When you consider the safety of the products that you and your family use every day, you might not think about the lawyers whose careers focus on making those products safer. Unlike product liability lawyers who make themselves so visible after disasters occur, we who specialize in this corner of administrative law are happiest when no crises occur and products safely move from design to the hands of the consumer.

“Other” is what we usually check off on CLE and malpractice insurance forms even though I have been practicing product safety law for nearly 35 years. Then we write in the blank space, “consumer product safety law” to convey that our principal practice is before the U.S. Consumer Product Safety Commission (CPSC). Unlike its cousins, FDA, EPA, and OSHA, some people respond that they have never heard of the CPSC and then demand an explanation of what we do. Frankly, this is not surprising, because neither the agency nor its practice area
has been accorded much visible respect over the years. CPSC has long been considered a backwater agency, and even its former commissioners have struggled to find positions after their terms expire.

But that is about to change, thanks to Congress and the economy. In 2008, Congress passed the Consumer Product Safety Improvement Act (CPSIA), which reauthorized the CPSC for the first time in 18 years and changed its statutory framework in major ways. It also reversed the “death by starvation” regime that the agency had been enduring, and substantially increased its appropriations. The multitude of new rules that were statutorily mandated set off a feeding frenzy among cash-starved law firms, which no longer consider this area “small potatoes.”

“Product safety expertise” pops up now on virtually every law firm website, but is the claim true? What has traditionally been a small niche practice has suddenly become part of “customs law,” part of “transportation law,” or part of “environmental law,” depending on the marketing tilt of the particular firm. Whether these newcomers will survive, amid the high potential for “rookie mistakes” in this specialized field, remains to be seen. Professional respect is going to come from participating in the work of implementing the 2008 legislation—in short, the huge task of cleaning up the statutory mess that Congress has made of the laws that CPSC administers—and unraveling the knots created by the multitude of unintended consequences of the new CPSIA. The agency counsel will be assisted by the product safety veterans in private practice, who can offer them creative solutions and feasible interpretations based on agency precedents.

Both sets of lawyers, inside and outside government, have the same mission: to protect the public from unreasonable risks of injury from consumer products. Consider this subarea of administrative law to be the flip side of product liability, that is, keeping unsafe products from entering the stream of commerce in the first instance. With the massive influx of imported consumer products in the past 20 years, this preventive and counseling mission has taken on a new sense of urgency. Rather than litigating a product liability case after an injury has occurred, risk avoidance is the role of product safety lawyers. The CPSC seeks to protect the public prospectively through rulemaking, corrective actions, and legislation. Getting the optimal public policy on safety is the thread that runs though all these things. But determining what particular risks of injury are “unreasonable” often divides the agency staff as well as the product safety bar.
The scope of CPSC activities is extremely broad, due to the statutory definition of a consumer product, namely any article or component part thereof that is produced or distributed for sale to a consumer for use in or around a permanent or temporary residence, a school, in recreation, or otherwise. Construing or creating public safety policy, as seen through the prism of 15,000+ consumer products, is a remarkably complex role that gives rise to the daily activities of any product safety attorney.

In essence, product safety policy is set through mandatory safety standards or bans, “substantial hazard” reports and recalls, and congressional action. We will describe each of these activities in more detail. Imagine yourself in either the shoes of the agency attorney or of the private attorney representing a client before the Commission.

THE CPSC

The CPSC was created in 1973 as a compromise between the White House and Congress over a national consumer protection agency. It has five commissioners and approximately 500 employees within a variety of disciplines ranging from engineers, epidemiologists, toxicologists, and human factor analysts to media affairs specialists. CPSC administers five different statutes: the Consumer Product Safety Act, the Federal Hazardous Substances Act (FHSA), the Flammable Fabrics Act, the Poison Prevention Act, and the Refrigerator Safety Act. Each statute has its own peculiarities (toys are hazardous substances under the FHSA) and differing requirements, which add to the challenge of the practice.

Rulemaking

In order to establish a safety standard or regulation for a consumer product, the agency must go through a rulemaking. Potential subjects for rulemakings are ideally selected through injury data analysis to detect emerging hazards, but they also can be requested by public petitions. Lawyers are involved at each step of rulemaking. The agency lawyers must determine which statute is most appropriate for the regulation of the subject matter, and whether the data can support a CPSC finding that the unreasonable risk of injury can be prevented or reduced by such a standard or ban. Counsel for the interested parties will submit comments that present data and arguments for or against the proposal.
and offer alternatives for the agency to consider. The process of negotiation can last years and will generate significant fees for the law firm(s) representing the affected industry. Rulemaking offers attorneys the best opportunity to have a positive impact on public policy, with considerable opportunity to pose alternatives and use creativity, before any crisis arises.

**Reporting and Recalls**

By far, the majority of the daily work of lawyers at and with the CPSC takes place when products in the marketplace and homes are found to have safety problems. This is the bread and butter for any product safety attorney in private practice.

1. **Reporting.** A provision in the CPSC legislation, Section 15(b), requires manufacturers, importers, distributors, and retailers to immediately report to the CPSC when they obtain information that reasonably supports the conclusion that their product fails to comply with a mandatory safety standard, that their product may contain a defect which could create a substantial product hazard, or that their product creates an unreasonable risk of serious injury or death. While noncompliance with a mandatory safety standard triggers an automatic report, the other two grounds for reporting are much more nuanced. The counsel for the individual company must make quick decisions, often based on a single complaint, quality report, or “incident” report. The stakes are always high. That quick decision can often mean millions of dollars for the company in recall costs or millions of dollars in civil penalties for the company if it fails to report.

Even if a voluntary report is not made to the agency, the Commission staff may discover the problem itself through consumer complaints, retailer reporting, or third-party investigations such as state attorneys general, consumer advocates, or the media. In such a case, the agency will send the company an investigatory letter and invite a response. Both a corrective action plan and a penalty for failing to report are likely outcomes from a decision not to report to the agency.

A civil penalty ($15 million cap) is still possible even though a company makes a report under Section 15(b). In these cases, the Commission determines that a company failed to make an adequate report in a “timely” manner. In other words, the agency contends that the company had an obligation to make a report much earlier than it
actually did. The negotiations between the lawyers concern what the client knew and when it knew it or reasonably should have known it. Once that is resolved, the negotiations then turn to the amount of the civil penalty and the consideration of any mitigating factors. Occasionally, these cases will end up in litigation in a federal district court, but the majority of them settle with a consent agreement.

2. **Corrective action.** Once a report is made to the agency, then counsel for the company may choose to develop a voluntary corrective action plan or to litigate the need for corrective action with the Commission staff in an administrative proceeding. Regardless of whether a plan is voluntary or is ordered after litigation, the plan typically will involve a recall to repair, replace, or refund the purchase price of the potentially defective product and will specify how the company intends to make the public aware of this recall. In the case of voluntary corrective actions, the agency must approve the corrective action plan that the company proffers or may impose its own plan. Both of these alternatives can entail extensive negotiation. Once the agency and the company announce the recall, then the hard work begins of actually implementing the corrective action. Counsel must monitor the work in order to prepare and submit monthly progress reports to the agency. If at any time the agency is not satisfied with the progress of the recall, it can order the company to re-announce the recall and start all over again.

**The Congress**

The respective oversight committees in the House and Senate are prone to interfere with the activities of the CPSC much more frequently than with its counterpart agencies. Potential injuries to children always make for good media attention, particularly during election cycles. Thus, members of Congress are quick to drop in bills directing the agency to address injuries caused by this product or to ban that chemical, frequently before the facts or science are known. As a result, the statutes are littered with provisions that seem to have dropped from the sky.

This predisposition of Congress presents an opportunity for counsel to use the legislative process to benefit a client or industry. Frequently, a position paper is developed and then shopped around the members of the commerce committees or the congressional delegation of the state where the company is headquartered. Once interest is expressed, then
the educational process of a majority of the members of the subcommit-
tee, then the full committee, and eventually the full chamber takes place. 
More background papers are drafted, coalitions or alliances are built, 
written and oral testimony is developed and presented, amendments are 
proffered, report language is suggested, and eventually a bill emerges 
that is passed. Then the process starts all over again in the other chamber 
in somewhat similar steps, until you reach a Conference committee, from 
which the final piece of legislation emerges. Each step requires critical 
analysis and skillful writing by counsel, frequently under tight deadlines. 
In the end, however, a public law authored by you and signed by the 
president is a beautiful thing to behold. It many respects it is the epitome 
of success for someone who wants to influence public policy for the ben-
etfit of the client and of the consumers of this country.

On any given day, the desk of a product safety attorney will be filled 
with matters touching on all three ways of protecting the public from 
unreasonable risks of injury. It helps to be able to multitask because 
you will have to keep many balls in the air at one time. You will never 
be bored as there is always something new to learn. Within 24 hours, 
you must be able to jump from one subject that you know intensely due 
to a lengthy rulemaking process, to three products about which you 
only have limited knowledge because of the time pressure to initiate an 
expedited recall and then to a third subject about which you know noth-
ing but must strategize with your client to obtain congressional relief. 
A working knowledge of the various sciences and disciplines relating 
to consumer products or a technical background will be an advantage, 
although plenty of lawyers with liberal arts degrees have flourished 
only they found reliable testing labs.

The year 2010 is a good time to consider product safety law because 
the agency is hiring new legal talent. Moreover, companies and law 
firms are looking to hire young attorneys with product safety experi-
ience with CPSC. You will earn a fair living, and your work will matter 
to families who will never know that your efforts made their baby’s 
bottle safer or kept their child from a risk that older models of that 
product might have presented. These are the psychological rewards of 
a job well done. You will need flexibility; good listening skills; ability 
to be a balanced observer of divergent client and government views 
on the same risk issues; and a great deal of personal integrity, because 
as with any field that has a small active bar, lawyers know and respect 
those attorneys whose competence and honest dealings can be trusted. 
Please consider this area of law as you develop your career path.