machines cost the company an equivalent of the sales rung up in only 1 minute and 33 seconds. For large retailers and manufacturers, paying civil fines are a small cost of doing business.

The Consumer Product Safety Act's Section 15 (b) requires that manufactures, distributors, and retailers who learn that their product either: (1) fails to comply with an applicable consumer product safety rule or with a voluntary consumer product safety standard; (2) or contains a defect that could create an unreasonable risk of serious

injury or death (i.e., a “substantial product hazard”) must immediately notify the CPSC – unless the company knows the CPSC has already been informed. See 15 U.S.C. § 2064(b).

The history, however, of manufacturers’ failure to report in a timely manner under this section is all too well known. Especially of concern are manufacturers’ failures to report children’s products known by them to have caused injury or death. Included among companies failing to report are Wal-Mart and General Electric (GE) -- two of the wealthiest corporations in America. We believe the cap on the fines CPSC can levy for failure to report known hazards weakens the power of the reporting statute. Current total fines may not exceed \$1,850,000 for any related series of violations. This amount is too small to be an effective deterrent for large corporations.

Below are details of fines the CPSC has imposed for failure to report under Section 15 (b):

- In 1991, Graco, a children’s products manufacturer, paid a \$100,000 civil penalty for failing to report stroller injuries to CPSC in a timely fashion. In 1989, the Philadelphia Inquirer estimated Graco’s revenues at \$150 million.
- Again in 2005, Graco, which is now owned by Newell Rubbermaid, was fined for the same violation – failure to report safety issues including deaths and serious injuries associated with 16 juvenile products sold under the Graco and Century brands. From 1991 through 2002, the company engaged in “systematic violations” of the law. This time, the fine was largest civil penalty ever levied by the CPSC -- \$4 million. Yet, this was less than one-tenth of one percent of Newell Rubbermaid’s annual sales.
- In April of 2001, Cosco/Safety 1st agreed to pay CPSC a total \$1.75 million in civil penalties—the largest fine CPSC has ever levied—for failing over a four year period to report to CPSC defects in cribs, strollers and a toy walker that caused the deaths of two babies and countless other injuries. Both companies had previously been fined for failing to report under 15 (b); in 1996 Cosco paid a \$725,000 civil penalty and in 1998 Safety 1st paid a \$175,000 penalty. Both companies have also had an inexcusable number of recalls or products used by children. By the time this fine was levied in 2001, Cosco had 12 recalls of

children's products and Safety 1st had five recalls. Dorel Industries, which owns Cosco and Safety 1st, reported \$421 million in sales from juvenile products in 2002. Does a \$1.75 million fine deter a firm of this size from failing to report?

- In June of 2001, CPSC fined Fisher-Price \$1.1 million for failing to report injuries from a dangerous and defective toy. The company had not reported 116 fires from Power Wheels toy. Fisher-Price, a wholly owned subsidiary of Mattel, boasts sales of \$1.2 billion in its most recent annual report and notes that its sales are up 8% worldwide.
- In November 2001, CPSC fined Icon Health and Fitness \$500,000 for failure to report serious safety hazards with home exercise equipment.
- In August of 2002, GE paid the CPSC a \$1 million penalty for failing to report defects in dishwashers that it first became aware of 10 years earlier. GE is one of the largest companies in the history of the United States, with 2002 revenues of \$131.7 billion.
- In March 2001, West Bend Co. paid CPSC a \$225,000 fine for failing to report fire hazards caused by a defect in its water distillers it had learned about three years earlier.
- In 2002, the CPSC won a case in court imposing a \$300,000 fine on a juice extractor company that had failed to inform CPSC about injuries 22 customers had complained of when using their juicers.
- In 2002, Honeywell paid \$800,000 for failing to report under 15 (b). In 2003 to date, Weed Wizard had paid \$885,000, while Wal-Mart has paid \$750,000.

Are these fines acting as an adequate incentive for companies to report product safety hazards? The record suggests they are not. We believe these companies are well-represented, and well aware of the CPSC's reporting requirements—these requirements have been on the books for more than 30 years. It seems clear that the caps on these fines limit their deterrence effect to the equivalent of a \$2 ticket for parking violations in downtown New York City.

Need for Legislation Criminalizing Knowing or Reckless Failures to Inform That Leads to Injury

Consumer Union supports the introduction of legislation designed to deter company employees with decision-making authority from knowingly jeopardizing consumer safety. And on this point, please let me be clear. Perhaps any company can make a mistake. However it is what individuals within a company do after they have completed their due diligence and are aware that they have an unreasonably dangerous or potentially fatal defect in one of their products that should be the focus of this bill. If companies fail to disclose this information, or continue to sell a product then they should be held criminally responsible.

We believe the language of any legislation should be targeted so that responsibility cannot be avoided by company representatives who have the power to ensure that unsafe products are not marketed. Furthermore, we believe the scope of any bill should be broad enough to underlie the entire product system and include not only traditionally manufactured products, but also vehicles, foods and drugs. A company representative that knowingly allows the introduction of tainted meats or hazardous pharmaceuticals to the market should be just as culpable as manufacturers that produce unsafe vehicles.

We believe that the triggers for determining when a product is defective must be clearly defined, and that an appropriate definition of defective is when it is likely to cause serious bodily injury or death.

Manufacturers' responsibilities to make products that are not unreasonably unsafe should not be defined by either mandatory or voluntary safety standards. In many cases, safety standards fail to account for reasonably foreseeable use. Warning labels and instructions must not be used by manufacturers as a shield against concerns that a product is defective if it reasonably could cause unnecessary harm. Many products that meet applicable standards are still unreasonably unsafe. For example, a dresser sold by Sears that we tested recently tips over too easily, yet meets the voluntary industry safety standard.

Need for Broad Authority for Criminal Penalties

Manufacturers have failed to inform the CPSC of the dangers related to their product despite mounting evidence and increasing numbers of injured consumers. It is clear from this record that mere fines failed to deter corporate employees from failing to report substantial product hazards to the CPSC. The preventable loss of a loved one is a very personal experience. Similarly, legislation to improve manufacturer, distributor and retailer reporting must place responsibility on real people. Any weaker provision that puts responsibility civil or criminal liability on corporations only, and insulates the individuals responsible for the foreseeable deaths and injuries of consumers would fail to ensure adequate incentives to prevent defective products from entering, or being eliminated from, the marketplace. Although corporate officials may weigh the costs of compliance against the likelihood of having their product exposed as defective, and the costs saved by keeping silent, employees are less likely to gamble with their personal freedom, or risk a criminal conviction.

Individuals in companies who knowingly allow dangerously defective (*i.e.* likely to cause death or serious bodily injury) products to be introduced into interstate commerce should be held accountable. In addition, knowledgeable employees who fail to pass along this information to responsible government agencies should be held criminally responsible. Without this important information, government watchdog agencies are ineffective.

Other areas of the law include criminal penalties for parties who put the public at risk of harm. Under the Consumer Product Safety Act, criminal penalties (fines and imprisonment) can be levied against any person who knowingly and willfully violates the prohibited act section of the CPSA (Section 19) after having received notice of noncompliance from the CPSC. See 15 U.S.C. § 2070 (a). In addition:

any individual director, officer, or agent of a corporation who knowingly and willfully authorizes, orders, or performs any of the acts or practices constituting in whole or in part a violation of section 19, and who has knowledge of notice of noncompliance received by the corporation from the Commission, shall be subject to penalties under this section without regard to any penalties to which that corporation may be subject under subsection (a). 15 U.S.C. § 2070(b).

Under Section 303 of the Federal Food, Drug, and Cosmetic Act (FDCA), individuals can be held criminally liable for violations of Section 301 (21 U.S.C. § 321), the prohibited acts section of the FDCA “shall be imprisoned for not more than one year or fined not more than \$1,000, or both.” 21 U.S.C. § 333(a)(1) However, the commission of such a violation after a conviction, or with the intent to defraud or mislead “shall be imprisoned for not more than three years or fined not more than \$10,000 or both.” 21 U.S.C. § 333(a)(2). Other criminal violation such as the knowing distribution of drugs Finally, the government has reserved the right to impose criminal penalties for violations involving someone who knowingly and willfully falsifies, conceals a material fact; makes materially false, fictitious, or fraudulent statements; or makes or uses a false writing to the government can be fined or imprisoned up to 5 years, or both. See 18 U.S.C. § 1001.

We strongly urge Congress to create criminal penalties for an individual who knowing the likely harm, introduces a product into commerce known to be defective and capable of serious bodily injury or death; or has the requisite level of responsibility or authority over a product and fails to notify the appropriate agency of a known product defect that is capable of causing death or serious bodily injury. We believe that this authority is appropriate and necessary to supplement existing criminal penalties.

Need for “Savings Clause” and to Prevent Preemption of State Criminal and Tort Law

We recommend that any legislation contain a “savings clause” to ensure that states will still be able to hold manufacturers criminally responsible for the allowing the knowing or reckless introduction of defective products into interstate commerce. If this “savings clause” is not included in the legislation, we strongly recommend that if this bill should go forward any attempt to either preempt states from pursuing criminal charges against individuals, or to limit the ability of consumers to seek redress through state tort systems should be rejected. Tort law establishes a duty of care that protects citizens when the Government is too slow to act, when federal minimum standards are grossly insufficient or outdated or when standards are not well enforced. Preemption, if accepted by the courts, would reduce or eliminate manufacturer incentives to exceed this inadequate minimum standard. Any preemption of state common or statutory law in

this case would remove incentives for manufacturers to make safer products – by shielding them from findings that their product was unreasonably unsafe, causing serious bodily injury or death.

Finally, this legislation should address head-on how a company whose employees are prosecuted under this law must deal with removing their defective product from the marketplace. While it sends a strong message to make corporate officials responsible for their misdeeds, it is also important to take timely and effective measures to inform and assist consumers who still have the unreasonably dangerous product in their home.

To prevent future deaths and serious injuries, the defective products themselves should also be placed “behind bars” so that they cannot pose unreasonable risks of harm. Therefore, we urge you to consider expanding corporate duties to include an intensive effort on the part of the manufacturer to get the defective product off the market. Companies should at least be required to spend advertising dollars to inform consumers about their defective products with as much splash and sophistication as they spent on marketing it in the first place. Effective legislation to ensure responsible corporate behavior must focus on appropriate liability in a court of law and accountability in the court of public expectations.

* * *

I thank the Chairman and other members of the Committee for the opportunity to testify, and I look forward to answering any questions you have.