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THE CONSUMER'S SLEEPING GIANT—THE FEDERAL HAZARDOUS SUBSTANCES LABELING ACT

Franklin D. Houser*

INTRODUCTION

In an attempt to curb the growing number of deaths resulting from accidental poisonings, in 1927 Congress passed the Federal Caustic Poison Act,[1] a consumer safety act. Neither this Act nor common law remedies against manufacturers were found to be sufficient to alleviate the growing problems of accidental deaths of children caused by the ingestion of common household products containing lethal ingredients.[2] The Act covered only twelve harmful compounds or products used in households in 1927. Since that time, America's technology has boomed, and the Madison Avenue-inspired proliferation of home products has more than kept pace. Millions of household products have been developed and sold to the consuming public. Many of these products are potentially harmful, yet bear either insufficient warnings or are totally devoid of warnings. In 1960 alone, it was estimated that approximately 300,000 hazardous household substances were being marketed without proper labeling.[3]

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1. Act of March 4, 1927, ch. 489, §§ 1-10, 12, 44 Stat. 1406-10.

2. *See generally* Comment, *Federal Hazardous Substances Legislation: Effect on Consumer Protection and Manufacturing Liability*, 13 B.C. IND. & COM. L. REV. 504 (1972). The early common law remedies were inadequate to curb accidental deaths because the law placed no effective duty upon manufacturers of household products to alleviate the risk of accidental poisoning. Suits against manufacturers were essentially precluded by virtue of the privity doctrine, which meant that manufacturers had no liability to injured customers. Although exceptions to the privity rule later arose, the possibility of consumer recovery against a manufacturer was still slight due to the difficulties in sustaining the burden of proving that the manufacturer had been negligent and that the negligence was the proximate cause of the injury. Since a product defect was not conclusive proof of negligence, even under the later doctrine of strict liability in tort, the consumer's position was fraught with difficulties. To recover under this doctrine he had to prove that the product was defective, but was unable to do so because the dangerous chemicals contained in the product accidentally ingested did not constitute a defect, but rather, were necessary to enable the product to clean properly or to effectuate any other intended use for which it was purchased. *Id.* at 506-07.

3. 106 CONG. REC. 5536 (1960) (remarks of Senator Bush).

Following enactment of the Federal Caustic Poison Act, additional laws were passed which also included requirements for certain descriptive labeling,[4] but the Congress discovered that the scope of these acts was no longer sufficient. There were numerous hazardous chemicals used in the household which were not subject to any of these laws. A congressional report concluded that,

> In recent years rapid advances have been made in the field of applied chemistry, and these advances, although generally beneficial to the public at large, have posed new problems which can adequately be dealt with only through public education and Government regulation. . . . There is a need for legislation requiring better labeling of poisonous and hazardous materials that are brought into the home.[5]

To meet this need for new legislation, in 1960 Congress passed the Federal Hazardous Substances Labeling Act (FHSLA).[6]

The Federal Hazardous Substances Labeling Act has been in effect for over thirteen years and has been substantially expanded by three acts[7] designed to protect children from hazardous toys and household substances. Although broad in its scope and ambitious in its purpose, the FHSLA has largely proven to be a "sleeping giant." The manufacturers and distributors of products subject to the provisions of the Act have largely ignored its requirements. In addition, the American consumer has failed to recognize and avail himself of the protection afforded by the Act.

This article will examine the labeling requirements which must be met by persons selling certain goods in interstate commerce and describe the products subject to the Act. The article

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4. The Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 135-135k (1970) (enacted June 25, 1947, ch. 125, § 2, 61 Stat. 163); The Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 301-82 (1970) (enacted June 25, 1938, ch. 675, § 1, 52 Stat. 1040). *See* Fisher, *Cosmetic Labeling: The FDA's Response to Consumer Needs*, 14 SANTA CLARA LAW. 542 (1974).

5. H.R. REP. NO. 1861, 86th Cong., 2d Sess. (1960), *reported in* 2 U.S. CODE CONG. & AD. NEWS 2834 (1960).

6. The Federal Hazardous Substances Labeling Act, 15 U.S.C. §§ 1261-74 (1970), *as amended*, 15 U.S.C. § 2079(a) (Supp. 1972). [In 1972 Congress amended sections 1262-74 by transferring the administrative and enforcement functions of the Secretary of Health, Education and Welfare to the Consumer Product Safety Commission, consisting of five Commissioners appointed by the President and approved by the Senate. Hereinafter, 15 U.S.C. §§ 1261-74 (1970) will be cited with the amendment presumed.]

7. The Poison Prevention Packaging Act, 15 U.S.C. §§ 1471-76 (1970) (enacted Dec. 30, 1970, Pub. L. No. 91-601, § 7(a), 84 Stat. 1670); The Child Protection and Toy Safety Act of 1969, 15 U.S.C. §§ 1261, 1262, 1274 (1970) (enacted Nov. 6, 1969, Pub. L. No. 91-113, § 2(a), (c), (d), 83 Stat. 187-89); The Child Protection Act of 1966, 15 U.S.C. §§ 1261-65, 1273 (1970) (enacted Nov. 3, 1966, Pub. L. No. 89-756, §§ 2(a)-(c), 3(a) 80 Stat. 1303-04).

will also discuss those activities which are strictly prohibited under the Federal Hazardous Substances Labeling Act and the effects of these prohibitions. Finally, it will analyze the statutory penalties for violations of the Act as well as the civil remedies available to consumers when the minimum requirements of the Act are not met.

LABELING REQUIREMENTS

One of the stated purposes of the original Act was to provide nationwide uniformity in the labeling of potentially hazardous substances.[8] It was believed that in the absence of a federal law, diverse labeling regulations would be adopted by the states which would lead to a multiplicity of requirements and create unnecessary confusion in labeling.[9] In addition, it was noted that it would be impractical for a marketer of products sold interstate to label his products separately for those states and cities which had developed their own labeling standards.[10] In order to implement the purpose of providing nationwide uniformity, the Congress in 1969 pre-empted the labeling requirements of the states by declaring,

> that it is the intent of the Congress to supercede any and all laws of the States and political subdivisions thereof insofar as they may now or hereafter provide for the precautionary labeling of any substance or article intended or suitable for household use . . . .[11]

In the area of household product labeling therefore, the Federal Hazardous Substances Labeling Act requirements are now determinative of whether a particular warning is adequate, although prior to the Act, labeling requirements were determined by individual state legislatures.[12]

The Federal Hazardous Substances Labeling Act defines a label as a display of written, printed or graphic matter on the container of any substance.[13] In addition to the foregoing, the label must be legible and must be accompanied by complete directions for proper use.[14] Moreover, the amended version of

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8. H.R. REP. No. 1861, 86th Cong., 2d Sess. (1960), *reported in* 2 U.S. CODE CONG. & AD. NEWS 2833 (1960).

9. *Id.* at 2835.

10. H.R. REP. No. 2166, 89th Cong., 2d Sess. (1966), *reported in* 3 U.S. CODE CONG. & AD. NEWS 4097 (1966).

11. Child Protection and Toy Safety Act of 1969, 15 U.S.C. § 1261 (1970) (enacted Nov. 6, 1969, Pub. L. No. 91-113, § 2(a), (c), (d), 83 Stat. 187-89).

12. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 28753, 28755 (West Supp. 1973) which delineate California's labeling requirements. These requirements are identical to the labeling provisions in the Federal Act.

13. 15 U.S.C. § 1261(n) (1970).

14. *Id.*

the Act specifically applies the labeling requirements to unpackaged as well as packaged goods.[15]

The general labeling standards of the FHSLA require that certain matters be stated "conspicuously"[16] on the labels of hazardous substances.[17] The name [18] and place of business[19] of the manufacturer, packer, distributor or seller must appear on the label. The standards also require that the common or usual name of the hazardous substance be obvious to the eye of the consumer.[20] If there is no common or usual name the Act permits the use of a chemical name.[21] In addition, the Commission established under FHSLA may allow the generic name to be placed on the label.[22] The word "WARNING" or "CAUTION" must be noticeable on all hazardous substances unless the word "DANGER" is required to be used.[23] The labeling standards mandate that a short description of the principal hazard be made plainly visible on the label.[24] Examples of such a description would be "Flammable" or "Vapor Harmful."[25] Precautionary measures describing any action which should be followed or avoided is also to appear conspicuously on the label.[26] In addition the label should include the statement "keep out of the reach of children" or its equivalent.[27] If the article is intended for use by children and is not a banned hazardous substance, adequate directions for the protection of children from the hazard it presents should be clearly visible on the label.[28]

Certain types of hazardous substances are subject to special labeling requirements. The signal word "DANGER" must be

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15. *Id.*

16. "[C]onspicuously" in section 2(p)(1) and (p)(2) of the act means that, under customary conditions of purchase, storage, and use, the required information shall be visible, noticeable, and in clear and legible English. Some factors affecting a warning's prominence or conspicuousness are: Location, size of type, and contrast of printing against background. Also bearing on the effectiveness of a warning might be the effect of the package contents if spilled on the label. Unless impracticable because of the nature of the substance, the label shall be of such construction and finish as to withstand reasonably foreseeable spillage through foreseeable use.

21 C.F.R. § 191.1(d) (1973).

17. 15 U.S.C. § 1261(p)(1) (1970).

18. 15 U.S.C. § 1261(p)(1)(A) (1970).

19. *Id.*

20. 15 U.S.C. § 1261(p)(1)(B) (1970).

21. *Id.*

22. *Id.* *See* note 6 *supra.*

23. 15 U.S.C. § 1261(p)(1)(C), (D) (1970). *See* notes 29-32 and accompanying text *infra.*

24. 15 U.S.C. § 1261(p)(1)(E) (1970).

25. *Id.*

26. *Id.* § 1261(p)(1)(F).

27. *Id.* § 1261(p)(1)(J)(i).

28. *Id.* § 1261(p)(1)(J)(ii).

placed on the label of all substances which are extremely flammable, corrosive or highly toxic as defined in sections 1261(1)(i) and (h) respectively.[29] In addition, the word "POISON" must appear on any hazardous substance defined as "highly toxic."[30] Instructions for first aid treatment are to be included on the label when necessary or appropriate.[31] Finally, if a package requires special care, the label should contain instructions for handling and storage.[32]

All required label declarations are to be located prominently,[33] in conspicuous and legible type,[34] and must be printed in the English language.[35]

Congress has provided for flexibility in the Act by empowering the Commission to vary or add to the labeling requirements as it finds necessary in view of any special hazard presented by a particular substance.[36] This flexibility is essential to insure that the Act will not become obsolete. As new hazardous substances enter the market, it is conceivable that the dangers they present to the consumer will necessitate an addition to or change in the labeling requirements. The Commission is also authorized to exempt products from these requirements "to the extent it determines to be consistent with adequate protection of the public health and safety."[37]

In addition to the labeling requirements previously described, the Poison Prevention Packaging Act of 1970[38] provides that the Consumer Product Safety Commission may, under specified circumstances, prescribe packaging standards for certain hazardous substances.[39] A detailed discussion of those standards is, however, beyond the scope of this article.[40]

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29. *Id.* § 1261(p)(1)(C).
30. *Id.* § 1261(p)(1)(H). *See* note 41 *infra.*
31. *Id.* § 1261(p)(1)(G).
32. *Id.* § 1261(p)(1)(I).
33. 21 C.F.R. § 191.1(d) (1971).
34. 15 U.S.C. § 1261(p)(2) (1970).
35. *Id.* While Congress only requires that the label be printed in English, it might be desirable to have bilingual labels, especially for products which flow into those areas where the primary language of a substantial number of residents is one other than English. The Commission, under 15 U.S.C. § 1262(b) (1970), could require that labels be bilingual under its power to establish reasonable variations or additional label requirements for the protection of public health and safety.
36. 15 U.S.C. § 1262(b) (1970). *See* note 6 *supra.*
37. 15 U.S.C. § 1262(c) (1970).
38. 15 U.S.C. §§ 1471-76 (1970) (enacted Dec. 30, 1970, Pub. L. No. 91-601, § 7(a), 84 Stat. 1670). *See* note 6 *supra.*
39. *Id.* § 1472, *as amended,* 15 U.S.C. § 2079(a) (Supp. 1972). *See* note 6 *supra.*
40. The Commission basically must use a reasonableness standard and may use available scientific, medical and engineering data regarding special packaging

Inextricably tied to the labeling requirements of the Act is the structure of product classification under the Federal Hazardous Substances Labeling Act. Under the Act's basic scheme, products can be divided into three categories: hazardous substances, misbranded hazardous substances and banned hazardous substances. While hazardous substances and misbranded hazardous substances are allowed to enter the flow of commerce once they have been properly labeled, banned hazardous substances are completely restricted from channels of interstate commerce even though they meet the labeling requirements of the Act.

PRODUCT CLASSIFICATION

Hazardous Substances

A product which is subject to the Act's labeling requirements is designated a "hazardous substance." Basically,

> [t]he term "hazardous substance" means: (1) (A) Any substance which (i) is toxic,[41] (ii) is corrosive,[42] (iii) is an irritant,[43] (iv) is a strong sensitizer,[44] (v) is flammable or combustible,[45] or (vi) generates pressure through decomposition, heat, or other means, if such substance or mixture of substances may cause substantial personal injury or substan-

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and concerning accidental ingestions, injuries and illnesses. *Id.* §§ 1471-76. For an article discussing the Poison Prevention Packaging Act, see generally Corrigan, *Poison Prevention Packaging Act*, 26 FOOD DRUG COSM. L.J. 447 (1971).

41. The term "toxic" shall apply to any substance (other than a radioactive substance) which has the capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface.

15 U.S.C. § 1261(g) (1970).

42. The term "corrosive" means any substance which in contact with living tissue will cause destruction of tissue by chemical action; but shall not refer to action on inanimate surfaces.

15 U.S.C. § 1261(i)(1970).

43. The term "irritant" means any substance not corrosive within the meaning of subparagraph (i) of this section which on immediate, prolonged, or repeated contact with normal living tissue will induce a local inflammatory reaction.

15 U.S.C. § 1261(j) (1970).

44. The term "strong sensitizer" means a substance which will cause on normal living tissue through an allergic or photodynamic process a hypersensitivity which becomes evident on reapplication of the same substance and which is designated as such by the [Commission]. Before designating any substance as a strong sensitizer, the [Commission], upon consideration of the reaction, shall find that the substance has a significant potential for causing hypersensitivity.

15 U.S.C. § 1261(k) (1970).

45. The term "flammable" shall apply to any substance which has a flash point of above twenty degrees to and including eighty degrees Fahrenheit . . . and the term "combustible" shall apply to any substance which has a flash point above eighty degrees Fahrenheit to and including one hundred and fifty degrees . . . .

15 U.S.C. § 1261(l) (1970) (method of determining flash point also designated).

> tial illness[46] during or as a proximate result[47] of any customary or reasonably foreseeable handling or use [48] including reasonably foreseeable ingestion by children.[49]

Congress suggested certain criteria to be used in determining whether a particular substance was hazardous. The basic standards to be used are those recognized in common law civil liability cases in which a seller is found to have had a duty to warn potential purchasers of the inherent dangers of his product.[50]

The word "substance" is never defined by the Act. It was earlier suggested that the word should be limited to its chemical definition,[51] meaning basically any "particular kind of matter, whether element, compound, or mixture."[52] One authority noted that throughout the Act the provisions spoke only of the "container" and the "label on the container" and made no mention of warning labels on "substances" as such. Thus it was suggested that the Act did not pertain to those articles which could be sold unpackaged, such as toys. Rather, it was submitted, the Act applied only to chemical products "which from their very nature must be in a container in order to be handled or used."[53]

Recent amendments have expanded the term "hazardous substances" to include articles used by children such as toys. In light of these amendments the definition now makes the Act applicable to practically any product which causes harm in one of the six prescribed ways.[54] The 1969 amendment broadened the definition by including,

> [a]ny toy or other article intended for use by children which the [Commission] by regulation determines, in accordance with section 1262(e) of this title, presents an electrical,[55]

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46. Substantial personal injury or illness. This term means any illness or injury of a significant nature. It need not be severe or serious. What is excluded by the word "substantial" is a wholly insignificant or negligible injury or illness.
21 C.F.R. § 191.1(p) (1973).

47. Proximate result. A proximate result is one that follows in the course of events without an unforeseeable, intervening, independent cause.
21 C.F.R. § 191.1(q) (1973).

48. Reasonably foreseeable handling or use. This includes the reasonably foreseeable accidental handling or use, not only by the purchaser or intended user of the product, but by all others in a household, especially children.
21 C.F.R. § 191.1(r) (1973).

49. 15 U.S.C. § 1261(f)(1)(A) (1970).

50. S. REP. No. 1158, 86th Cong., 2d Sess. (1960).

51. Scriba, *The Federal Hazardous Substances Labeling Act*, 17 BUS. LAW. 137 (1961).

52. *Id.* at 139.

53. *Id.* at 140.

54. *See* notes 41-46 *supra.*

55. An article may be determined to present an electrical hazard if, in normal use or when subjected to reasonably foreseeable damage or

mechanical,[56] or thermal[57] hazard.[58]

The definitions of "electrical", "mechanical" and "thermal" hazards explain that an article may be determined to present any one of these hazards if, when subjected to reasonably foreseeable damage or abuse, its design or manufacture may cause a particular personal injury or illness.[59] These definitions indicate that Congress intended to make any toy that was foreseeably harmful subject to the labeling requirements of the Act.

To avoid uncertainty in applying the Act's standard of "reasonably foreseeable",[60] Congress gave the Consumer Product Safety Commission power to declare a substance "hazardous" if it finds that a product meets the Act's basic definition under section 1261(f)(1)(A).[61] It is conceivable that instances may occur where a particular substance would not be included within the technical definition of the Act. As a result, uncertainty arises as to whether such a substance would be subject to the Act's provisions. By giving the Commission the power to determine that a particular substance is hazardous, this problem of uncertainty in the application of the Act can be avoided.

The procedure which the Commission is to use in declaring a substance to be hazardous is found in the formal rule-making procedure embodied in sections 371(e)-(g) of the Federal Food, Drug and Cosmetic Act.[62] Any action to declare a substance hazardous is initiated by a proposal made by the Commission or by petition of any interested person.[63] Within thirty days after

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abuse, its design or manufacture may cause personal injury or illness by electrical shock.

15 U.S.C. § 1261(r) (1970).

56. An article may be determined to present a mechanical hazard if, in normal use or when subjected to reasonably foreseeable damage or abuse, its design or manufacture presents an unreasonable risk of personal injury or illness (1) from fracture, fragmentation, or disassembly of the article, (2) from propulsion of the article (or any part or accessory thereof), (3) from points or other protrusions, surfaces, edges, openings, or closures, (4) from moving parts, (5) from lack or insufficiency of controls to reduce or stop motion, (6) as a result of self-adhering characteristics of the article, (7) because the article (or any part or accessory thereof) may be aspirated or ingested, (8) because of instability, or (9) because of any other aspect of the article's design or manufacture.

15 U.S.C. § 1261(s) (1970).

57. An article may be determined to present a thermal hazard if, in normal use or when subjected to reasonably foreseeable damage or abuse, its design or manufacture presents an unreasonable risk of personal injury or illness because of heat as from heated parts, substances, or surfaces.

15 U.S.C. § 1261(t) (1970).

58. 15 U.S.C. § 1261(f)(1)(D) (1970).

59. *See* notes 55-57 *supra*.

60. *Id.*

61. 15 U.S.C. § 1262(a)(1)(1970). *See* note 6 *supra*.

62. 21 U.S.C. §§ 371-1056 (1970).

63. Under this procedure it appears that a manufacturer desiring certainty

the Commission releases its public order regarding the proposal,[64] any person who will be adversely affected by the order may file objections to it with the Commission and request a public hearing. Until final action is taken on the objections the order will remain ineffective.[65] The Commission will then hold public hearings at which any interested person may present his views. Upon completion of the hearing the Commission will act on the objections and issue a final order which could include the promulgation of a new regulation. The order will be based on a fair evaluation of the entire record,[66] setting forth detailed findings of fact upon which the order is based. The order will not take effect prior to ninety days after its publication.[67] In the case of actual controversy as to the validity of any order, any person who will be adversely affected by the order if it is placed in effect may, within the ninety days, file a petition with the United States Court of Appeals for a judicial review of the order.[68]

Although section 1262(a)(1) allows the Commission to declare certain substances to be hazardous, it does not restrict the coverage of the Act to those substances alone. Thus, the provision provides for clarity of application without compromising the broad sweep of the definition by limiting coverage to certain named substances, as under the Federal Caustic Poison Act.[69]

There are numerous substances which are specifically exempted from the Federal Hazardous Substances Labeling Act.[70] The term "hazardous substances" is not applied to pesticides which are subject to the Federal Insecticide, Fungicide and Rodenticide Act.[71] Also exempted are food, drugs or cosmetics subject to the Federal Food, Drug and Cosmetic Act.[72] Common fuels stored in containers and used for household cooking, heating or refrigeration are not covered by the Act,[73] since the user is usually completely aware of the nature of the product.[74] Another reason such fuels are exempted is because regula-

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could submit his product to the Commission prior to its release to the public, and could thereby ascertain whether it would be declared a hazardous substance and require special labeling.

64. 21 U.S.C. § 371(e)(1) (1970).
65. 21 U.S.C. § 371(e)(2) (1970).
66. 21 U.S.C. §§ 371-1056 (1970).
67. 21 U.S.C. § 371(e)(3) (1970).
68. 21 U.S.C. § 371(f)(1) (1970).
69. Act of March 4, 1927, ch. 489, §§ 1-10, 12, 44 Stat. 1406-10.
70. 15 U.S.C. §1261(f)(2) (1970).
71. *Id.* *See* note 4 and accompanying text *supra.*
72. *Id.*
73. 15 U.S.C. § 1261(f)(2) (1970).
74. H.R. REP. No. 1861, 86th Cong., 2d Sess. (1960), *reported in* 2 U.S. CODE CONG. & AD. NEWS 2837 (1960).

tions of the Interstate Commerce Commission prescribe specifications for the labeling of containers for flammable liquids and gases used as fuels.[75] An exception to this exemption, however, is fuel stored in a portable container. A portable container used for delivery or temporary or additional storage which contains a substance that is hazardous as defined in the FHSLA is subject to the labeling requirements of the Act even though it contains fuel to be used in heating, cooking or refrigeration.[76] Other substances specifically exempted from the Act are any source material, special nuclear material or by-product material defined in the Atomic Energy Act of 1954.[77]

In addition to the above exemptions there are instances in which the application of labeling requirements is impractical. The Commission is authorized to exempt certain hazardous substances from full labeling compliance if it finds the size of the package containing the substance makes labeling difficult, the substance presents only a minor hazard, or "for other good and sufficient reason."[78] Numerous exemptions have been made on the basis of small packages, minor hazards and special circumstances.[79] Examples of such exemptions are book matches, wrapping paper and containers of certain pastes and waxes.[80]

The definition of "hazardous substances" under the FHSLA does not limit application of the Act to chemical substances only. Any product which is capable of causing harm in one of the six prescribed ways is subject to the Act. In addition to the substances which fall within the technical definition of hazardous substances, as well as those which the Commission determines to be within the purview of the Act, misbranded and banned hazardous substances are included within the scope of the Act.

Misbranded Hazardous Substances

The Act defines a "misbranded hazardous substance" as any substance which is subject to the Act but fails to meet its packaging or labeling requirements.

> The term "misbranded hazardous substance" means a hazardous substance (including a toy, or other article intended for use by children, which bears or contains a hazardous substance in such manner as to be susceptible of access by a

75. 18 U.S.C. § 835 (1970).
76. 21 C.F.R. § 191.61(b) (1973).
77. These substances are exempted by 15 U.S.C. § 1261(f)(3) (1970), as defined by The Atomic Energy Act of 1954, 42 U.S.C. § 2011 (1970).
78. 21 C.F.R. § 191.62(b) (1973).
79. 21 C.F.R. § 191.63 (1973).
80. *Id.*

> child to whom such toy or other article is entrusted) intended, or packaged in a form suitable, for use in the household or by children, if the packaging or labeling of such substance is in violation of an applicable regulation issued pursuant to section 1472 or 1473 of this title (Poison Prevention Act) or if such substance, except as otherwise provided by or pursuant to section 1262 of this title, fails . . . to meet the labeling requirements of this Act.[81]

To be a "misbranded hazardous substance" as defined above, a substance must be a "hazardous substance"; be intended, or packaged in a form suitable for use in the household[82] or by children; and, violate a packaging or labeling requirement of the Act. The requirement that the substance be intended for "use by children" is important. It has been held that a person selling a hazardous substance is charged with a *duty to inquire* whether children would use the product.[83]

The court in *United States v. 7 Cases, Cracker Balls*[84] discussed the various elements of a misbranded hazardous substance. In *7 Cases, Cracker Balls*,[85] the government alleged that certain fireworks, "Cracker Balls," were being sold in misbranded packages in violation of the Federal Hazardous Substances Labeling Act.[86] The "cracker balls" were composed of small quantities of gunpowder and particles of sand or flint in papier mâché coatings. If the "cracker balls" were thrown against a hard surface or struck, they exploded with a loud noise.[87]

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81. 15 U.S.C. § 1261(p) (1970).

82. *Hazardous substances intended or packaged in a form suitable for use in the house.* "Hazardous substances intended or packaged in a form suitable for use in the household" means any *hazardous substance, whether or not packaged, that under any customary or reasonably foreseeable condition of purchase, storage, or use may be brought into or around a house, apartment, or other place where people dwell, or in or around any related building or shed, including but not limited to a garage, carport, barn, or storage shed.* The term includes such articles as polishes or cleaners designed primarily for professional use but that are available in retail stores such as hobby shops for non-professional use. Also included are such items as anti-freeze and radiator cleaners that although principally for car use may be stored in or around dwelling places. The term does not include industrial supplies that might be taken into a home by a serviceman. An article labeled as and marketed solely for industrial use does not become subject to this act because of the possibility that an industrial worker may misappropriate a supply for his own use. Size of unit or container is not the only index of whether the article is suitable for use in or around the household. The test shall be whether under any reasonably foreseeable condition of purchase, storage, or use the article may be found in or around a dwelling.

21 C.F.R. § 191.1(c) (1973) (emphasis added).

83. United States v. Chalaire, 316 F. Supp. 543 (E.D. La. 1970).

84. 253 F. Supp. 771 (S.D. Tex. 1966).

85. *Id.*

86. *Id.* at 772.

87. *Id.*

The court found that the product was a hazardous substance as defined by the Act in that it was flammable and generated pressure through decomposition, heat or other means.[88] The court noted that the cracker ball might cause substantial personal injury as a proximate result of any reasonably foreseeable handling or use.[89] It was also noted that the cracker balls were "in a container intended or suitable for household use."[90] Thus the court held that, to avoid being a "misbranded package of a hazardous substance", a "label" had to be affixed to the plastic envelope in which the cracker balls were packaged.[91] The court noted that it was not required that *each* cracker ball bear such a label.[92] While it can be seen from this decision that a misbranded hazardous substance can be made to comply with the requirements of the Act by relabeling the product to provide a warning as to its inherently dangerous nature, a banned hazardous substance, on the other hand, is subject to the strictest proscriptions of the Act. Although a banned hazardous substance may be packaged and labeled in a manner which complies with the Act, it may be completely prohibited from entering the flow of interstate commerce if the Commission finds the prohibition necessary to protect the public.

Banned Hazardous Substances

The term "banned hazardous substances" as defined in the FHSLA is applied to two groups of substances. One group includes,

> any toy, or other article intended for use by children, which is a hazardous substance or which . . . contains a hazardous substance in such a manner as to be susceptible of access by a child to whom such toy or other article is entrusted.[93]

The second group covered includes any hazardous substance intended or packaged for use in the household which the Commission classifies as a "banned hazardous substance" if it finds that the protection of the public health and safety will be furthered by keeping such a substance out of the channels of interstate commerce. A product may be so designated even though it meets the labeling requirements of the Act.[94]

Section 1261(q)(1) allows the Commission to exempt two types of articles from the first group. Articles which by their na-

88. *Id.* at 773.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. 15 U.S.C. § 1261(g)(1) (1970). *See* note 6 *supra.*
94. *Id.*

ture require the inclusion of a hazardous substance or necessarily present an electrical, mechanical or thermal hazard may be exempted if they bear adequate labeling.[95] The labeling must give directions and warnings for safe use. These articles must be intended for use by children who are mature enough to "read and heed such directions and warnings."[96] An example of such an article is a chemistry set. Common fireworks are the second type of article which may be exempted if the Commission determines that they can be adequately labeled to protect those purchasing and using them.[97] Examples of common fireworks are cone fountains, cylinder fountains and sparklers.

The receipt and delivery in interstate commerce of any banned hazardous substance is prohibited by section 1263 of the Act.[98] Thus section 1261(q)(1) of the Act, read together with section 1263, gives the Consumer Product Safety Commission the unique power to completely ban a product from interstate commerce. If a particular substance meets the definition of a "banned hazardous substance" and the Commission determines that the substance does not fall within any of the specified exemptions, that substance would be banned from interstate commerce.

The hazards presented by certain substances cannot be eliminated effectively even by warnings. This is particularly true when the intended users are children. Often children are too young to read or understand warnings placed on articles which they use. Where warnings on particular substances have proven to be ineffective, the total ban of these substances from interstate commerce may be found to be necessary for the protection of the public.

The primary use of section 1261(q)(1) has been to ban the sale of various dangerous childrens' toys. In *United States v. Chalaire*[99] defendants Chalaire and Latapie were charged with violations of the Federal Hazardous Substances Labeling Act arising out of sales of fireworks. On one occasion the defendants sold fireworks to a thirteen-year-old who sustained substantial injury as a result of the exploding fireworks, including the loss of fingers and his vision in one eye. On three other occasions sales were made by defendants to Food and Drug Inspectors. At the time of these purchases the defendants did not inquire as to the age of the buyer(s), or as to whether the fireworks were to be used by children.[100] The court found that the sale of certain Class B fire-

95. *Id.*
96. *Id.*
97. *Id.*
98. 15 U.S.C. §1263 (1970).
99. 316 F. Supp. 543 (E.D. La. 1970).
100. *Id.* at 545.

works (silver kings and cherry bombs) which were not absolutely banned,[101] became banned hazardous substances[102] within the purview of the Act when sold to children. When Class B fireworks were to be used for bona fide agricultural purposes, such as the protection of crops from depredation by birds and animals, they were not banned from channels of interstate commerce. They were, however, banned from channels of commerce leading to children.[103] Thus the court held that the sale of the fireworks by defendants to adults, without first asking the adult whether a child would be using them, resulted in a violation of the Act.[104] Under the reasoning of *Chalaire* it appears that the clause "intended for use by children" in section 1261 of the Act imposes on the seller of hazardous substances the duty of inquiring as to whether the substance will ultimately be used by a child.

In *R. B. Jarts, Inc. v. Richardson*[105] the court implied that darts, whch were thirteen inches long weighing approximately one-half pound and containing an aluminum shaft and metal nose, could properly be classified as a "banned hazardous substance."[106] However, the court indicated that the darts could be exempt from such a classification if they carred a warning that they were *not a toy for use by children* and if they were not sold in toy stores or toy departments.[107] The court's discussion in *Jarts* suggests that although a toy or article intended for use by children may fall within the definition of "banned hazardous substances", a court may attempt to fit it within one of the exemptions so that its sale will not be completely banned. Section 1261(q)(1) provides that the Commission may exempt certain articles from the classification of "banned hazardous substances" if they are properly labeled and are intended for use by children with sufficient maturity to read and heed the label.[108]

PROHIBITED ACTS

Numerous activities are prohibited under the Federal Hazardous Substances Labeling Act.[109] A violation of the Act occurs if any misbranded hazardous substance or banned hazardous substance is either introduced into[110] or received[111] in inter-

101. *Id.* at 548.
102. *See* text accompanying note 83 *supra.*
103. *Id.*
104. *Id.* at 547.
105. 438 F.2d 846 (2d Cir. 1971).
106. *Id.* at 853-54.
107. *Id.*
108. 15 U.S.C. § 1261(g)(1) (1970). *See* note 6 *supra.*
109. 15 U.S.C. § 1263 (1970).
110. *Id.* § 1263(a).
111. *Id.* § 1263(c).

state commerce. The Act also forbids any actions which would cause a hazardous substance to become a misbranded or banned hazardous substance.[112] For example, the alteration, mutilation or destruction of the label of a hazardous substance might cause that substance to become a misbranded hazardous substance. It is also a prohibited act to give a false guarantee that a particular hazardous substance is not in a misbranded package[113] such as when the label of a chemistry set states that it is safe for use by children of all ages. It should be noted, however, that the giving of such a guarantee is not a violation of the Act if the guarantor relied on such a written guarantee when he received the substance.[114]

An additional activity prohibited under the Federal Hazardous Substances Labeling Act is the failure to permit entry or inspection of an establishment or vehicle as authorized by section 1270(b) of the Act, or to permit access to or copying of any record as authorized by section 1271.[115] The introduction into interstate commerce of a hazardous substance in a re-used food, drug or cosmetic container or in a container which, although not re-used is identifiable as a food, drug or cosmetic container is also prohibited.[116] Section 1263(f) of the Act declares that the re-use of a food, drug or cosmetic container for a hazardous substance is an action which results in the hazardous substance's becoming a misbranded hazardous substance. Finally, it is a prohibited act for a person to reveal, or use to his own advantage, a trade secret obtained under the authority of section 1270.[117]

Whenever a person performs an act which is prohibited under section 1263, he violates the Federal Hazardous Substances Labeling Act. It has been held that knowledge and willfulness are *not* elements of such a violation.[118] In *United States v. Chalaire*,[119] the court noted that these elements are not mentioned anywhere in the statute and that the legislative history of the statute indicated that Congress did not intend knowledge and

112. *Id.* § 1263(b).
113. *Id.* § 1263(d).
114. *Id.*
115. *Id.* § 1263(e).
116. *Id.* § 1263(f).
117. *Id.* § 1263(h). Authority was given to the Secretary of HEW, under 15 U.S.C. § 1270 (1970), and is now given to the Consumer Product Safety Commission by virtue of 15 U.S.C. § 2079(a) (Supp. 1972), to conduct examinations of the various products. 15 U.S.C. § 1263(h) (1970) prohibits any employee involved in these examinations from using knowledge gained therefrom to his advantage.
118. United States v. Chalaire, 316 F. Supp. 543 (E.D. La. 1970).
119. *Id.*

willfulness to be elements of a violation.[120]

The major effects of these prohibitions are to ban the sale in interstate commerce of products which do not meet the labeling requirements of the Act, such as misbranded hazardous substances, and to ban from interstate commerce those products which are so potentially hazardous that precautionary warnings will not protect the consumer.[121]

STATUTORY PENALTIES FOR VIOLATIONS

A violation of the Federal Hazardous Substances Labeling Act is a misdemeanor offense punishable by a fine of not more than five hundred dollars or imprisonment of not more than ninety days, or both.[122] Offenses which are committed with the intent to defraud or mislead, or offenses following a prior offense, are punishable by a fine of not more than three thousand dollars or imprisonment of not more than one year, or both.[123] The United States District Courts are given jurisdiction under the Act to restrain violations[124] and provision is made for trial by jury in any proceeding for criminal contempt.[125]

Any misbranded hazardous substance or banned hazardous substance may be proceeded against on "libel of information" while in interstate commerce or anytime thereafter.[126] To effect a seizure of such a substance the government must bring a suit in the United States District Court within the jurisdiction in which the hazardous substance is located.[127] In a suit of this type the court usually condemns the particular substance[128] and gives the government the right to seize the product. The paramount consideration in using this procedure is the protection of the public. It should be noted that when a determination is made that a product is in violation of the Act, that product may be liable to seizure even though the label was thought to be sufficient when the goods passed into interstate commerce. In *Wilmington Chemical Corporation v. Celebrezze*,[129] the plaintiff manufacturing company was using a label on its product, a water repellent known as "X-33", which had been approved by the Food and Drug Administration. However, several months subsequent to this ap-

120. *Id.* at 548.
121. FRUMER AND FRIEDMAN, PRODUCTS LIABILITY § 186.35 (1973).
122. 15 U.S.C. § 1264(a) (1970).
123. *Id.*
124. *Id.* § 1267(a).
125. *Id.* § 1267(b).
126. *Id.* § 1265(a).
127. *Id.*
128. *Id.*
129. 229 F. Supp. 168 (N.D. Ill. 1964).

proval, the plaintiff was advised that the label was not in conformance with the Federal Hazardous Substances Labeling Act.[130] Plaintiff was told that the usage of certain words would bring the label into compliance. The company was also informed that unless the change on the label was made immediately on all shipments made by plaintiff during the past two years, the government would begin seizing the product. The plaintiff brought an action in the United States District Court for a declaratory judgment that the new labeling requirements could only apply to products shipped subsequent to the promulgation of this new standard. The district court dismissed the action, noting that prior to the action the government had attempted to work out a voluntary program whereby the plaintiff would recall its products and relabel them. This program, however, proved to be ineffective because plaintiff refused to recall previously sold products deemed to be inadequately labeled and seizure of the products became necessary. The court, therefore, dismissed plaintiff's suit for declaratory judgment that the FHSLA can be applicable only to products shipped subsequently to the promulgation of the ruling requiring new labeling, noting that if plaintiff's labels were insufficient to warn *future* users, they were equally insufficient to warn users of cans *previously* marketed.[131] The court commented that, under the Act, protection of the public is the paramount consideration and it is the duty of the government

> to do a complete job of protection and not trust to luck that purchasers of the cans theretofore sold to dealers will be aware enough to understand the previously approved but inadequately specific label.[132]

By finding that the labeling of the product in question was already being ably dealt with by the administrative process, the court held that it should not interpose its jurisdiction to pass on the labeling of a highly technical and dangerous substance, although it would not uphold such administrative determinations where the agency clearly abused its discretionary power.[133]

A manufacturer or distributor must repurchase any banned hazardous substance from the person to whom he sold it.[134] Such a repurchase must be made whether or not the substance was banned at the time of the sale.[135] The manufacturer or distributor is required to refund to that purchaser the price plus

130. 15 U.S.C. §§ 1261-74 (1970).
131. 229 F. Supp. 168, 170 (N.D. Ill. 1964).
132. *Id.* at 171.
133. *Id.* at 172.
134. 15 U.S.C. § 1274(a)(1), (2) (1970).
135. *Id.* § 1274(a).

any expenses incurred in returning the article or substance.[136] Similarly, a retailer must repurchase a banned hazardous substance if the buyer returns it to him.[137]

CIVIL REMEDIES

Although violations of the Federal Hazardous Substances Labeling Act are penal in nature, the purpose of the Act is to prevent injuries and promote safety. As an Act promoting safety, it sets out minimum standards for labeling. Basically these standards require warning of the hazard presented by the product and instructions as to its use. If these minimum standards are not met, the defendant could be adjudged negligent per se in an appropriate civil action.[138] At least two courts have indicated that a civil remedy would be recognized under the Act.[139] In *Cross v. Board of Supervisors of San Mateo County*,[140] the plaintiff brought an action for damages alleging that the defendants were representing false information on the labels of their products, air deodorizers and fresheners. The court found that the plaintiff's allegations suggested a violation of the Federal Hazardous Substances Labeling Act.[141] Although there is no specific provision for civil recovery under the Act, the court held that such recovery could be applied under appropriate circumstances.[142] The *Cross* court noted, however, that plaintiff's allegations were insufficient to state a claim for private relief because she had failed to show any damages to herself from the alleged violation.[143]

In *Courtney v. American Oil Co.*,[144] Richard Courtney, aged 10, and his father brought an action to recover damages sustained as a result of the alleged negligence of a gasoline station owner. The defendant had sold five cents worth of gas to Richard and a friend for use in a model airplane engine. At the time of the purchase the defendant neither labeled the can of gas nor warned the boys about the dangers of gasoline. Subsequent to the sale Richard's friend ignited the gas with a cigarette lighter and as a result Richard was burned. The trial court concluded that the sale of the gas was not the proximate cause as a matter of

136. *Id.* § 1274(a)(1), (2).
137. *Id.* § 1274(a)(3).
138. RESTATEMENT (SECOND) OF TORTS § 288B (1965).
139. Cross v. Board of Supervisors of San Mateo County, 326 F. Supp. 634 (N.D. Cal. 1968), *aff'd*, 442 F.2d 362 (9th Cir. 1971); Courtney v. American Oil Co., 220 So. 2d 675 (Fla. Ct. App. 1969).
140. 326 F. Supp. 634 (N.D. Cal. 1968), *aff'd*, 442 F.2d 362 (9th Cir. 1971).
141. *Id.* at 638.
142. *Id.*
143. *Id.*
144. 220 So. 2d 675 (Fla. Ct. App. 1969).

law of the injury and directed a verdict for the defendant.[145] The district court of appeals affirmed that decision.[146] On appeal, the plaintiffs contended that the trial court erred in not applying the Federal Hazardous Substances Labeling Act.[147] The court of appeals noted that this Act prohibited the sale in interstate commerce of dangerous substances without a label describing the substance and the hazard presented by it.[148] The court stated however, that the Act was designed to protect the general public rather than a limited class of plaintiffs, and, that a violation would give rise to negligence at most, but would not be conclusive as a matter of law on the issue of proximate cause.[149] In *Courtney*, the decision was based on the lack of proximate cause which limits the liability of a negligent actor to the reasonably foreseeable consequences of his negligence. Here, the gasoline was sold for a legitimate purpose—use in a model airplane engine. Because the personal injury resulted from an intentional effort of one of the purchasers to ignite it, the court found that the consequence of the sale was not one which was reasonably foreseeable by the defendant. It thus held for the defendant, affirming the trial court's ruling on proximate cause.[150]

Because of the protective nature of the Act, and its explicit application to children, it is apparent that the *Courtney* court was unduly narrow in its interpretation of what was reasonably foreseeable. It construed the reasonably foreseeable standard under the Act, which expressly includes "reasonably foreseeable ingestion by children,"[151] too strictly. Had the child been injured by ingestion of the gasoline rather than by ignition of the substance, the injury would have fallen within the foreseeable purview of the Act. That one type of injury can be a reasonably foreseeable consequence while the other cannot seems inapposite in view of the highly flammable nature of the gasoline as well as the protective purposes of the Act.

However, it is apparent from *Courtney* that to recover for personal injuries under the Federal Hazardous Substances Labeling Act on a negligence claim, proximate cause must be independently established since it is not proven merely by a showing that the Act was violated. Consumers may be able to obtain relief against violators of the Act on a theory of strict liability in tort. Restatement (Second) of Torts section 402A states that a

145. *Id.* at 677.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. 15 U.S.C. § 1261(f)(1)(A) (1970).
151. 220 So. 2d at 678.

seller will be held strictly liable for harm caused by his product if 1) the product is defective; 2) the defective condition is unreasonably dangerous to the user; and 3) the defective condition was the cause of the harm.[152] An increasing number of courts are recognizing that products which contain latent foreseeable hazards, although ostensibly perfectly made, are "defective" unless an adequate warning is given to the consumer.[153]

In *Patch v. Stanley Works*,[154] the defendant company was being sued for injuries caused to Soucy and for the wrongful death of Patch. The death and injuries occurred when a coating compound which the two men were testing exploded. The compound, which was manufactured by the defendant, contained a highly flammable substance. The label on the container, however, neither revealed the contents of the compound nor warned of its flammable nature. Using the Restatement (Second) of Torts section 402A as its guide, the court in *Patch* found the manufacturer of the compound to be strictly liable for the harm caused by the product.[155] The court noted that defendant's liability is clearly explained in comment (h) to section 402A which states,

> Where, however, the seller has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger . . . and a product sold without such a warning is in a defective condition.[156]

Following the reasoning of this case, it is arguable that when a seller fails to meet the labeling requirements of the Federal Hazardous Substances Labeling Act, his product is defective under the tort theory of strict liability. As a result, that seller could be held strictly liable for any harm caused by that defective condition.

CONCLUSION

There is hardly a product used in the household, whether liquid, gaseous or solid, a chemical compound, textile or film, which is properly labeled under the full purview of this Act. A casual examination of available kitchen, bathroom and recreational supplies will ordinarily reveal clear violations or minimal back-handed compliance with the requirements of the Act. This is particularly true of that part of the Act which requires a short

152. RESTATEMENT (SECOND) OF TORTS § 402A (1965).
153. *See* cases cited in FRUMER AND FRIEDMAN, PRODUCTS LIABILITY § 3-224.7 n.12 (Supp. 1973).
154. 448 F.2d 483 (2d Cir. 1971).
155. *Id.* at 488-89.
156. *Id.* at 489.

description of the principal hazard[157] and precautionary measures describing actions to be followed or avoided.[158]

These defectively labeled products are still causing and will continue to cause untold thousands of deaths and injuries every year.[159] Why do these products cause death and injury? The purveyors of these products would represent that it is because of consumer stupidity and carelessness. However, this ostensible stupidity and carelessness often results from the failure of the producers who place their products on the market to inform the consuming public of the propensities and dangers of the products they use. Steps must be taken to educate and alarm the populace of the potential hazards of seemingly innocent products. Strong, effective warnings and instructions that communicate the hazards of foreseeable and unforeseeable use of products provide the only hope for preventing injuries and needless deaths.

Through increased enforcement, agency pressure, and civil liability resulting from violations of the Act, the "sleeping giant" of the Federal Hazardous Substances Labeling Act will one day awaken. To date, the Act has been largely ignored and more honored in its breach than in its acceptance. Hopefully, for the benefit of the consuming public, when the giant does awaken, the laudable purposes of the Act will become a reality rather than

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157. 15 U.S.C. § 1261(p)(1)(E) (1970).

158. *Id.* § 1261(p)(1)(F).

159. 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%

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).

Statistics show 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).

merely an ideal. Perhaps, the goals of the Act may be more clearly realized through massive consumer education utilizing such methods as federal educational advertising, mass media as well as other channels of information dissemination so that each consumer will be aware of not only the inherent dangers of the products he uses, but also of the standards which must be met by manufacturers of products which find their way into the American home.