

Testimony of the
U.S. Public Interest Research Group (U.S. PIRG)
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Also on behalf of
Consumer Federation of America
Consumers Union
Public Citizen

Legislative Hearing on HR 5913,
The Protecting Americans from Unsafe Foreign Products Act

Before the Subcommittee on Commercial and Administrative Law
The Honorable Linda Sanchez, Chair

Committee on the Judiciary
U.S. House of Representatives

Washington, DC

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Madame Chair Sanchez, Rep. Cannon, members of the committee: Thank you for the opportunity to testify today in support of HR 5913, **The Protecting Americans from Unsafe Foreign Products Act**. I am Edmund Mierzwinski, Consumer Program Director of U.S. PIRG. As you know, U.S. PIRG serves as the federation of and national lobbying office for state Public Interest Research Groups. PIRGs are non-profit, non-partisan public interest advocacy organizations with offices around the country. We take on powerful interests on behalf of our members and other consumers. For the last 22 years we have issued an annual major report – Trouble In Toyland¹ – on the dangers posed by unsafe toys. We have also supported legislation to improve food and drug safety. My testimony is also on behalf of several other leading consumer organizations: the Consumer Federation of America, Consumers Union and Public Citizen.

Events that occurred in 2007 – now known as the year of the recall – have shined a bright light on the need for greater protection for American families from the hazards posed by imported toys and other unsafe products. According to the non-profit safety organization Kids In Danger, in 2007 there were 231 children's product recalls accounting for more than 46 million items, including twelve recalls that involved one million or more units, resulting in at least 657 injuries and 6 deaths. Kids in Danger also found that thirty-million of those recalled products were toys.² Other recalls or tragedies have involved unsafe tires, tainted Heparin (a blood thinner), poisoned toothpaste, seafood and even pet food. The vast bulk of these products were of foreign manufacture.

In response to the year of the recall, and the shocking findings that the Consumer Product Safety Commission (CPSC) lacked the resources, the will and the authorities to protect America's children from unsafe toys, the House has overwhelmingly passed HR 4040, the Consumer Product Safety Modernization Act (Dingell-Rush). That bill is expected to be conferenced soon with its Senate counterpart and become law.³ Legislation addressing food and drug safety regulation is before other committees of the Congress. In addition, the President has established an import safety task force-- The Interagency Working Group on Import Safety.⁴ Since the Congress is closest to completion of its reforms dealing with product safety, the remainder of my discussion today will reference those reforms for comparison with the goals of your bill.

U.S. PIRG believes that for consumers to be assured that products that they buy are safe, we must ensure at least three levels of defense above and beyond any market notions of the supposed adequacy of competition or voluntary standards to protect consumers.

First, federal laws should provide a strong floor of protection and federal regulatory agencies should enforce those laws to both deter wrongdoing and hold wrongdoers accountable.

Second, states should be allowed to enact and enforce stronger laws and state attorneys general – often the toughest cops on the consumer beat – should be allowed to enforce both state and federal laws to the greatest extent possible, with full authority to impose penalties, recover damages and restitution as well as to obtain injunctive relief.

Third, consumers should have the right to adequate redress – without roadblocks -- to bring private actions against wrongdoers to obtain compensation for their injuries or damages and to deter further wrongdoing.

A combination of these three pillars of consumer protection—strong federal enforcement, strong state enforcement and strong private enforcement – is the best protection against unsafe products.

But the Consumer Product Safety Modernization Act only addresses improvements to the first two of these three inter-related pillars.⁵ Without going into its full structure, I would point out that both bills include a number of provisions designed to give the CPSC greater authority to stop unsafe imported products.⁶

That is why your proposal, **The Protecting Americans from Unsafe Foreign Products Act**, fills a significant hole in our product safety nets. With some 80% of toys being manufactured abroad, it is critical to ensure that our system of accountability includes foreign manufacturers, as well as holding others in the stream of commerce responsible.

Your legislation amends current law to facilitate service of process on foreign manufacturers by permitting service on the manufacturer wherever they reside, are found, have an agent, or transacts business.

Under your bill, service of process and personal jurisdiction is proper so long as one of the following two criteria is met: (1) the manufacturer knew or reasonably should have known that the product or component would be imported for or use in the U.S.; or (2) the manufacturer had contacts with the U.S. whether or not such contacts occurred in the place where the injury occurred. The bill also establishes a choice of law provision in favor of the state where the injury took place.

By making it easier to hold foreign wrongdoers accountable, your bill would help consumers gain access to justice and also help equalize pressure on U.S. firms that may bear unequal treatment under our laws.

Of course, your bill importantly does not eliminate any responsibility or liability for U.S. manufacturers, importers, distributors, or retailers.⁷ It simply makes it easier for consumers to obtain redress from foreign manufacturers. All wrongdoers should always be held accountable.

Last year, for example, Mattel used what I call the Bart Simpson defense (“I wasn’t there, I didn’t do it, and it’s not my fault”) when it initially blamed a third-party Chinese supplier for failing to follow its lead paint requirements on a toy that was later recalled.⁸ Mattel, of course, under the Consumer Product Safety Act and the Federal Hazardous Substances Act, violated U.S. law by entering the banned hazardous substance into U.S. commerce. It trusted, but failed to verify. Mattel would still face liability even if one of its third-party foreign suppliers also did under your act.

And, with the growing dominance of mega-retailers such as Wal-Mart who may appear to a casual observer to simply sit at the end of the supply chain but actually own or control the entire

supply chain all the way back to the Chinese manufacturing plant, it is critical to maintain liability wherever it may rest.

Nevertheless, your provision is important. In recent testimony before this committee, Pamela Gilbert, a former executive director of the CPSC, described the long, complex supply chain for Aqua Dots, a toy recalled by the CPSC because it was found to contain a cheaper, substandard chemical added by a China-based manufacturer to save money. The chemical degraded into a date-rape drug analogue when swallowed by children, leaving them in coma-like states for hours.⁹

In the Aqua Dot case, the chain of ownership was as follows: The manufacturer, Moose Enterprise, is a Melbourne, Australia company. Moose Enterprise produced the product in Chinese factories. The North American distributor of Aqua Dots is Spin Master, a company based in Toronto, Canada. All of this means that, until the toys reached stores in the U.S., they were owned and controlled by foreign firms. This type of scenario is becoming increasingly common with toys and other products that are sold here.¹⁰

Fundamentally, the best way to ensure accountability is to make sure that everyone in the chain of commerce has liability – from the Chinese (or other) manufacturer, to the importer, to the distributor, to the retailer. Product safety law (although it can always be improved) makes the entity that enters the product into U.S. commerce liable with an enforcement mechanism that generally is enforced by the CPSC against a U.S. importer, manufacturer, distributor or retailer. Your legislation extends the reach of that liability to the first step in the chain, the foreign manufacturer.

Conclusion

Unfortunately, globalization has provided too many firms in the global supply chain with the wrong incentives: they want to cut corners, they want the cheapest supplier, they don't do third-party testing and they use cheaper, dangerous chemicals instead of safe ones. This has placed consumers worldwide at risk. By strengthening U.S. product safety laws and strengthening the ability of U.S. consumers to seek redress from more wrongdoers, actions by U.S. policymakers can benefit all consumers worldwide, since it will ultimately be more efficient for manufacturers and retailers to supply everyone to meet U.S. levels of safety rather than face U.S. levels of liability.

We commend the committee for this action. Making it easier to serve foreign manufacturers is a commendable action taken by “The Protecting Americans from Unsafe Foreign Products Act.” We also of course would concur with the encyclopedic testimony of Professor Andrew Popper before this committee in November that describes many of the other barriers that prevent injured consumers from obtaining redress and holding wrongdoers accountable.¹¹ We encourage the committee to continue its oversight and investigation into ways to re-balance our tort system, which for the last two decades has been severely skewed against individual victims at the behest of politically-powerful corporate interests. We look forward to working with you on these and other matters.

¹ The U.S. Consumer Product Safety Commission has already recalled 3 toys identified in the November 2007 U.S. PIRG “Trouble In Toyland” report available at <http://www.toysafety.net> (last visited 29 April 2008).

² “2007: The Year of the Recall,” Kids In Danger, Chicago Illinois, released February 2008, available at http://www.kidsindanger.org/publications/reports/2008_Year_of_the_recall.pdf (last visited 29 April 2008).

³ The House passed HR 4040 on suspension on a 407-0 vote on ___ December 2007. The Senate passed its companion bill S. 2663, the CPSC Reform Act (Pryor-Inouye-Stevens-Collins) on ___ March 2008. My most recent testimony on these issues is from 4 October 2007, on S. 2045, the CPSC Reform Act of 2007 before the Senate Commerce Subcommittee on Consumer Affairs, Insurance, and Automotive Safety (S. 2045 was re-numbered S. 2663 for floor consideration), and is available at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=2fa5ccb9-a6f8-40fb-aa4c-da3c55cdf897 or <http://tinyurl.com/3emy26> (last visited 29 April 2008).

⁴ See <http://www.importsafety.gov/> (last visited 29 April 2008).

⁵ On the second pillar, state attorney general enforcement, the Senate bill’s language is preferable.

⁶ In addition to specific reforms, the Senate bill, S. 2663, Section 43(3)(B) includes a Comptroller General study of “requiring foreign manufacturers to consent to the jurisdiction of United States courts with respect to enforcement actions by the Consumer Product Safety Commission.”

⁷ Under the Federal Hazardous Substances Act and the Consumer Product Safety Act, retailers, distributors and importers as well as manufacturers have long held liability for a variety of practices, including failing to comply with applicable rules, entering banned substances into commerce and failing to notify the CPSC of hazards.

⁸ See BBC News story, “Mattel recalls millions more toys,” 14 August 2007, Excerpt-- “The company blamed the amount of lead in the paint on a subcontracted Chinese company called Hong Li Da using paint from unauthorised suppliers.” Available at <http://news.bbc.co.uk/2/hi/business/6946425.stm> (last visited 29 April 2008). But also see Los Angeles Times, “Mattel apologizes to China,” 22 September 2007, where Mattel admitted that the vast number of magnet recalls (87% of the total recalls) were due to a Mattel-led US design flaw. Available at <http://www.latimes.com/business/la-fi-mattel22sep22.0.2070706.story?page=2&coll=la-home-center> (last visited 29 April 2008).

⁹ CPSC news release, “Spin Master Recalls Aqua Dots – Children Became Unconscious After Swallowing Beads,” 7 November 2007, available at <http://www.cpsc.gov/CPSC/PUB/PREREL/prhtml08/08074.html> (last visited 29 April 2008).

¹⁰ See Subcommittee on Commercial and Administrative Law, Oversight Hearing on Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products, 15 November 2007, Testimony of Pamela Gilbert, available at <http://judiciary.house.gov/OversightTestimony.aspx?ID=1219> (last visited 29 April 2008). Gilbert goes on to point, however, the following: “I would note, however, that most of the obstacles that injured individuals face in the product liability system – obtaining jurisdiction, conducting discovery, and enforcing judgments – also make it very difficult for the CPSC to carry out a product recall with a foreign firm.”

¹¹ Subcommittee on Commercial and Administrative Law, Oversight Hearing on Protecting the Playroom: Holding Foreign Manufacturers Accountable for Defective Products, 15 November 2007, Testimony of Professor Andrew Popper, available at <http://judiciary.house.gov/media/pdfs/Popper071115.pdf> (last visited 29 April 2008).