Private Causes of Action under the Reporting Rules of the Consumer Product Safety Act

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INTRODUCTION

Recently, attorneys representing plaintiffs in products liability suits have been advised to consider adding to their claims a count for violation of the reporting rules promulgated under the Consumer Product Safety Act.1 These rules require manufacturers, distributors, or retailers of a potentially hazardous consumer product to report on the product to the Consumer Product Safety Commission (the Commission).2 Although the Consumer Product Safety Act (the CPSA or the Act) became law in 1972,3 only in 1981 did plaintiffs who had been injured by defective consumer products begin to take advantage of the Act's provision that apparently allows a federal cause of action for a violation of the Commission's reporting rules.4 In addition to providing an alternative cause of action, the use of this provision allows a plaintiff to bring in federal court a products liability claim which would otherwise have no basis for federal jurisdiction.5 The CPSA's authorization of this particular use of the private cause of action is questionable, however, and federal courts have split on the issue of whether to recognize it.6

This Note assesses the validity of the private cause of action for a violation of the CPSA reporting rules and concludes that the cause of action should not be recognized. Part I describes the structure of the CPSA and the relation of the Commission's rules to the Act. Part II discusses the reported cases ruling on the private cause of action for violation of the report-

5. The CPSA-based claim, which normally accompanies other products liability claims available at common law, can also be brought in state court under that court's concurrent jurisdiction. See Swenson v. Emerson Elec. Co., 374 N.W.2d 690, 697 (Minn. 1985).
6. See infra notes 34-58 and accompanying text.
ing requirements. Part III considers the principles of administrative rulemaking that clarify the nature and force of the Commission's reporting rules. Finally, Part IV explains why recognition of the private cause of action for violation of the reporting rules is inconsistent with the logic behind the CPSA and the Act's relation to common-law products liability litigation.

I. THE CONSUMER PRODUCT SAFETY ACT

The CPSA represents Congress's response to the need for a comprehensive federal regulatory body to oversee the area of consumer product safety. Previous legislation in the area had been piecemeal. By creating the Consumer Product Safety Commission, Congress intended to bring the supervision of a broad array of products under one authority and to vest that authority with wide-ranging administrative power to supervise and regulate the safety of consumer products. The Act itself

7. The congressional declaration of the purpose of the Act states:
   The Congress finds that—
   (1) an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce;
   (2) complexities of consumer products and the diverse nature and abilities of consumers using them frequently result in an inability of users to anticipate risks and to safeguard themselves adequately;
   (3) the public should be protected against unreasonable risks of injury associated with consumer products;
   (4) control by State and local governments of unreasonable risks of injury associated with consumer products is inadequate and may be burdensome to manufacturers;
   (5) existing Federal authority to protect consumers from exposure to consumer products presenting unreasonable risks of injury is inadequate; and
   (6) regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter.


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does not set forth substantive standards of product safety but rather gives the Commission specific powers to investigate and regulate consumer products. The heart of the Commission's regulatory authority is its power to issue "consumer product safety standards" dictating performance requirements and warning or instruction requirements and its power to ban products that cannot be rendered safe through the enforcement of standards. These powers are accompanied by elaborate descriptions of the administrative procedures to be followed at each step of the Commission's development and promulgation of safety standards.

The Act also contains several enforcement provisions. Failures to comply with actions or rules of the Commission are listed as "prohibited acts." Anyone who knowingly commits

The term "consumer product" means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise . . . ."


10. The Commission is charged, for example, with establishing an Injury Information Clearinghouse, the purpose of which is "to collect, investigate, analyze, and disseminate injury data, and information, relating to the causes and prevention of death, injury, and illness associated with consumer products." Id. § 5(a)(1), 15 U.S.C. § 2054(a)(1).


14. The list of prohibited acts reads as follows:

It shall be unlawful for any person to—

(1) manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which is not in conformity with an applicable consumer product safety standard under this chapter;

(2) manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which has been declared a banned hazardous product by a rule under this chapter;

(3) fail or refuse to permit access to or copying of records, or fail or refuse to establish or maintain records, or fail or refuse to make reports or provide information, or fail or refuse to permit entry or inspection, as required under this chapter or rule thereunder;

(4) fail to furnish information required by section 2064(b) of this title;

(5) fail to comply with an order issued under section 2064(c) or
any of these acts is subject to civil penalties,\textsuperscript{15} and anyone who willingly commits any of the acts is subject to criminal penalties.\textsuperscript{16} In addition, a liberal provision for private enforcement allows “any interested person”\textsuperscript{17} to bring an action in federal district court seeking enforcement of a consumer product safety rule or of a Commission “order.”\textsuperscript{18} A Commission “order,” as authorized by subsections 15(c) and (d) of the Act,\textsuperscript{19} may re-

(d) of this title (relating to notification, to repair, replacement, and refund, and to prohibited acts);

(6) fail to furnish a certificate required by section 2063 of this title or issue a false certificate if such person in the exercise of due care has reason to know that such certificate is false or misleading in any material respect; or to fail to comply with any rule under section 2063(c) of this title (relating to labeling);

(7) fail to comply with any rule under section 2058(g)(2) of this title (relating to stockpiling); or

(8) fail to comply with any rule under section 2076(e) of this title (relating to provision of performance and technical data); and

(9) fail to comply with any rule or requirement under section 2082 of this title (relating to labeling and testing of cellulose insulation).

(10) fail to file a statement with the Commission pursuant to section 2067(b) of this title.


15. \textit{See id.} § 20(a)(1), 15 U.S.C. § 2069(a)(1). This section defines “knowingly” as “(1) the having of actual knowledge, or (2) the presumed having of knowledge deemed to be possessed by a reasonable man who acts in the circumstances, including knowledge obtainable upon the exercise of due care to ascertain the truth of representations.” \textit{Id.} § 20(d), 15 U.S.C. § 2069(d). There is a maximum penalty of $2,000 for each violation, and a maximum penalty of $500,000 for a related series of violations. \textit{Id.} § 20(a)(1), 15 U.S.C. § 2069(a)(1).

16. \textit{See id.} § 21(a), 15 U.S.C. § 2070(a). The maximum penalty is $50,000 or one year of imprisonment, or both. \textit{Id.}

17. \textit{Id.} § 24, 15 U.S.C. § 2073. This section reads in part: “Any interested person . . . may bring an action in any United States district court for the district in which the defendant is found or transacts business to enforce a consumer product safety rule or an order under section 2064 \textsuperscript{[§ 15]} of this title, and to obtain appropriate injunctive relief.”


18. That this private enforcement action is intended only to substitute for, not to add to, the Commission’s power to enforce its own rules and orders is shown by the following statutory limitation: “No separate suit shall be brought under this section if at the time the suit is brought the same alleged violation is the subject of a pending civil or criminal action by the United States under this chapter.” \textit{CFSA} § 24, 15 U.S.C. § 2073 (1982).

quire a manufacturer, distributor, or retailer of a nonconform-
ing product to give public notice of the potential hazard, to
bring the product into conformity with a standard, to replace
the product with a conforming product, or to refund the
purchase price of the hazardous product.\footnote{20}

In addition to these enforcement provisions, the Act also
authorizes private causes of action by parties seeking damages
for injuries sustained as a result of a violation of the Commis-

\begin{quote}
Any person who shall sustain injury by reason of any knowing (in-
cluding willful) violation of a consumer product safety rule, or any
other rule or order issued by the Commission may sue any person
who knowingly (including willfully) violated any such rule or order in
any district court of the United States in the district in which the de-
fendant resides or is found or has an agent, shall recover damages sus-
tained and may, if the court determines it to be in the interest of
Justice, recover the costs of suit, including reasonable attorneys' fees
\footnote{21}
\end{quote}

The inducements offered to plaintiffs—the prospect of auto-
matic federal jurisdiction and the possible recovery of attor-
neys' fees—are tempered only by the requirement that the
claim satisfy a jurisdictional amount of $10,000.\footnote{22}

It is noteworthy that the private cause of action does not
exist for violations of the terms of the statute itself.\footnote{23} It
appears that the primary purpose of the CPSA is not to establish

\footnote{20. See id.}
\footnote{21. Id. \S 23(a), 15 U.S.C. \S 2072(a) (emphasis added); see, e.g., Griswold In-
1982). \textit{Griswold Insulation} involved a suit brought by an installer and whole-
saler of cellulose insulation against the manufacturer of the insulation under
\S 2072 of the CPSA. The plaintiff sued for monetary damages sustained when
the defendant supplied it with insulation allegedly in violation of a consumer
product safety standard. The court held that the plaintiff as an “intermediary
consumer” had the right to sue under \S 2072 and that the plaintiff’s economic
injury constituted an “injury” for the purpose of that section. \textit{Id.} at 1340-41.
1980) (plaintiff company denied a private enforcement action for injunctive relief
and imposition of the statutory penalty under 15 U.S.C. \S 2073). For further
discussion of \textit{Plaskolite}, see supra note 17.}
\footnote{22. See CPSA \S 23(a), 15 U.S.C. \S 2072(a) (1982). The claim must exceed
$10,000 unless the action is against an officer, employee, or agency of the
United States. \textit{Id.}}
\footnote{23. Normally, when a federal statute creates an explicit private cause of
action, it does so for violations of its own provisions, not just for violations of
the rules that may be promulgated pursuant to those provisions. An example
is the Consumer Credit Protection Act, see 15 U.S.C. \S\S 1601-1693 (1982 &
Supp. II 1984), and its provision for “Civil Liability”: “Except as otherwise
provided in this section, any creditor who fails to comply with any require-
substantive standards for consumer safety but rather to create a Commission and vest it with the power to formulate such standards. Congress has nevertheless provided for enforcement of certain provisions of the Act, even if not by means of a private cause of action. The list of "prohibited acts," with the provisions for civil and criminal penalties, gives the Commission itself the power to seek sanctions for violations of key sections of the Act.

The private cause of action exists for violation of the consumer product safety rules that the Commission is authorized to promulgate. Because these standards are specific in content and can be formulated only after extensive rulemaking procedures that include substantial public participation, it is logical that their violation may give rise to a private cause of action.

More problematic is the extension of the cause of action to the violation of "any other rule or order issued by the Commission." The CPSA authorizes the Commission to develop several specific kinds of rules beyond the consumer product safety standards. The bulk of the litigation that has arisen under the CPSA, however, has not concerned violations of the rules that the statute authorizes the Commission to issue. Rather, the litigation has concerned violations of the reporting requirements the Commission has chosen to promulgate under section...
15(b) of the Act. Although the Act did not explicitly authorize such rules, in 1973 the Commission published rules in the Federal Register offering “guidelines” for interpreting the reporting requirements of section 15(b). These rules, now codified at 16 C.F.R. § 1115, specify, among other things, the kinds of information that must be reported to the Commission and the timetable for doing so. Violations of these rules, rather
than violations of the consumer product safety rules, have been used as the bases of private causes of action.

II. CASES ADDRESSING THE ISSUE OF WHETHER A PRIVATE CAUSE OF ACTION EXISTS FOR VIOLATIONS OF THE REPORTING REQUIREMENTS

Since 1981, there have been eight reported opinions, all but one from federal courts, ruling on the validity of the private cause of action for violation of the reporting requirements. In seven of these cases, the courts ruled only on the defendant's motion for partial summary judgment to dismiss the plaintiff's CPSA claim. Five of these courts denied the motion, thus recognizing the CPSA claim, but two courts have recently granted the motion, thus rejecting the CPSA claim. In the eighth case the court granted a plaintiff's motion to amend the complaint to include the CPSA claim. A brief review of the product is defective or violates a consumer product safety rule. Five days after that time, the Commission's rule allows it to impute the same information to the Chief Executive Officer of the company. If the information is unclear or incomplete, the company normally has ten days to investigate and evaluate it. Once it is in possession of information that "reasonably supports the conclusion" that the product is indeed defective or fails to comply with a safety rule, the company has twenty-four hours to report the information to the Commission. In Morris, the court apparently believed that the plaintiff was basing the claim on a violation of the CPSA itself, not on a violation of the Commission's reporting rules. The court therefore denied the claim because the CPSA provides no private cause of action for violation of its own terms. See supra note 23 and accompanying text.
courts’ reasoning introduces the main issues raised by the rec-
ognition of the private cause of action.

The earliest case, *Butcher v. Robertshaw Controls Co.*,38 in-
volved a plaintiff who received serious burns as the result of
the explosion of a gas-run hot water heater. The plaintiff
brought state common-law claims of fraud, negligence, and
strict liability against the manufacturers of the gas water
heater and of its automatic shut-off device as well as against the
gas supplier. The plaintiff also added a claim for a violation of
the Commission’s reporting requirements, a claim that allowed
him to bring his suit in federal court.

The defendants denied that the CPSA’s provision for a pri-
vate cause of action extended this right to violations of the
Commission’s reporting rules.39 The defendants apparently
stressed the difference between substantive rules, such as the
consumer product safety rules, and interpretive rules, such as
the reporting requirements,40 and argued that only a violation
of the substantive rules can sustain a cause of action.41 To rein-
force their contention, the defendants claimed that recognition
of the new private cause of action would flood the federal
courts with products liability suits that would qualify for fed-
eral jurisdiction solely because of the CPSA claim.42

The *Butcher* court agreed with the defendants that the
Commission had issued two distinct kinds of rules. The court
found that the consumer product safety rules are substantive in
nature whereas the “disclosure rules” of section 1115,43 promul-
gated under section 15(b) of the CPSA, are procedural or inter-
pretive.44 The court did not, however, accept the defendants’
conclusion that only a violation of a consumer product safety
rule could give rise to a private cause of action. Rather, a
straightforward reading of the language of section 23 convinced
the court that Congress intended “any other rule or order” to
include the reporting requirements contained in section 1115.45
The court allowed the private cause of action for violation of
these rules, citing the principle that remedial legislation should

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39. *Id.* at 698.
40. For further discussion of the difference between substantive and in-
terpretive rules, see infra notes 64-70 and accompanying text.
42. *Id.* at 700.
43. 16 C.F.R. § 1115 (1985).
45. *Id.* at 700.
be given a liberal construction by the courts. In response to the defendants' floodgates argument, the court simply observed that, if more products liability suits entered the federal courts, this may have been Congress's intention.

After Butcher, four other federal courts essentially adopted its reasoning and holding. The only state court that has ruled on the issue, the Minnesota Supreme Court, reached the same result through similar reasoning in the case of Swenson v. Emerson Electric Co. As in Butcher, the plaintiff in Swenson added a federal claim under section 23 of the CPSA to his common-law product liability claims arising out of an injury caused by a gas water heater explosion. Though agreeing with the defendant that the reporting rules of section 1115 are interpretive in nature, the court refused to accept the defendant's contention that an interpretive rule cannot be binding and therefore cannot be "violated" so as to give rise to a private cause of action. The court stated instead that interpretive rules may be binding on a court if the court accepts them as reasonably related to the statute they interpret. Because the reporting requirements of section 1115 are a reasonable interpretation of section 15(b) of the statute, the Minnesota court held that a violation of the rules can sustain a private cause of action.

Two federal district courts have subsequently found defendants' arguments persuasive and have refused to recognize a private cause of action for a violation of the provisions of section 1115. In Morris v. Coleco Industries, the court concluded for several reasons that Congress did not intend to create a private cause of action for failure to report defective products to the Commission. The Morris court reasoned that the reporting requirements are primarily statutory because they are contained in section 15(b) and hence do not arise under any rule or

47. Id. at 700.
49. 374 N.W.2d 690, 699-701 (Minn. 1985).
50. See id. at 701 (citing Production Tool Corp. v. Employment and Training Admin., 688 F.2d 1161, 1165 (7th Cir. 1982)).
51. See Swenson, 374 N.W.2d at 705.
53. See id. at 10.
order issued by the Commission, the violation of which would give rise to the cause of action. The court apparently concluded that Congress intended the civil and criminal penalties provided for in the Act to be the exclusive means of enforcement of the reporting requirements. The court also thought it "illogical" that Congress might have believed that a company's failure to report to the Commission would be the proximate cause of an injury. Finally, the court expressed concern that recognizing the cause of action would convert the federal courts into a "special tribunal" for products liability suits.

With the exceptions of Butcher and Swenson, the analyses offered in the reported opinions have been surprisingly perfunctory. Courts have avoided a sustained discussion of the status and legal effect of the reporting requirements of section 1115 in two ways. First, courts recognizing the private cause of action have appealed too rapidly to the "plain meaning" of the statute. Second, courts denying the private cause of action have moved too quickly to policy arguments that focus on an anticipated flooding of the federal courts by products liability litigation.

Little attention has been directed to the administrative law problem of what it means to base a private cause of action on the violation of rules that are only interpretive in nature. The next section of this Note discusses whether Congress intended to create a private cause of action based on the violation of interpretive rules, and if so, whether its intent can be given effect. A judgment concerning the effect of section 1115 on pri-
vate litigation requires a brief discussion of some of the relevant fundamentals of administrative rulemaking.

III. LEGISLATIVE VERSUS INTERPRETIVE RULES AND THE NATURE OF SECTION 1115

A. THE TWO KINDS OF ADMINISTRATIVE RULES

Rulemaking by administrative agencies takes place within the constitutionally defined boundaries separating the legislative, judicial, and executive functions of government. The early view was that a legislative body could never delegate its lawmaking powers to administrative agencies.\(^{62}\) In recent decades, however, the considerable growth in the importance of regulatory agencies has been accompanied by a recognition that certain traditionally legislative functions can be transferred from the legislative branch to administrative agencies.\(^ {63}\) Consequently, certain rules promulgated by administrative agencies are said to be "legislative," or "substantive."\(^ {64}\) Because they result from a valid delegation of legislative power, these rules have a binding effect similar to that of statutes.\(^ {65}\)

Legislative rules must be distinguished from other rules promulgated by agencies, which are called "interpretive" or "administrative" rules. Whereas legislative rules amount to a type of lawmaking, interpretive rules embody an agency's interpretation of a statute that it enforces, or an agency's description of its own internal organization or of the procedures it has developed for fulfilling its functions.\(^ {66}\)

Although it is not always apparent on its face whether an

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\(^{63}\) See generally 2 K. Davis, Administrative Law Treatise § 7:9 (2d ed. 1979) (tracing the early development of the acceptance of the delegation of legislative power to administrative agencies).

\(^{64}\) On the use of these two terms as synonyms, see 2 K. Davis, supra note 63, § 7:9, at 47.

\(^{65}\) See, e.g., id. § 7:8, at 36 ("Valid legislative rules have about the same effect as valid statutes; they are binding on courts."); see also Batterson v. Francis, 432 U.S. 416, 418 (1977) (discussing an administrative rule promulgated by the Secretary of Health, Education and Welfare "pursuant to a delegation of rulemaking authority"). The Batterson court defined the authority delegated by Congress to the Secretary: "In exercising that responsibility, the Secretary adopts regulations with legislative effect. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner." Id. at 425.

\(^{66}\) For a discussion of the Administrative Procedure Act's definition of rules, see infra note 82; see also 2 K. Davis, supra note 63, §§ 7:5, at 25, 31, 7:7-9.
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administrative rule is legislative or interpretive, the two kinds of rules can be sharply distinguished by the type of the authority under which they are promulgated. A legislative rule, resting upon a delegation of authority from a lawmaking body, requires an explicit grant of legislative power contained in a statute, whereas an interpretive rule, not involving legislative power, requires no such authorization. The result, however, is that an interpretive rule has no authority independent from that of the statute it purports to interpret.

Although a legislative rule must be grounded in statutory authority, the statutory grant need not precisely define the scope of the legislative power assigned to the agency. The statute must nevertheless contain language that confers on the administrative agency the authority to enforce its provisions. If such language is absent, any rules promulgated under the statute must be interpretive. The converse, however, is not always true: the mere fact that a statute contains a grant of legislative power to an agency does not mean that all rules promulgated by that agency must be legislative. If the agency has intended to promulgate them as interpretive rules, that intent may govern.

The distinction between legislative and interpretive rules is

67. As Professor Kenneth Davis has written: “The question whether a rule is legislative or interpretive thus depends upon whether or not it is issued pursuant to a grant of lawmaking power.” 2 K. DAVIS, supra note 63, §7:10, at 52.

68. See 2 K. DAVIS, supra note 63, §7:8, at 36; B. SCHWARTZ, ADMINISTRATIVE LAW §56, at 148-49 (1976).

69. See 2 K. DAVIS, supra note 63, §§7:8, at 36.

70. See generally 2 K. DAVIS, supra note 63, §§7:8-11 (distinguishing between legislative and interpretive rules in the context of the historical background, major cases, current law, and democratic theory). The case establishing the non-binding effect of interpretive rules is Skidmore v. Swift & Co., 323 U.S. 134, 139-40 (1944) (holding that because the Fair Labor Standards Act gave no general rulemaking power to its Administrator, the opinions he published were interpretive only and not binding on the courts).

71. As Professor Davis states: “The statutory grant of power may be specific and clear, or it may be broad, general, vague and uncertain.” 2 K. DAVIS, supra note 63, §7:11, at 54.

72. See K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES, §§5:03, at 148 (1976). Professor Davis has stated:

When [an agency] has the delegated power, its rules may be either legislative or interpretive, depending on which kind of rules the agency intends to make. An agency with the power to make both kinds of rules necessarily has authority to determine which kind it is making, and the best evidence of its intent is what it says when it issues the rules.

Id.
acknowledged in the Administrative Procedure Act (the APA). Only legislative rules are subject to either the informal ("notice and comment") or the formal procedures that precede the promulgation of rules; interpretive rules are exempt from all such procedures. The procedures outlined in the APA constitute a set of minimum requirements for legislative rules issued by all federal administrative agencies; stricter procedural requirements can be set by the statutes that create and empower specific agencies. Thus, if an agency promulgates rules without having followed either the formal or the informal procedures for rulemaking established by the APA, those rules are necessarily interpretive. Once again, however, the converse is not always true: an agency may, if it wishes, adopt notice and comment procedures when proposing interpretive rules without thereby converting them into legislative rules.

The distinction between the two kinds of rules is crucial for the purposes of judicial review and enforcement. Legislative rules are binding upon courts to the same degree as the statutes to which those rules seek to give substance. Interpretive rules, though they are usually entitled to deference from a court, can never have a binding effect upon the court. An important consequence is that there can be no violation of an interpretive rule per se; what appears to be a violation of an interpretive rule is in fact a violation of the underlying statute, or indeed no violation at all if the court decides that the rule was an erroneous interpretation of the statute.

In light of these principles of administrative rulemaking,

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74. See id. §§ 4, 5, 5 U.S.C. §§ 553, 554.
75. Section 4(b) of the APA states in relevant part: "Except when notice or hearing is required by statute, this subsection does not apply—(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice . . . ." Id. § 4(b), 5 U.S.C. § 553(b).
76. For example, CPSA §§ 7 and 8 prescribe special procedures for the development of consumer product safety rules that exceed the basic requirements of the APA. See CPSA §§ 7, 8, 15 U.S.C. §§ 2056, 2057 (1982). For discussion of the CPSA's procedural requirements, see Scalia & Goodman, supra note 7, at 906-22.
77. This is the procedure the Commission adopted while developing the reporting requirements contained in 16 C.F. R. § 1115. See infra notes 91-93 and accompanying text.
78. As the Supreme Court stated in Batterson v. Francis, 432 U.S. 416, 425 (1977): "A reviewing court is not free to set aside those regulations [i.e., regulations "with legislative effect"] simply because it would have interpreted the statute in a different manner.”
79. See id. at 425 n.9. The Court stated: "By way of contrast, a court is not required to give effect to an interpretative regulation.” Id.
the creation of a private cause of action for a violation of the
reporting rules promulgated by the Commission as section 1115
is more problematic than might first appear from the language
of the Act. As was discussed previously,80 many courts have
been impressed by the “plain meaning” of section 23 which cre-
ates a private cause of action for a violation of “a consumer
product safety rule, or any other rule or order issued by the
Commission.”81 These courts have read the language of section
23 as creating a private cause of action for violations of inter-
pretive as well as of substantive rules; they have thus held sec-
tion 1115, whether interpretive or substantive, to sustain a
cause of action.82 This result proves anomalous, however, if
section 1115 consists of merely interpretive rules. It is neces-
sary to reconcile section 23’s creation of a private cause of ac-
tion with the principle of administrative law that states that
there can be no violation, and, by extension, no private cause of
action for a violation, of an interpretive rule. It is thus crucial
to determine whether the provisions of section 1115 as promul-
gated by the Commission are substantive or interpretive rules.

B. SECTION 1115 AS AN INTERPRETIVE RULE

An examination of section 1115, its history, and its relation
to the statutory section under which it was promulgated reveals
that it is an interpretive rule. Section 15(b) of the CPSA, under
which section 1115 was promulgated, contains no grant of legis-
lative power to the Commission.83 In addition, the Commission
itself has labeled section 1115 an interpretive rule.84

The CPSA contains no general grant of lawmaking authority
to the Commission. In this respect, it differs from many
other federal statutes that establish commissions or agencies to enforce their provisions. Rather than conveying a general grant of power to the Commission, the Act confers specific, limited powers in several of its sections. For example, section 7 of the Act authorizes the Commission to issue consumer product safety rules, and section 8 authorizes the Commission to ban hazardous products that cannot be rendered safe through compliance with safety rules. Sections 15(c) and (d) also contain specific grants of power to the Commission. Conversely, section 15(b), the section under which the Commission promulgated its own section 1115, contains no grant of lawmaking authority.

The grant of power in the sections immediately following section 15(b) and in other sections of the Act underscores the absence of such a grant in section 15(b) itself, an absence that must be considered intentional. This necessarily implies that the reporting requirements of section 15(b) are exclusively statutory in nature and are not intended to be supplemented by regulatory requirements fixed by the Commission. This assertion does not mean that the Commission is unable to issue interpretive rules announcing its reading of the requirements of section 15(b), as it in fact has done. It does mean, however, that those rules must be read only as an interpretation of the requirements already imposed by the statute, and not as the imposition of a new set of legislative requirements.

Moreover, the Commission has acknowledged that the

88. See id. § 15(c)-(d), 15 U.S.C. § 2064(c)-(d). These subsections outline the procedures the Commission must follow before issuing an order to a manufacturer, distributor, or retailer to give notice to the general public or to specific purchasers of a defective product of the hazard the product represents, to repair the product, to replace it, or to refund its purchase price. Any such order must be preceded by a formal hearing of the kind defined in APA § 5, 5 U.S.C. § 554 (1982). The cross-reference to this section of the APA is found in the CPSA at CPSA § 15(f), 15 U.S.C. § 2064(f) (1982).
89. For the text of § 15(b), see supra note 30.
rules it has promulgated as section 1115 are interpretive. When the Commission first proposed rules under the Act's reporting requirements, it stated that its rules would “provide[e] guidelines for compliance with section 15(b) of the [CPSA].”

In revising the “guidelines” in 1975 and 1977, the Commission followed the notice and comment steps which comprise the informal rulemaking procedures under the APA. The fact that an agency follows notice and comment procedures, however, does not convert its rules into legislative ones. In the 1977 revision, the Commission stated that it would begin to impose sanctions for violations of its rules. In response to this announcement, some commentators complained that the imposition of sanctions for violations would amount to giving the new rules a legislative, binding effect. After this complaint the Commission backed down, removed the threat of sanctions, and clarified the nature of the rules it was promulgating. In a written comment, the Commission stated that it had “considered the difference between promulgating the rule as substantive or interpretive . . . and [had] decided to promulgate the rule as interpretive.”

This comment by the Commission offers important clarification but is misleading in one respect. By stating that it had “decided” to promulgate the rules as interpretive, the Commission implied that it could have chosen to promulgate them as

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93. See supra note 77 and accompanying text. Presumably, the Commission has elected to use notice and comment procedures for its rules governing reporting requirements to remain consistent with the general policy of the CPSA, which emphasizes public comment and participation in the rulemaking process beyond what the APA demands. On the CPSA’s procedural requirements for rulemaking, see Scalia & Goodman, supra note 7, at 906-27. In fact, many federal agencies routinely use notice and comment procedures when promulgating interpretive rules. See Asimow, supra note 85, at 529.
96. Id. The Commission went on to explain the difference in effect between legislative and interpretive rules:

A substantive rule has the force and effect of law. Thus, a violation of a substantive rule issued under the CPSA is equivalent to a violation of the CPSA. In contrast, an interpretive rule offers guidance as to what a law means, but does not itself have the force and effect of law. A violation of an interpretive rule is not necessarily a violation of law; the failure to comply with an interpretive rule is a violation of the law under which it is issued only if the rule reasonably interprets that law.

Id. (emphasis in original).
legislative. In fact, the Commission had no legislative power to promulgate legislative rules relating to the requirements of section 15(b). 97

Significantly, the occasion for the Commission's labeling the rules as interpretive involved a decision whether it could impose sanctions for violations of the rules. This question is analogous to that of whether a private cause of action can be based on a violation of those rules. The Commission's conclusion that it could not properly apply sanctions for violations of the interpretive rules suggests the parallel conclusion that a violation of those rules could not sustain a private cause of action.

Under different circumstances a court need not always accept as controlling an agency's labeling of its rules. The court may reject the agency's label, however, only when the agency has a legislative grant of power in the first place, so that there is a possible ambiguity as to whether the rules it subsequently promulgates are legislative or interpretive. 98 Even in these circumstances, courts accept the agency's own characterization of its rules as interpretive unless the label betokens an attempt by the agency to circumvent the notice and comment procedures required by the APA for substantive rules. 99

Once the Commission has publicly labeled its rules as interpretive, only confusion would result if a court relabeled them as legislative. A party potentially affected by the reporting requirements of section 1115 is entitled to rely on the Commission's description of them as interpretive and the concomitant implication that violation of those rules in them-

97. See supra notes 85-90 and accompanying text.

98. See, e.g., Lewis-Mota v. Secretary of Labor, 469 F.2d 478, 481-82 (2d Cir. 1972) (rejecting an agency's labeling of its own rule as interpretive and holding that the rule was invalid as a substantive rule because the agency had not followed notice and comment procedures before promulgating it). Cf. American Trucking Ass'n v. United States, 688 F.2d 1337, 1343-48 (11th Cir. 1982), rev'd on other grounds, 104 S. Ct. 2458 (1984) (upholding certain rules issued by the Interstate Commerce Commission as valid interpretive rules but striking down one rule for the Commission's failure to comply with notice and comment procedures before issuing it); General Motors Corp. v. Ruckleshaus, 742 F.2d 1561, 1565, 1572 (D.C. Cir. 1984) (upholding as a valid interpretive rule an Environmental Protection Agency regulation requiring the recall of all automobiles of a certain class, against a challenge that the rule was in fact a legislative rule that had been promulgated without the requisite notice and comment procedures), cert. denied, 105 S. Ct. 2153 (1985).

99. As Professor Davis explains: "If [the agency] says: 'We intend these rules to be interpretative, even though we are using notice and comment procedures,' what the agency does depends upon what it says." K. DAVIS, supra note 72, § 5.03, at 148.
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selves could not give rise to sanctions. If a court reversed this description and gave the rules legislative effect, it would expose such a party to unforeseeable liability.

The conclusion that the Commission's section 1115 is an interpretive rule and therefore cannot be violated in such a way as to give rise to a private cause of action must still be reconciled with the "plain language" meaning that several courts have found in section 23 of the Act. Those courts read the language creating a cause of action for "violation of a consumer product safety rule, or any other rule or order issued by the Commission" as including interpretive rules like section 1115. These courts, however, have overlooked the word "violation," which the phrase "any other rule or order" modifies. If one can impute to Congress the knowledge that an interpretive rule cannot be violated, then by "any other rule or order" Congress must have meant only legislative rules and orders, the only rules capable of violation. This conclusion is at least consistent with the legislative history of section 23. The conclusion that Congress did not intend to create a private cause of action for violation of the Commission's reporting requirements

100. For this argument, see Appellant's Brief at 13-23, Drake v. Honeywell, Inc., No. 85-5179 (8th Cir., appeal filed June 5, 1985).
102. See supra notes 45-48 and accompanying text.
103. See supra notes 78-79 and accompanying text and text following note 79.
104. The section of the law creating the private cause of action, the present § 23(a), is the subject of some discussion in the committee reports and floor debates. The debates, committee reports, and texts of the bills that passed through the Senate and the House on their way to becoming the CPSA are conveniently assembled in BUREAU OF NATIONAL AFFAIRS, THE CONSUMER PRODUCT SAFETY ACT—TEXT, ANALYSIS, LEGISLATIVE HISTORY app. (1973).

In the original House bill, the grant of the private cause of action was phrased more narrowly than in § 23 of the Act as ultimately enacted. A private cause of action was provided for death, injury, or illness resulting from the failure of a consumer product to comply with a consumer product safety rule or for "failure to comply with an order under section 15(c) or section 15(d)." H.R. 15,003, 92d Cong., 2d Sess. §23(a)(2), 118 CONG. REC. 31,409 (1972). Consumer product safety rules and orders under § 15(c) and § 15(d) were clearly intended to have legislative force because they were expressly authorized by the terms of the statute. Section 15(c) and § 15(d) orders would of course be issued only after a possible product hazard came to the knowledge of the Commission, whether through a § 15(b) report filed by a manufacturer, distributor, or retailer of the product or through another channel. By providing for a private cause of action only for a violation of such rules or orders, the House bill clearly did not intend to create liability for a company's failure to comply with the reporting requirement that arose earlier. The report of the House Committee on Interstate and Foreign Commerce that accompanied the bill was equally explicit in limiting the private cause of action to violations of
is reinforced by an examination of the relation of the private
cause of action created by the CPSA to the existing common-

law causes of action in the products liability area.

IV. THE RELATION OF THE CPSA TO COMMON-LAW
PRODUCTS LIABILITY LITIGATION

Section 23 of the Act, after providing for the private cause
of action, states: "The remedies provided for in this section
shall be in addition to and not in lieu of any other remedies
provided by common law or under Federal or State law."105 By
granting a private cause of action for the violation of substan-
tive rules promulgated under the CPSA, Congress showed its

consumer products safety rules or of § 15(c) and § 15(d) orders. See H.R. REP.
No. 1153, 92d Cong., 2d Sess. 47 (1972).

After the original House bill, the language granting the private cause of
action became more inclusive. The Senate version of § 23, which was subse-
quently adopted by the House, allowed a private cause of action for a violation
of "a consumer product safety standard, regulation, or order." S. 3419, 92d
Cong., 2d Sess. § 316(d)(2), 118 CONG. REC. 21,911 (1972) (emphasis added).
Moreover, when the final bill emerged from the Conference Committee, it
contained the still broader language of the current § 23, granting a private
cause of action for "violation of a consumer product safety rule, or any other
rule or order issued by the Commission." CPSA § 23(a), 15 U.S.C. § 2072(a)

These changes in terminology apparently indicate an intention to expand
the scope of the private cause of action. The discussion that might be expected
to accompany a significant alteration of the provisions of the bill is, however,
lacking from the record. The debate on the floor of the Senate that preceded
that chamber's passage of the bill contains no reference at all to the provision
for a private cause of action. See 118 CONG. REC. 21,846-903 (1972). When the
compromise bill emerged from the Conference Committee, the revised provi-
sion for a private cause of action in § 23 did receive some attention during the
House debate. Most of this attention focused, however, on the $10,000 jurisdic-
tional amount now required for private lawsuits and the effect this require-
ment would have on the volume of litigation in the federal courts. Nothing
was said about the scope of the new language, "any other rule or order," that
had emerged from the Conference Committee. Insofar as House members did
reflect on the scope of the private cause of action, their attention seems to
have been directed only to violations of consumer product safety rules as the
basis for the cause of action. See 118 CONG. REC. 31,383-84 and 31,402-03 (1972),
reprinted in BUREAU OF NATIONAL AFFAIRS, supra, at 263-64, 281-83.

Thus the evidence presented by the legislative history is inconclusive. The
language of the earliest House bill suggests an intention not to create a private
cause of action for violations of rules promulgated under § 15(b) reporting re-
quirements. The shift toward the more inclusive terms of the ultimate § 23 of
the Act might normally imply a corresponding intent to expand the grounds of
the cause of action, but the lack of explanation accompanying the new lan-

willingness to expand the amount of products liability litigation in the federal courts. It is equally clear, however, that Congress expected most of this litigation to arise from violations of consumer product safety standards, the most significant substantive rules it authorized the Commission to issue.\textsuperscript{106} Allowing damages for the violation of such a standard is consistent with the doctrine of strict liability in the consumer products area.\textsuperscript{107} The Commission's decision that a consumer product safety rule is necessary to eliminate a risk of injury\textsuperscript{108} provides the grounds for imposing strict liability on a defendant who has violated an existing safety rule.

If, however, a private cause of action were allowed for a violation of the substantial hazard reporting requirement, the federal Act would encroach on the states' common law of products liability in a confusing and unproductive way. Large numbers of products liability plaintiffs could gain federal jurisdiction by adding a claim for violation of the Commission's reporting requirements to their complaints. Once in federal court, the plaintiffs would proceed to litigate their state-law claims under the court's pendent jurisdiction.\textsuperscript{109} In fact, plain-

\textsuperscript{106} Although it is not part of the legislative history, it is interesting that most of the early commentators writing on the CPSA also interpreted the private cause of action as one that would essentially be limited to violations of consumer product safety rules, and, at most, to orders under § 15(c) and § 15(d). See, e.g., W. Kimble, Federal Consumer Product Safety Act § 345, at 270 (1975). Professor Kimble stated, in commenting on the § 23 requirement of a "knowing" violation of a rule or order:

A plaintiff need not establish actual knowledge on the part of the defendant, if he is able to demonstrate that the defendant, in the exercise of reasonable care, should have known that the product failed to comply with an applicable consumer product safety rule, or that there was a failure to comply with an order of the Commission under § 15. Id. (emphasis added).

\textsuperscript{107} Restatement (Second) of Torts § 402A(1) (1965) reads, in pertinent part: "One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property ...." Comment (a) to § 402A states in part: "This Section states a special rule applicable to sellers of products. The rule is one of strict liability, making the seller subject to liability to the user or consumer even though he has exercised all possible care in the preparation and sale of the product." Id. § 402(A) comment (a); see also Prosser and Keeton on the Law of Torts 677-724 (W. Keeton 5th ed. 1984) (setting forth development of current rule of strict liability for sale of defective products).


\textsuperscript{109} The federal courts that have so far recognized the validity of the claim under the CPSA have assumed that the common-law claims could also be litigated in federal court under the doctrine of pendent jurisdiction. One federal court that has rejected the federal claim for violation of the reporting require-
The duty to report is triggered by the seller's receipt of information that the product has a defect that creates a substantial hazard, or of information that the product violates an applicable consumer product safety rule. If the information is of the latter kind, the injured consumer already has a cause of action under section 23 for the violation of the product safety rule. In this case, the consumer need not take the circuitous route of proving that the seller of the product had knowledge at a given time that the product violated the rule.

In contrast, if the information allegedly available to the seller was that the product was defective, a private cause of action based on a failure to report such information would add little if anything to the common-law theories available to the plaintiff in most state courts. In states following section 402A of the Restatement (Second) of Torts, courts would allow recovery on a theory of strict liability if the plaintiff could show that the product was defective, without proving that the defendant knew of the defect. Section 23 of the CPSA, however, would require the plaintiff to show much more. First, the plaintiff would have to prove that the failure to report to the Commission was a "knowing" violation of the Commission's rules. Second, and more formidably, the plaintiff would have to show that the defendant's failure to report was the proximate cause of the injury.113

ments, however, has suggested that, even if it had recognized that claim, it would have dismissed the common-law claims from federal court because those claims would not exhibit a "common nucleus of operative facts" with the federally based claim. See Morris v. Coleco Indus., 587 F. Supp. 8, 10 (E.D. Va. 1984). The result would then be two lawsuits, one federal and one state, arising out of the same injury. The plaintiff could of course avoid this result by bringing all the claims together in state court under the latter's concurrent jurisdiction, but then the plaintiff would have lost the one clear advantage his CPSA claim could have afforded him: the right to be heard in federal court.

110. For a discussion of the ways in which liability under the CPSA may be harder to establish than under common-law products liability theories, see Comment, supra note 25, at 117-22.


112. Section 23 does not define the term "knowing." For the purpose of the imposition of civil penalties, § 20 of the Act defines "knowingly" as including both actual and constructive knowledge. See supra note 15. For the view that the same definition of "knowing" operates in § 23, see W. Kimble, supra note 106, § 345, at 270.

113. In other words, the plaintiff must prove that, had the defendant reported the relevant information in the manner prescribed by § 1115, the Com-
It is highly unlikely that Congress intended this result. The causation issue would require the judicial fact finder to speculate as to what action the Commission might have taken if it had received the information available to the seller of the product and what success the Commission's action would have had in correcting the product or preventing it from coming into the hands of the consumer.\textsuperscript{114}

Congress did not intend to displace common law but to supplement it by giving injured consumers an automatic cause of action for violations of consumer product safety standards or Commission orders. It did not intend to multiply hurdles for consumer-plaintiffs or to preempt common-law actions in products liability in the state courts by a federal cause of action.

If Congress did intend a private cause of action for violation of the Commission's reporting requirements, it could clarify its intention by making either of two simple amendments to the CPSA. First, Congress could amend section 23 to extend the private cause of action to violations of the provisions of the statute itself, not just violations of the rules promulgated under the statute, as it now stands. A violation of the reporting requirements contained in section 15(b) of the Act would then indisputably support a private cause of action, and a plaintiff would no longer have to rely exclusively on the terms of the Commission's section 1115 rules. Alternatively, Congress could amend section 15(b) to give the Commission explicit authority to promulgate rules under that section. Having statutory authority, the Commission could then promulgate rules that were truly legislative in nature, if it issued them in accordance with the informal or "notice and comment" APA procedures for legislative rules.\textsuperscript{115} By either method, Congress could resolve the present ambiguity of the Act in favor of an expanded private cause of action. Until Congress does so, however, a private

\textsuperscript{114} This speculation would be made even more difficult by the fact that the standard according to which a seller must report information to the Commission differs from the standard according to which the Commission may issue a § 15(c) or § 15(d) order. A seller must report all information which "reasonably supports the conclusion" that a product is hazardous, whereas the Commission cannot issue an order under § 15(c) or § 15(d) until it has determined after a formal hearing that the product "presents a substantial product hazard." \textit{See} CPSA § 15(c)-(d), 15 U.S.C. § 2064(c)-(d) (1982). Thus, the judge or jury would have to weigh both standards and consider the difference between them.

\textsuperscript{115} \textit{See supra} text accompanying notes 77-78.
cause of action for violation of the Commission's reporting rules should not be recognized.

CONCLUSION

The statutory scheme of the CPSA indicates that Congress did not intend to create a private cause of action for violations of rules that the Commission chose to promulgate as its interpretation of the reporting requirements of section 15(b). Congress consciously declined to create a private cause of action for the violation of the statutory reporting requirements themselves, or for any other provisions contained in the statute. Instead, Congress provided a private cause of action primarily for the consumer product safety standards and secondarily for the other legislative rules that it authorized the Commission to develop. These legislative rules have the status of law and their violation can properly sustain a cause of action. Yet interpretive rules like those of section 1115, which the Commission was given no explicit authority to issue, serve only as interpretations of statutory requirements and cannot create new legal duties.

The theory that no private cause of action exists for violation of section 1115 comports with Congress's stated desire to supplement the causes of action already available under the common law to products liability plaintiffs, rather than to make such causes of action more difficult to maintain. If, despite the evidence, Congress did intend to give a private cause of action for violations of the kinds of rules the Commission has promulgated as section 1115, it should now amend the CPSA to make its intention clear.

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