

**The Continuing Showdown Over Who Should Regulate  
Amusement Attraction Safety:  
A Critical Analysis of Why Fixed-Site Amusement Attraction Safety  
Should Remain State-Governed**

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**I. Introduction**

Every year, millions and millions of Americans hurtle through space toward Mars, freefall down the shafts of once-forgotten elevators, and become real-life crash test dummies through a series of harrowing and near disastrous auto tests — and they do it all without suffering so much as a scratch.

Such is life in a magical kingdom.

Today, at amusement parks across the country guests test the thrills of increasingly high-tech multi-million dollar rides and attractions. Destinations like Walt Disney World, Universal Orlando, Busch Gardens and the various Six Flags parks all provide the average American an opportunity to try unique experiences — and to test their mettle while doing so — on rides with such notorious names as Dueling Dragons, Demon Drop, and the Tower of Terror.

Yet, for all the high energy thrills enjoyed by guests (including this author), an important question remains: Are these high-tech attractions really safe? And, *more importantly*, who ultimately decides what “safe” means?

In the theme park industry, injuries and even deaths do occur. However, while any death or serious injury is certainly tragic, the statistics to date all demonstrate that serious injuries and deaths are very rare in the fixed-site amusement park industry.<sup>1</sup> Despite this, several members of Congress have, over the years, introduced various bills that seek to assign complete safety regulatory authority over fixed-site amusement parks to the federal government, and more particularly the United States Consumer Product Safety Commission (the “CPSC”).

The National Amusement Park Ride Safety Act of 2003 (the “NAPRSA”) is another effort in that direction. The bill itself is a short one-page bill that essentially seeks to reverse a 1981 amendment to the Consumer Product Safety Act of 1972 (the “CPSA”).<sup>2</sup> That amendment sought to clarify that fixed-site amusement parks do not fall within the CPSC’s jurisdiction.<sup>3</sup> The proponents of overturning this 1981 amendment are seeking to federalize the safety regulation of fixed-site attractions. They point to an alleged increase in guest injuries, and the fact that some states have not enacted safety regulations, as sufficiently compelling grounds for removing this authority from the states and transferring it to the CPSC.

Not surprisingly, the amusement park industry has staunchly opposed any efforts to federalize the safety regulation of fixed-site amusement parks by arguing that the existing state and local regulations have effectively protected the general public’s

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<sup>1</sup>In most statutes, including the *Consumer Product Safety Act*, an amusement attraction is “any mechanical device which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement”. 15 U.S.C. § 2052 (2003); *See also* Cal. Lab. Code Ann. § 7901 (Lexis 2003) and N.Y. Lab. Law § 870-c (Consol. 2003). A “fixed-site” amusement park would be one containing amusement attractions that are permanently attached to the premises.

<sup>2</sup> *See* H.R. 2207, 108<sup>th</sup> Cong. (May 22, 2003).

<sup>3</sup> *See* Pub. L. No. 97-35, 95 Stat. 724 (1981).

amusement-riding safety to date and, therefore, there is no reason to disturb the status quo.

This article will trace the development and current status of consumer safety regulation in general with a specific focus on fixed-site amusement park safety regulation. In doing so, the article will demonstrate that, historically, the development of fixed-site amusement park safety regulations has been a state-governed issue falling under the scope of the traditional state police power doctrine. The article will then analyze the states' current safety laws and regulations and will argue that keeping these regulations within the states' regulatory province will successfully accomplish the ultimate goal of protecting amusement park guest safety better than the current Congressional effort to federalize fixed-site attraction safety regulation under the CPSC. Finally, because several states have no existing regulations—and because several other states have very minimal regulations--this article will offer a proposed model state safety law for fixed-site amusement parks based upon a comparative analysis of existing state regulations.

## **II. The Development and Current Status of Consumer Safety and Fixed-Site Amusement Park Safety Regulation.**

In order to understand the state of today's amusement park laws and regulation, one must first identify the legal principles that preceded these laws. Doing so provides not only a chronological understanding of the *history* of these laws, but also provides greater insight into the *substance* of these laws. In other words, not just “how” they came to be, but “why” they came to be. This provides a historical legal context for an issue such as amusement park safety regulation that—since amusement parks themselves are a relatively recent cultural phenomenon—many might presume is a fairly nascent area of regulatory coverage.

In fact, the opposite is true. While amusement parks were only introduced to audiences in the United States in the last century, the underlying legal concept—consumer safety regulation—has a long, and somewhat abstract, history in this country.

### **A. The State's Traditional Police Power over Consumer Safety Issues: the Origin of Amusement Park Safety Regulation.**

*"The [s]tates traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."*<sup>4</sup>

Generally, the states' authority to regulate fixed-site amusement parks has been established through each State's “police power” to govern public safety. The term “police power,” however, is not found in the United States Constitution. Search for the same term in the Declaration of Independence, Articles of Confederation or even the Magna Carta and one still will not find it. In other words, the term “police power” is noticeably absent from all of these democracy-shaping documents. Yet despite this absence, courts

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<sup>4</sup> Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 751 (1985)(internal quotation marks omitted).

in the United States have consistently recognized that the states possess certain police powers — most notably over issues involving public safety, health, and morals.<sup>5</sup> And, even more importantly, the states have generally not simply recognized these powers in the abstract, but have utilized them to safeguard their citizens from various dangers — including those caused by consumer products.<sup>6</sup>

Despite the fact that the states had historically exercised their police powers to govern safety issues, a trend toward allowing the federal government to exercise regulatory authority over several traditionally State-governed matters began to develop in the mid to late 1800s. This development evolved out of the Supreme Court’s expansive interpretation of the Commerce Clause in light of the federal government’s attempt to use that clause to federalize issues that had heretofore been governed by the states.<sup>7</sup>

One of the first examples of the United States Supreme Court permitting the federal government to regulate an area that had traditionally been governed by states occurred in *Gibbons v. Ogden*.<sup>8</sup> In *Gibbons*, the Supreme Court was called upon to

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<sup>5</sup> What is the source of these fairly vague yet highly important powers? Unfortunately, the answer is not as simple as citing a Constitutional clause or amendment. Instead, the idea of the State’s police powers is founded in a sort of “natural law” type argument. As early as the mid 1800s, the United States Supreme Court had begun recognizing that States possessed certain regulatory powers termed “police powers”. The Court rhetorically asked “[W]hat are the police powers of a State?” in 1847. *Thurlow v. Massachusetts*, 46 U.S. 504, 583 (1847).

Yet, the Court’s own answer to that question did little to pinpoint the exact origin of these powers. Instead, the Court seemed to adopt a position that the States’ police powers were more akin to natural rights “inherently” afforded a sovereign rather than regulatory powers established by code or law. “They are nothing more or less than the powers of government inherent in *every* sovereignty to the extent of its dominions. . .” *Id.* (emphasis added).

The Court’s ambiguity in citing the source of such extensive powers is striking. In many ways it adopts the approach of “I know it is here, but I have no idea how it got here.” Nevertheless, while the courts have uniformly agreed that the States’ police powers exist, they continually have struggled to pinpoint the source of this existence: “[t]his power is, and must be from its very nature, incapable of any very exact definition or limitation.” *Slaughter-House Cases*, 83 U.S. 36, 62 (1872). It is worth noting though that the inability to define the precise source of these powers has not been isolated to a single set of jurists. Instead, this issue has perplexed more than one Court: “What that power is, it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety.” *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 470-471 (1877).

<sup>6</sup> In addition to theoretical underpinnings, the States’ police powers remained intact post-Constitution because of a very practical reality: the States were generally best-situated and best-equipped to exercise police powers: “Throughout our history the several States have exercised their police powers to protect the health and safety of their citizens. Because these are ‘primarily, and historically, ... matter[s] of local concern.’” *Medtronic v. Lohr*, 518 U.S. 470, 475 (1996) (quoting *Hillsborough County v. Automated Laboratories, Inc.*, 471 U.S. 707, 719 (1985)).

<sup>7</sup> Justice Clarence Thomas’s concurring opinion in *U.S. v Lopez* gives a concise examination of Commerce Clause jurisprudence. *See U.S. v. Lopez*, 514 U.S. 549 (1995).

One of his primary arguments is that since the New Deal, its language has been misinterpreted by the “substantial effects” test. “This test, if taken to its logical extreme, would give Congress a ‘police power’ over all aspects of American life.” *Id.* at 584. Nothing would be excluded from the reach of the Commerce Clause.

When the Constitution was written, commerce had a narrow definition, consisting of “selling, buying, and bartering, as well as transporting for these purposes.” *Id.* at 585. The problem arises today when the Court fails to distinguish between *interstate* commerce, wholly *intrastate* commerce, and *activities* that affect interstate commerce. *Id.* at 595.

<sup>8</sup> *Gibbons v. Ogden*, 22 U.S. 1 (1824).

determine the constitutionality of a New York state law granting exclusive license to operate steamships within its waters to Robert Livingston and Robert Fulton. Ogden claimed an exclusive right, granted by Livingston and Fulton, to operate a steamship on the route between New York City and Elizabethtown, New Jersey, and brought suit against Gibbons to prevent him from competing on the same route. New Jersey and Connecticut had conflicting statutes regulating steam travel on their waterways. The Court determined that the New York statute inhibited commerce among the states, and “that Congress may control the State laws, so far as it may be necessary to control them, for the regulation of commerce.”<sup>9</sup>

*Gibbons* essentially opened the door for the federal government to regulate traditionally state-governed issues if it deemed itself best situated to do so. While somewhat slow to embrace this notion within the context of consumer safety regulation, by the end of the century, the federal government began to displace the states as the chief regulator of consumer safety.

### **B. The Federal Government’s Push Toward Exercising Regulatory Jurisdiction Over Consumer Safety Issues.**

Even though the mainstream media’s interest in fixed-site amusement park safety regulation has only been piqued relatively recently<sup>10</sup>, the federal government’s effort to obtain regulatory control over amusement attractions in fixed-site attractions is not a recent development. In fact, during the mid 1970s and early 1980s, the CPSC actually filed several complaints seeking regulatory sanctions against operators of amusement attractions within fixed-site attractions. Not surprisingly, a slew of lawsuits over this issue quickly ensued between fixed-site parks and the CPSC. In 1981, however, just before the United States Supreme Court was prepared to hear oral arguments on this issue, Congress passed an amendment to the CPSA that finally clarified that fixed-site amusement parks do not fall within the CPSC’s regulatory jurisdiction.

Today—over two decades later—a variety of legal and political forces have revived this issue, returning it to the national spotlight. To truly understand the complex dynamics at work, one must return to the origin of this dispute: Congress’ first steps toward regulating consumer safety on a federal level.

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<sup>9</sup> *Id.* at 206.

<sup>10</sup> While accidents, and amusement park safety in general, have always received media coverage, such coverage has grown increasingly widespread within recent years. The following reports and articles are a survey of the growing scope and type of media outlets covering this issue: CNN *String of Amusement Park Accidents Causing Concern* (Aug. 26, 1999), available at <http://www.cnn.com/US/9908/26/rollercoasters.01/index.html> (last visited Mar. 5, 2004); CNN, *Congressional Panel Begins Hearings on Roller Coaster Safety* (May 17, 2000), available at <http://www.cnn.com/2000/US/05/17/amusement.park.safety/index.html> (last visited Mar. 5, 2004); *Eye on America: Amusement Park Accidents May Be More Widespread Than Believed* (CBS Evening News television broadcast Aug. 20, 2001); *Troubling Summer for Amusement Parks* (ABC World News Sunday television broadcast, Aug. 29, 1999); John Seewer, *Amusement Parks Put Science Into the Scream, Say It Makes Rides Safer*, AP WORLDSTREAM, June 10, 2002; Sean Wood, *Congressman to Press for Federal Regulation of Amusement Parks*, KNIGHT RIDDER/TRIBUNE NEWS SERVICE, Feb. 25, 2003.

## **1. The Federal Government's First Steps Toward National Consumer Safety Regulation.**

During much of its first one hundred years of existence, Congress generally avoided the regulation of consumer safety on a national level. Instead, Congress left it to the states, through their inherent police powers, to regulate consumer safety issues such as product safety, food safety, drug safety, and other consumer-related activities.<sup>11</sup> In 1879, however, the United States Department of Agriculture took the lead in one of the first efforts toward federalizing a consumer safety issue. The department, led by its chief chemist Peter Collier, lobbied Congress to pass a bill giving them general regulatory authority over food products.<sup>12</sup> These efforts were largely induced by two events: 1) the growing scientific knowledge of germ theory and how it could contaminate the food supply; and 2) the increasing problem of consumers unknowingly purchasing adulterated food as the economy and society shifted from a local food supply to a more nationalized food supply.<sup>13</sup>

This debate ended up pitting supporters of the farming industry, who favored a national law protecting the “natural” food supply, against the food-processing industry that opposed efforts to restrict the use of preservatives designed to alter the color, flavor,

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<sup>11</sup>In 1784, for example, Massachusetts passed a law regarding food standards in what is generally considered to be one of the first consumer regulatory acts in this country. FDA, <http://www.fda.gov/cvm/aboutcvm/aboutbeg.htm> (accessed Dec. 6, 2004).

Whereas some evilly disposed persons, from motives of avarice and filthy lucre, have been induced to sell corrupted, contagious or unwholesome provisions, to the great nuisance of public health and peace :

Be it therefore enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, That if any person shall sell any such diseased, corrupted, contagious or unwholesome provisions, whether for meat or drink, knowing the same, without making it known to the buyer, and being thereof convicted before the Justices of the General Sessions of the Peace, in the county where such offence shall be committed, or the Justices of the Supreme Judicial Court, he shall be punished by fine, imprisonment, standing in the pillory, and binding to the good behaviour, or one or more of these punishments, to be inflicted according to the degree and aggravation of the offence.

An Act Against Selling Unwholesome Provisions, MASS. GEN. LAWS ch. 50 (1784), *available at* <http://www.state.ma.us/dph/pdf/s98-1.pdf> (as of Mar. 8, 2004).

<sup>12</sup> FOOD AND DRUG ADMINISTRATION, CURRENT AND USEFUL INFORMATION FROM THE FOOD AND DRUG ADMINISTRATION (1999), *available at* <http://www.cfsan.fda.gov/mileston.html> (last visited Mar. 9, 2004).

<sup>13</sup> JAMES HARVEY YOUNG, FOOD AND DRUG ADMINISTRATION, THE LONG STRUGGLE FOR THE 1906 LAW (1981), *available at* <http://www.cfsan.fda.gov/~lrd/history2.html> (last visited Mar. 9, 2004); One example of this problem involved the “embalmed beef scandal”. This scandal arose out of canned meat that had a suspicious grayish coloring and had been served to American soldiers (such as the famous Rough Riders) during the war. Allegations arose that this beef was actually partially-decomposed meat that had been spoiled in the humid climate of the war’s locale. These unsanitary conditions were blamed on, among other things, improperly trained food personnel and improperly regulated food conditions. Ultimately, the scandal led to a series of charges before a court of inquiry as well as improved food regulations. See Edward F. Keuchel, *Chemicals and Meat: The Embalmed Beef Scandal of the Spanish-American War*, 48 BULLETIN OF THE HISTORY OF MEDICINE 249-264 (1974).

texture, and other features of the food supply. Advocates of a federal law for regulating the food supply pressed the issue with their argument that existing state regulations were insufficient to protect the general public. As one commentator described the debate:

Discoveries in chemistry, for example, led to new synthetic medicines and altered radically both the growing and the processing of food. Transportation developments brought processed food to an increasingly national market, making the growth of giant cities possible. The residents of those cities lost the ability villagers had possessed of being first-hand judges of the food they ate.<sup>14</sup>

In essence, advocates of a federal approach based their arguments on the premise that, even though the food supply might have previously been effectively regulated by the states in a generally local and intrastate society, the urbanization of America had created a much more interstate food supply. Because of this, the federal government was better situated to efficiently regulate such a national food supply. As one commentator wrote:

[t]he debate in 1886 between the defenders of a natural food and those of its alleged artificial substitute centered not only on matters of vested interest, but also pondered concerns about the public health, issues of governmental authority, and the myths in which were enshrined the meaning of the American experience.<sup>15</sup>

Despite persistent efforts to pass such a law, Congress failed to enact any national regulation for the remainder of the 19<sup>th</sup> century. As the 20<sup>th</sup> century began, however, support for national consumer food safety legislation continued to increase to the point that it appeared such a law was likely. One of the primary forces behind this increased support was Upton Sinclair's 1906 book *The Jungle*, in which he exposed some of the increasingly unhygienic practices of the meatpacking industry. Faced with documented evidence of serious abuses in the nation's food supply, public opinion quickly shifted and soon President Theodore Roosevelt, who until now had offered very little, if any, support for a national consumer food safety law, now also pressed Congress to pass such a national law.

Those efforts finally succeeded in June 1906, when Congress reversed course and passed both the Pure Food and Drug Act and the Meat Inspection Act.<sup>16</sup> These laws are generally considered to be the first federal laws regulating consumer safety.<sup>17</sup> And, in

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<sup>14</sup> JAMES HARVEY YOUNG, FOOD AND DRUG ADMINISTRATION, THE LONG STRUGGLE FOR THE 1906 LAW (1981), available at <http://www.cfsan.fda.gov/~lrd/history2.html> (last visited Mar. 9, 2004).

<sup>15</sup> *Id.*

<sup>16</sup> Lest anyone think that these Acts represent little more than a minor historical footnote, the national importance of the Pure Food and Drugs Act was confirmed on January 15, 1998 when the United States Postal Service released a commemorative stamp as part of a series of stamps honoring the major historical events of the United States from the 20th Century. See Press Release, United States Department of Health and Human Services, New Stamp Honors The First Comprehensive National Food And Drug Law (Jan. 13, 1998), available at <http://www.fda.gov/bbs/topics/NEWS/NEW00613.html> (last visited Feb. 27, 2004).

<sup>17</sup> While they were certainly the most noteworthy and publicized laws, whether these two laws were actually the "first" consumer safety laws is debatable. For example, in 1883, Congress passed the an act to

many ways, they were the first steps in a dramatic chain of events that would forever change the states' roles in regulating consumer safety issues.<sup>18</sup>

## **2. The Continued Growth of the Federal Government's Regulation of Consumer Safety Issues.**

The federalization of consumer safety regulation certainly did not begin and end with food and drugs.<sup>19</sup> In fact, over the next 60 years, Congress continued to expand the federal government's role in regulating consumer safety issues beyond food and drugs and into a wide range of other consumer products and activities. However, rather than taking an omnibus approach toward regulating consumer products and activities as a whole, Congress chose to accomplish this expansion through a series of self-standing acts that regulated individual consumer products and that were administered by a variety of different federal department and agencies. In fact, the broad, decentralized nature of the federal government's consumer regulatory activities was evidenced by the fact that, at

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regulate the purity of imported tea. Impure Tea Act, 22 Stat. 451 (1883). Likewise, in 1902, Congress passed a different act to regulate the safety of certain vaccines and medicines offered to the public. Biologics Control Act, Pub. L. No. 57-244, 32 Stat. 728 (1902).

Regardless of which law should be given the title of "first federal consumer safety law", the fact remains that the era from 1879 to 1906 ushered in the federal government's intrusion into the previously State dominated province of consumer safety and health regulation.

<sup>18</sup> Roosevelt's signing of the Meat Inspection Act and Pure Food and Drug Act were two examples of the trend toward "nationalizing" issues that affected citizens of more than just one state or locality. Termed "The New Nationalism", Roosevelt's own words clearly signaled the growing trend away from a State-centric regulatory system and toward a Federal Government-driven system:

I do not ask for overcentralization; but I do ask that we work in a spirit of broad and far-reaching nationalism when we work for what concerns our people as a whole...The national government belongs to the whole American people, and where the whole American people are interested, that interest can be guarded effectively only by the national government. The betterment which we seek must be accomplished, I believe, mainly through the national government....The American people are right in demanding that New Nationalism, without which we cannot hope to deal with new problems. The New Nationalism puts the national need before sectional or personal advantage. It is impatient of the utter confusion that results from local legislatures attempting to treat national issues as local issues.

Theodore Roosevelt, The New Nationalism, Address in Osawatomie, Kansas (Aug. 31, 1910), *available at* <http://www.tamu.edu/comm/pres/speeches/trnew.html> (last visited Dec. 27, 2004).

<sup>19</sup> Nor did the regulation of food and drugs themselves begin and end with the Pure Food and Drug Act. In fact the federal government would take two more important regulatory actions concerning consumer safety regulation as it relates to food and drugs before 1940. First, in 1927, Congress created a new regulatory administration charged with regulating consumer safety over these products. 44 Stat. 976, 1002 (1927). The agency was named the Food, Drug, and Insecticide Administration and would later become known as today's Food and Drug Administration. 46 Stat. 392, 422 (1930).

The second pivotal event occurred in 1938 when Congress enacted the Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, § 201(h), 52 Stat. 1040 (1938)(codified as amended at 21 U.S.C. § 321(h)(1994)). Among its groundbreaking provisions, this Act required manufacturers to obtain product safety approval prior to offering a new drug to the public and also authorized the new federal agency to conduct factory inspections and bring court actions to enforce its food and drug regulations.

one point, 33 different departments and agencies regulated over 100 various consumer activities.<sup>20</sup>

For example, in 1953, Congress passed the Flammable Fabrics Act.<sup>21</sup> This Act arose after a series of high profile incidents in which children wearing cowboy playsuits were seriously injured or killed after the outfits they were wearing ignited. Support for the Act was further bolstered following a series of instances in which individuals were seriously injured or killed when the sweaters they were wearing ignited.<sup>22</sup> When passed, the Act essentially gave the Federal Trade Commission complete regulatory authority over the safety of consumer clothing. Subsequently, in 1967, the Flammable Fabrics Act was expanded to also give the Federal Trade Commission general safety regulatory authority over interior furnishings such as rugs and carpets also.<sup>23</sup>

Another example of Congress' piecemeal approach of regulating specific products, rather than consumer activities as a whole, was the Refrigerator Safety Act.<sup>24</sup> The Refrigerator Safety Act was passed in 1956 following several years of increasing deaths among children who had suffocated after being trapped in refrigerators that, when closed, could not be opened from the inside.<sup>25</sup> Both the Flammable Fabrics Act and the Refrigerator Safety Act were lauded as important advancements in the safeguarding of American consumers. However, by their very nature, both acts were very limited in the scope of their application. Ultimately, Congress concluded that this piecemeal (and, arguably, unorganized) approach to consumer safety regulation had negatively affected consumer safety as a whole: "the scattering of these activities in oftentimes minute organizational units resulted in a loss of focus and commitment on the part of those responsible."<sup>26</sup>

As the nation proceeded into the 1960s, an increasing number of consumer product related deaths and injuries led Congress to reexamine its product-by-product regulatory approach. Many in Congress believed that the growing use of automated technology as a component of many consumer products had created a very dangerous scenario that warranted increased consumer safety regulations:

The end of World War II is a convenient point in time from which to consider what may be called a technological revolution in home products. Even the most modest homes today have numerous items—many of which are potentially dangerous—which were unthought of, or at least unattainable prior to World War II....For the most part this is a boon and an important contribution to an enviable progress in our society.

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<sup>20</sup> H.R. REP. NO. 91-1361, at 4 (1970).

<sup>21</sup> Flammable Fabrics Act, 15 U.S.C. §§ 1191-1204 (Pub. L. No. 83-88, 67 Stat. 111 (1953)).

<sup>22</sup> S. REP. NO. 83-400 (1953). These high profile incidents included one particularly concerning case of an individual's sweater igniting while he was sitting in court one afternoon.

<sup>23</sup> Pub. L. No. 90-189, 81 Stat. 568 (1967). In 1972, Congress re-assigned regulatory authority over personal clothing and interior furnishings from the Federal Trade Commission to the newly established CPSC. Pub. L. No. 92-573, 86 Stat. 1207 (1972).

<sup>24</sup> Refrigerator Safety Act, 15 U.S.C. §§ 1211-1214 (Pub. L. No. 84-930, 70 Stat. 953 (1956)).

<sup>25</sup> S. REP. NO. 84-2700 (1956).

<sup>26</sup> H.R. REP. NO. 91-1361, at 6 (1970).

However, such devices and numerous others in and related to the home too often have unwanted side effects.<sup>27</sup>

In light of this apparent concern that the use of technology in consumer products was outpacing safety, combined with its belief that existing state, local, and industry regulations were insufficient<sup>28</sup>, Congress decided to wholly re-examine its approach to consumer safety regulation. In 1961, Congress took one of its first steps toward extensively studying the issue of consumer product safety when the House Subcommittee on Intergovernmental Relations commissioned a study entitled “Consumer Protection Activities of the Federal Departments and Agencies.”<sup>29</sup> This study analyzed the federal government’s role in consumer safety activities to date and was followed the next term by two additional subcommittee reports addressing “Consumer Protection Activities of State Governments”.<sup>30</sup> These studies were a precursor to a broad new Congressional effort aimed at federalizing much of the consumer product safety field.

On November 20, 1967, Congress took a large step toward the federalization of consumer safety regulation when it established the National Commission on Product Safety (“NCPS”).<sup>31</sup> This “temporary”<sup>32</sup> commission was charged with researching the sufficiency and scope of the existing federal consumer product safety laws and then transmitting a final report to the President and to the Congress within two years.<sup>33</sup> In particular, Congress required that the NCPS consider the following four subjects:

- (1) the identity of categories of household products, except such products excluded in section 6, which [sic] may present an unreasonable hazard to the health and safety of the consuming public;
- (2) the extent to which self-regulation by industry affords such protection;
- (3) the protection against such hazardous products afforded at common law in the States, including the relationship of product warranty to such protection; and
- (4) a review of Federal, State, and local laws relating to the protection of consumers against categories of such hazardous products, including the scope of coverage, the effectiveness of sanctions, the adequacy of

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<sup>27</sup> H.R. REP. NO. 90-882, at 1925 (1967).

<sup>28</sup> Congress’ belief that a non-federal approach toward consumer safety was ineffective was demonstrated by the finding in H.R. REP. NO. 90-882 that “[I]ndustry, local government, and State government interests are aware of the problem and numerous regulations and statutes have been enacted, but no one has been heard to say that there is not a real need for improvement in this area...” *Id.*

<sup>29</sup> H.R. REP. NO. 87-1241(1961).

<sup>30</sup> H.R. REP. NO. 88-445 (1963); H.R. REP. NO. 88-921 (1963).

<sup>31</sup> Pub. L. No. 90-146, 81 Stat. 466 (1967), *amended by* Pub. L. No. 91-51, 83 Stat. 86 (1969).

<sup>32</sup> “Temporary” in the sense that the express terms of Pub. L. No. 90-146 required that “[n]inety days after submission of its final report, as provided in section 2(c), the Commission shall cease to exist.”

<sup>33</sup> The original bill establishing the National Commission on Product Safety mandated that the commission transmit its report within “two years from the date of approval of this joint resolution” which would have been November 20, 1969. *See* Pub. L. No. 90-146, 81 Stat. 466, 500 (1967). However, administrative matters delayed President Lyndon B. Johnson’s appointment of the commission until March 27, 1968. As a result, Congress extended the deadline for the commission’s final report until June 30, 1970. *See* Pub. L. No. 91-51, 83 Stat. 86 (1969).

investigatory powers, the uniformity of application, and the quality of enforcement.<sup>34</sup>

As part of its effort, the NCPS researched hundreds of different consumer products<sup>35</sup>—ultimately identifying in excess of 300 categories of products that remained unregulated under the existing regulatory schemes.<sup>36</sup> These products ranged the gamut from children’s toys to lawn care products.<sup>37</sup>

After completing its research, the NCPS completed its charge by submitting to Congress and the Nixon administration a final report outlining its results.<sup>38</sup> In short, the NCPS found the threat posed by consumer products to be “bona fide and menacing.”<sup>39</sup> The report found that one of the primary causes of this threat was that Congress had passed too many stand-alone consumer safety laws governing different products.<sup>40</sup> This created a lack of uniformity that led in turn to an unorganized and certainly less than comprehensive approach to regulating consumer safety.<sup>41</sup> The NCPS proposed resolving this problem by creating an omnibus safety regulation covering nearly all consumer products and activities.<sup>42</sup>

Moreover, the Chairman of the NCPS was adamant that this issue simply could not be remedied through increased industry self-governance because “American industry may lack the incentive for safety necessary to overcome what may be an irreconcilable profit motive.”<sup>43</sup> Therefore, “government must be its gadfly.”<sup>44</sup>

In addition to this perceived profit motive, the NCPS also concluded that an industry-governed solution would be ineffective because “[o]nly a few of the largest manufacturers have coherent, articulated safety engineering programs.”<sup>45</sup> According to the NCPS, this not only resulted in many products whose engineering standards were dubious at best, but also resulted in sporadic manufacturer attempts to quantify consumer injury data and establish cost-benefit analyses for safety design changes.<sup>46</sup>

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<sup>34</sup> Pub. L. No. 90-146, 81 Stat. 466, 499 (1967).

<sup>35</sup> The fact that the NCPS chose to examine “consumer products” as a whole is interesting since its enabling legislation limited its mandate to “household products”—a seemingly much narrower scope of products. The NCPS apparently decided to *sua sponte* expand its mandate beyond the scope of its enabling legislation and include “consumer products” because “that term best describes our statutory mandate and most products which are not now subject to adequate Federal safety regulation.” *Hearing on National Commission On Product Safety Before Senate Comm. on Commerce*, 91<sup>st</sup> Cong. 37 (1970)(hearing and final report presented to the President and Congress). While this decision might have been well-intentioned, as will become evident in the next section, the NCPS’ decision to essentially re-write the scope of its legislatively-assigned task ultimately would serve as a central issue in the litigation of whether fixed-site amusement parks ever fell within the United States Consumer Product Safety Commission’s jurisdiction.

<sup>36</sup> *Id.* at 6.

<sup>37</sup> *Id.* at 37.

<sup>38</sup> *Id.* at 29.

<sup>39</sup> *Id.* at 28.

<sup>40</sup> *Id.* at 38.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 46,47.

<sup>43</sup> *Id.* at 6.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 38.

<sup>46</sup> *Id.*

The NCPS also dismissed any idea that this issue could be effectively dealt with on the state government level:

State and local laws also demonstrate the inadequacies of existing safety legislation. These laws, often passed in response to specific tragedy, frequently deal with such isolated products as bedding, matches or exploding golf balls. In addition the laws' limited effectiveness in protecting consumers they often present significant obstacles to manufacturers who are forced to comply with conflicting State and local requirements.<sup>47</sup>

According to the NCPS, the ineffectiveness of a State-governed solution<sup>48</sup> was compounded by the transient nature of consumer products: “[m]anufacturers of hazardous products can make and ship out items that cannot be sold at retail in their own community.”<sup>49</sup> The NCPS concluded that one solution to these issues was federal preemption in the field of consumer safety regulation because “[s]tates seldom impose safety standards for consumer products.”<sup>50</sup>

In light of these perceived problems with an industry or State-governed solution, the NCPS concluded that the only effective solution to consumer safety issues must be federal in its nature: “[w]e believe that the leadership in this effort to eliminate unreasonable hazards in the marketplace is appropriately and peculiarly a function of the Federal Government.”<sup>51</sup>

While the NCPS was conducting its research, the Nixon administration was also researching this issue and preparing its own proposed comprehensive approach to regulating consumer products.<sup>52</sup> Soon thereafter, both the NCPS and the President submitted bills to Congress aimed at consolidating nearly all federal consumer product safety regulation<sup>53</sup> under the umbrella of one entity. Both bills proposed creating a comprehensive federal consumer safety regulation with one major exception: the Commission's bill sought to establish a new independent regulatory agency<sup>54</sup> while the

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<sup>47</sup> *Id.* at 6.

<sup>48</sup> Interestingly though, the NCPS was not entirely dismissive of *any* State role in consumer product regulation. In fact, in its Final Report, the NCPS concluded that:

As State[s] and municipalities traditionally have served to adapt national programs to unusual local conditions, they have also been a source of original and innovative techniques and ideas in legislation... [t]hey provide an indispensable channel and source for the feedback of information about product safety and the effect of safety regulations.

*Id.* at 51.

<sup>49</sup> *Id.* at 39.

<sup>50</sup> *Id.* at 52; To be fair though, the NCPS did envision a scheme in which those “State regulations that do not unduly burden interstate commerce ...” might be still be appropriate. *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> S. 1797, 92nd Cong. (1972); H.R. 8110, 92nd Cong. (1972).

<sup>53</sup> While the CPSC was often called a “comprehensive” or “omnibus” consumer safety bill, several consumer products and activities did not (and still do not) fall within the scope of the CPSC. Examples include the United States Coast Guard's jurisdiction over consumer boat safety (14 U.S.C. § 2), the Food and Drug Administration's jurisdiction over consumer drugs, food, cosmetics, and medical devices (21 U.S.C. §§ 301 et seq), the National Highway Traffic Safety Administration over motor vehicles and tires (23 U.S.C. § 404), and the Federal Aviation Administration's jurisdiction over aircraft (49 U.S.C. § 40101).

<sup>54</sup> S. 983, 92nd Cong. (1972); H.R. 8157, 92nd Cong. (1972).

President's bill sought to vest authority in a new entity within the existing Department of Health, Education and Welfare.<sup>55</sup>

The NCPS envisioned an independent agency that would be similar to the Federal Trade Commission in that it would not directly report to any Department or Cabinet office.<sup>56</sup> It concluded that an independent agency was an absolute necessity because “[s]tatutory regulatory programs buried in agencies with broad and diverse missions have, with few exceptions, rarely fulfilled their mission.”<sup>57</sup> This resulted from the fact that non-independent agencies inherently suffer inadequate staffing and funding because of competition for these limited resources within the umbrella agency.<sup>58</sup>

The Nixon administration, on the other hand, envisioned its proposed Consumer Safety Administration as essentially replacing the Department of Health, Education and Welfare's Food and Drug Administration with three distinct “offices”, namely, the Office of Product Safety Regulation, the Office of Food Regulation, and the Office of Drug Regulation.<sup>59</sup> The administration aimed to take what it called the “next logical step” in consumer product safety regulation by establishing the “Government's authority to take positive action in the interests of safety, when needed, across the full range of consumer products.”<sup>60</sup> The administration bill provided for the promulgation of mandatory product safety standards, authority to conduct inspections, and a private right of action mechanism.<sup>61</sup> In the end, the Nixon administration chose to pursue this goal through an existing department, rather than an independent agency, because it believed that “this important program can be most efficiently and effectively managed in a major department [the existing HEW] which has similar and complementary programs, supporting facilities and a high degree of visibility in the public eye.”<sup>62</sup>

Ultimately, components of both approaches were melded into what was originally termed the Food, Drug and Consumer Product Agency but soon became known as the

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<sup>55</sup> S. 1797, 92nd Cong. (1972).

<sup>56</sup> S. 983, 92nd Cong. (1972); H.R. 8157, 92nd Cong. (1972).

<sup>57</sup> *Hearing on National Commission On Product Safety Before Senate Comm. on Commerce*, 91<sup>st</sup> Cong. 41 (1970)(hearing and final report presented to the President and Congress).

<sup>58</sup> *Id.*

<sup>59</sup> The administration's rationale for opposing the creation of a new independent agency was based upon the stated need to reduce the growing proliferation of such agencies at that time:

Those who favor an independent agency do so in hopes that this will be useful in achieving our common goals—assuring visibility, public accountability, a quick start, and vigor for an important new program. But this is not necessarily the best way to achieve these ends. And it runs counter to a current need to consolidate, not proliferate, agencies. We all know that we cannot indefinitely proliferate agencies for a multitude of special needs. The problem of proliferation of agencies has become acute.

*The Consumer Product Safety Act: Hearings on H.R. 8110, H.R. 8157, H.R. 260 (and additional bills), H.R. 3813 (and additional bills) Before the House Subcomm. on Commerce. & Finance of the House Comm. on Interstate and Foreign Commerce*, 92<sup>nd</sup> Cong. 974, 977 (1971).

<sup>60</sup> *Id.* at 977.

<sup>61</sup> *Id.* at 970-976.

<sup>62</sup> *Id.* at 977. A detailed analysis of additional differences between the administration's bill and the NCPS Commission bill is located in the Senate sub-committee hearing statement and testimony of Elliot Richardson, Secretary of the Department of Health, Education, and Welfare, *id.* at 968-1057.

Consumer Product Safety Commission (“CPSC”).<sup>63</sup> The underlying idea was to create a new “super-agency” that would combine certain areas of regulatory authority previously exercised by the Food and Drug Administration, Center for Disease Control, Department of Commerce, Federal Trade Commission, Department of Agriculture and the former Department of Health, Education, and Welfare.<sup>64</sup> Ultimately, Congress sought to establish “one agency with comprehensive jurisdiction and authority to regulate all food, drugs, and common household products.”<sup>65</sup>

The effort to establish an omnibus federal consumer safety regulation was finally completed when Congress passed the Consumer Product Safety Act of 1972 (“CPSA”) and President Nixon signed the bill into law.<sup>66</sup> This Act created the CPSC, an independent federal agency with authority to exercise safety regulatory jurisdiction over nearly all consumer products and activities.<sup>67</sup>

### **3. The Crescendo of Federal Consumer Safety Regulatory Power: the Creation of the Consumer Product Safety Commission**

In establishing the CPSC in 1972, Congress issued a series of findings that specifically set forth its rationale for exercising what was essentially a federal police power over issues of consumer safety. Among other things, Congress specifically found that the states were not adequately regulating consumer safety:

The Congress finds that

(1) an unacceptable number of consumer products which present unreasonable risks of injury are distributed in commerce;

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<sup>63</sup> Possibly predicting these diverging approaches, legislation was at one point introduced that would have created *both* an independent agency called the Consumer Protection Agency and an executive branch office called the Office of Consumer Affairs. *See* H.R. 18214, 91st Cong. (1970).

<sup>64</sup> *See* S. REP. NO. 92-749 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4573, 4574.

<sup>65</sup> *Id.* As clearly demonstrated by the Senate Commerce Committee report, the Committee contemplated the consumer product regulatory scope of this Act in terms of “household products”. The use of this language seems to be an early indication that non-household products, such as amusement park attractions, were not originally envisioned as falling within the scope of this new “super-agency”. In fact, the Committee report later reiterated the limited regulatory scope of this agency, at least in terms of consumer products, when it stated that, “new legislative authority is also necessary to cover the safety hazards posed by **household products** for which present law establishes no safety regulation.” *See* S. REP. NO. 92-749 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4573, 4579 (emphasis added). Thus, the argument by those in favor of granting the CPSC jurisdiction over fixed-site park attractions, that Congress created a previously non-existent regulatory loophole for fixed-site park attractions by exempting them from the current scope of the CPSC’s jurisdiction seems to ignore the fact that the Senate itself originally provided the Federal government with regulatory authority only over “household products.”

<sup>66</sup> Consumer Product Safety Act of 1972, Pub. L. No. 92-573, 86 Stat. 1208, 2051 (1972).

<sup>67</sup> A detailed explanation of how Congress ultimately reconciled the differing approaches toward creating a new federal entity charged with a near comprehensive regulatory responsibility over consumer products can be found in the Joint Explanatory Statement of the Committee on Conference for the CPSA (PL 92-573) located at H.R. REP. NO. 92-1593, at 32-56.

(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 Act.<sup>68</sup>

After making these findings, Congress proceeded to identify the goals it sought to achieve by establishing the CPSC

(1) to protect the public against unreasonable risks of injury associated with consumer products;

(2) to assist consumers in evaluating the comparative safety of consumer products;

(3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and

(4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.<sup>69</sup>

The CPSA provided the CPSC with two types of enforcement tools: the ability to promulgate mandatory product safety standards and the ability to initiate product recalls.<sup>70</sup> The mandatory standard provision was generally considered the more effective of the two because it allowed the CPSC to prevent products that did not meet the mandatory standard from even entering the marketplace.<sup>71</sup> However, the CPSA required that the CPSC complete a detailed rule-making process before promulgating a mandatory standard.<sup>72</sup> Consumers could also petition the CPSC for a specific product safety standard.<sup>73</sup>

The recall provision, on the other hand, allowed for swift and decisive action on a consumer product—but, by its very nature, only after the product had entered into the marketplace. This presented the CPSC with a choice: prioritize its own efforts on the more cumbersome mandatory standards approach of preventing dangerous consumer

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<sup>68</sup> Pub. L. No. 92-573, § 2, 86 Stat. 1208, 2051 (1972).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at § 7, 86 Stat. at 2056.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

products from getting to market or prioritizing the less cumbersome recall approach of removing dangerous consumer products after they had entered the market. Despite the incredible amount of research, study, and debate that ultimately went into creating it, the CPSC would soon find that its ability to accomplish these Congressionally-established goals was much less certain than expected.

The first chairman of the CPSC, Richard Simpson, opted for the former approach and went so far as to promise that the CPSC would promulgate at least 100 new mandatory product safety standards within the CPSC's first ten years.<sup>74</sup> The problem this pledge faced was that it did not fully grasp the effect of also allowing consumers, as well as trade groups, corporations, or nearly any other type of entity, to petition the CPSC for mandatory safety standards. This created a logjam of petitions which itself was compounded by the fact that, soon after its first day of business, the CPSC began to solicit petitions from consumers.<sup>75</sup> The result was that the CPSC was quickly inundated with an unmanageable number of safety standard petitions that distracted the Commission from formulating any of its own product safety standards.<sup>76</sup> In response, the CPSC tried different measures to enable it to begin establishing its own agenda (rather than simply responding to outside petitions); however, by 1976, Chairman Simpson acknowledged that up to 75 percent of the CPSC's regulatory efforts were spent responding to petitions rather than creating its own mandatory standards or instituting its own recalls.<sup>77</sup> In many ways, the CPSC's aggressive attempt to respond to outside petitions, while still implementing its own internal safety priorities, created a "jack of all trades but a master of none" scenario.<sup>78</sup>

Despite facing a complete overload of its resources, the CPSC would soon decide that its regulatory scope allowed it to exercise nationwide jurisdiction over amusement parks, including those fixed to a specific site. The CPSC made this decision despite the fact that, near this very time, the General Accounting Office had issued several reports and offered testimony before a Congressional oversight committee that was critical of the CPSC's operations, including its overextension of resources: "the Commission needs to be selective in its enforcement and compliance activities and it certainly cannot cover the total universe on a 100-percent basis."<sup>79</sup>

This decision to further expand its regulatory reach would only end up exacerbating the CPSC's problems as it would now mean that the CPSC would have to travel throughout country inspecting the growing number of fixed-site amusement parks sprouting up from Los Angeles to Long Island—and all parts in between since, unlike household products (or, for that matter, nearly all other products that it regulated), fixed-

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<sup>74</sup> E. Marla Felcher, *The U.S. Consumer Product Safety Commission: The Paper Tiger of American Product Safety*, at <http://www.understandinggovt.org/felcher.html> (last visited Mar. 6, 2004).

<sup>75</sup> *Id.* at 4.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> During these early years, the CPSC also faced a variety of other problems including a series of General Accounting Office reports that the CPSC was wasting its resources. *Id.* at 6. These problems would serve as the seed for Congress' eventual wholesale reevaluation of the CPSC as part of the 1981 Amendment which would clarify that fixed-site amusement parks did not fall within the CPSC's regulatory jurisdiction. See Pub. L. No. 97-35, 95 Stat. 724 (1981).

<sup>79</sup> *To Aid in the Enforcement of Acts Implemented by the Consumer Product Safety Commission: Hearing Before the Sen. Commerce on Comm., 93<sup>rd</sup> Cong. 17* (Sept. 9, 1976)(statement of Gregory Ahart, Director Human Resources Division General Accounting Office).

site amusement attractions could not be packaged up and shipped to a central CPSC testing facility for inspection and analysis. By deciding to begin regulating fixed-site attractions, the CPSC would end up raising serious legal questions of not only *could* the it legally regulate such attractions but, in light of its limited budget and staffing, *should* it do so. The stage was now set for the regulatory showdown over fixed-site attractions.

### **C. The Birth and Development of Fixed-Site Amusement Parks in the United States.**

In 1894, what is generally considered the first modern day amusement park, “Water Chutes”, opened in Chicago. In addition to being the first park to charge admission, Water Chutes was also the first park to use amusement rides as its primary guest attraction. The success of Water Chutes ultimately led to the opening of the famous Coney Island amusement park in New York. Soon, this new form of entertainment found its way into communities throughout the country.<sup>80</sup> In fact, by 1910, over 2000 amusement parks were being operated within the United States.<sup>81</sup>

The number of amusement parks continued to gradually grow throughout the early 20<sup>th</sup> century with one historian identifying the 1920s as “the golden age of amusement parks.”<sup>82</sup> However, by the end of that decade, the Great Depression had struck and the number of amusement parks had dwindled to around 400.<sup>83</sup> The industry would make a comeback, however, because of the prosperity that many Americans encountered following World War II.<sup>84</sup> This comeback too faced challenges though as more and more American families moved away from the cities--where many amusement parks were located--and into the suburbs. While doing so, many of these families also began to find their main source of entertainment at home following their purchase of that new innovation known as the television.<sup>85</sup>

On July 17, 1955, a pivotal event in the history of amusement parks occurred with the opening of Disneyland in Anaheim, California. Costing upwards of \$17 million, Disneyland was designed as a variation of the traditional amusement park that had, until now, been centered around a midway.<sup>86</sup> Instead of adhering to that traditional layout, Disneyland was centered around five “themed” lands—thus the creation of the term “theme park”. In addition to being designed differently than any amusement park at the time, Disneyland also placed a unique emphasis on “ride safety” as being one of the key components to a successful park. As one commentator has noted, “Disney saw his park

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<sup>80</sup> For a detailed historical review of how amusement parks have developed in the United States, I recommend JUDITH A. ADDAMS, *THE AMERICAN AMUSEMENT PARK INDUSTRY: A HISTORY OF TECHNOLOGY AND THRILLS* (Twayne 1991); WILLIAM F. MANGELS, *THE OUTDOOR AMUSEMENT INDUSTRY* (VANTAGE 1952); AND DALE SAMUELSON, *THE AMERICAN AMUSEMENT PARK* (St. Paul 2001).

<sup>81</sup> NATIONAL AMUSEMENT PARK HISTORICAL ASSOCIATION, *Great Moments*, available at <http://www.napha.org/moments.html> (last visited Feb. 27, 2004).

<sup>82</sup> *Id.* at 2.

<sup>83</sup> NATIONAL AMUSEMENT PARK HISTORICAL ASSOCIATION, *Industry History*, available at <http://www.napha.org/history.html> (last visited Feb. 27, 2004).

<sup>84</sup> *Id.* at 2.

<sup>85</sup> *Id.* at 2.

<sup>86</sup> NATIONAL AMUSEMENT PARK HISTORICAL ASSOCIATION, *Great Moments*, p.3, available at <http://www.napha.org/moments.html> (last visited Feb. 27, 2004).

as the future of entertainment and even as a model of cities to come: clean, efficient, safe, and controlled.”<sup>87</sup>

The incredible success of Disneyland ultimately led to large corporations such as Marriott Corporation, Anheuser-Busch, and Mattel entering the theme park field.<sup>88</sup> This boom continued through the 1970s with the opening of Disney World in Orlando, Florida and into the 1980s and 1990s with the openings of various Sea World, Universal, and Six Flags theme parks as well as Epcot Center in Orlando, Florida—the first park to be built at a cost of over \$1 billion dollars.<sup>89</sup>

In 2003, over 165 million people attended just the top fifty most-visited parks in the United States.<sup>90</sup> In total, there are approximately 600 amusement and theme parks located in the United States.<sup>91</sup> Not surprisingly, with this incredible growth, has come increased scrutiny. In particular, a growing number of consumers, regulators, media, and researchers have increasingly asked the question: are the products of this industry that so many Americans enjoy every year really safe?

The answer to this question serves as the crux of the debate regarding whether the federal government or the state governments should regulate the safety of fixed-site amusement and theme parks. In fact, not long after the passage of the CPSA, the CPSC appeared to offer its own answer to this question when it attempted to usurp the traditional state authority over this regulatory area. What followed was a debate that continues today, full of legal and legislative wranglings.

#### **D. The CPSC’s Attempt at Exercising Safety Regulatory Jurisdiction Over Fixed-site attractions.**

*[Police Powers] form a portion of that immense mass of legislation which embraces everything within the territory of a State, not surrendered to the general government: all which can be most advantageously exercised by the States themselves.*<sup>92</sup>

Traditionally, the CPSC has taken a very expansionist view regarding the scope of its regulatory authority to the point that it now regulates over 15,000 different products.<sup>93</sup> When it comes to fixed-site amusement attractions, however, the CPSC has not always

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<sup>87</sup> Joshua Wolf Shenk, *Hidden Kingdom: Disney’s Political Blueprint*, THE AMERICAN PROSPECT, March 21, 1995, available at <http://www.prospect.org/print/V6/21/shenk-j.html> (last visited Mar. 9, 2004).

<sup>88</sup> NATIONAL AMUSEMENT PARK HISTORICAL ASSOCIATION, *Great Moments*, p.3, available at <http://www.napha.org/moments.html> (last visited Feb. 27, 2004).

<sup>89</sup> *Id.* at 3.

<sup>90</sup> Mike Schneider, *Amusement Park Attendance Slides*, THE ASSOCIATED PRESS, posted Dec. 20, 2003, available at <http://www.thestate.com/mld/thestate/business/7536247.htm> (last visited Mar. 9, 2004).

<sup>91</sup> Press Release, International Association of Amusement Parks and Attractions, U.S. Amusement/Theme Parks & Attractions Industry – Attendance & Revenues, available at <http://www.iaapa.org/modules/News/index.cfm?fuseaction=Details&mtid=3&iid=1051> (last visited Feb. 28, 2004).

<sup>92</sup> *Gibbons v. Ogden*, 22 U.S. 1, 203 (1824).

<sup>93</sup> United States Consumer Product Safety Commission, Products Under the Jurisdiction of Other Federal Agencies and Other Federal Links, available at <http://www.cpsc.gov/federal.html> (last visited Feb. 26, 2004).

been absolutely certain that these attractions fell within its regulatory jurisdiction. In fact, a review of internal CPSC documents from the mid 1970s reveals that the CPSC's very first steps into this area were trepiditious at best.

### **1. The CPSC's Initial Steps Toward Exercising Jurisdiction Over Fixed-Site Amusement Parks.**

One of the first documented internal CPSC discussions of this issue occurred in August 1974 when Robert W. McAfee, Acting Area Director for the CPSC's Denver Area Office wrote to the CPSC's Office of Field Coordination Director, Charles Boehne, inquiring whether amusement park rides actually fell within the CPSC's jurisdiction.<sup>94</sup> Less than ten days later, Mr. Boehne forwarded a memorandum with his office's initial thoughts on Mr. McAfee's inquiry to the CPSC General Counsel's Office. In this memorandum Mr. Boehne indicated that his office felt that strong arguments could be made both in favor of and against the CPSC asserting jurisdiction over amusement rides:

Dave Wolfson tells me there is a clear case to argue against jurisdiction on the theory of assumption of risk.<sup>95</sup> On the other side of the coin, we could say that the consumer is purchasing the ride, and the ride itself represents a consumer product; therefore the ride is subject to our jurisdiction. From this position, we could argue that, as a consumer product, the ride would be subject to our jurisdiction if it presented an unreasonable source of risk to the consumer.<sup>96</sup>

In November of that same year, the CPSC General Counsel Office issued a memorandum in which it concluded that "amusement rides fall within the jurisdiction of the Commission, and are subject to regulation under the Consumer Product Safety Act."<sup>97</sup> The OGC relied upon Section 3 (a)(1) of the CPSA which defined consumer products as: "any article or component part thereof, produced or distributed ... (ii) for the personal

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<sup>94</sup> Acting Director McAfee's August 27, 1974 short three paragraph letter included the straightforward question: "Dear Chuck: Here's another area we may need clarification and a decision. Is [sic] recreational rides in amusement parks our jurisdiction, or to whom?" Letter. From Robert McAfee, CPSC Acting Director, to Charles Boehne, Director, CPSC Office of Field Coordination (Aug. 27, 1974), *available at* [http://www.saferparks.org/pdf/cpsc\\_memo1.pdf](http://www.saferparks.org/pdf/cpsc_memo1.pdf) (last visited Mar. 8, 2004).

<sup>95</sup> The somewhat curious argument that "assumption of risk" might somehow affect jurisdiction was summarily dismissed by the Office of General Counsel's November 13, 1974 Response Memorandum which stated that: "In your memorandum, you question whether the theory of assumption of risk bars the Commission from jurisdiction over amusement rides. Assumption of the risk is a legal theory used by defendants in product liability cases between private parties. In no way does it affect our jurisdiction over defective consumer products." Memorandum from Susan Ness, CPSC General Counsel's Office, to Charles H. Boehne, Director, CPSC Office of Field Coordination (Nov. 13, 1974), *available at* [http://www.saferparks.org/pdf/cpsc\\_memo3.pdf](http://www.saferparks.org/pdf/cpsc_memo3.pdf) (last visited Feb. 27, 2004).

<sup>96</sup> Memorandum from Charles H. Boehne, Director, CPSC Office of Field Coordination, to Michael Brown, CPSC General Counsel's Office (Sept. 4, 1974), *available at* [http://www.saferparks.org/pdf/cpsc\\_memo2.pdf](http://www.saferparks.org/pdf/cpsc_memo2.pdf) (last visited Feb. 27, 2004).

<sup>97</sup> Memorandum from Susan Ness, CPSC General Counsel's Office, to Charles H. Boehne, Director, CPSC Office of Field Coordination (Nov. 13, 1974), *available at* [http://www.saferparks.org/pdf/cpsc\\_memo3.pdf](http://www.saferparks.org/pdf/cpsc_memo3.pdf) (last visited Feb. 27, 2004).

use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise ...”

Based upon this definition, the General Counsel’s Office reasoned that “[i]t can be said that consumers ‘use’ amusement rides when they ride on them ... Since that use is considered ‘recreation’, amusement rides fall within the above statutory definition.”<sup>98</sup>

Interestingly, neither Mr. McAfee’s original letter nor Mr. Boehne’s subsequent memorandum—nor even the November response memorandum from the Commission’s General Counsel’s Office—made any distinction between whether the amusement rides were located in fixed-site parks or mobile parks. Whether these individuals simply did not understand the potential significance of this distinction is unclear. It does, however, seem to indicate that all of these individuals, including the Commission’s legal counsel, were evaluating this issue within the context of statutory interpretation rather than a Constitutional question involving interstate commerce.<sup>99</sup>

## **2. The CPSC’s Initial Enforcement Actions**

The CPSC’s internal conclusion that it maintained regulatory jurisdiction over amusement park rides was soon followed by its first lawsuit seeking to enjoin the operation of a specific ride. In *CPSC v. Chance Manufacturing Co., Inc.*<sup>100</sup>, the CPSC sued the manufacturer and distributor of the “Zipper”—an amusement ride in which guests were placed in vehicles seating two or three persons and then rotated on a 360 degree arc.<sup>101</sup> This lawsuit was preceded by a news release from the CPSC which contained an “urgent warning” for consumers to avoid riding the Zipper following four fatalities and two serious injuries suffered after a door latch allegedly malfunctioned causing riders to be ejected from the ride vehicle.<sup>102</sup>

In the lawsuit, the CPSC first alleged that the Zipper was a consumer product subject to its regulatory jurisdiction.<sup>103</sup> The CPSC then alleged that the operation of this consumer product should be enjoined because it constituted an “imminently hazardous consumer product” which, pursuant to Section 12(b)(1) of the CPSA was subject to temporary and permanent relief (in this case the CPSC sought a preliminary injunction).<sup>104</sup> The manufacturer of the Zipper and the defendant responded by seeking the dismissal of the lawsuit on the ground that the Zipper did not fall within the definition

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<sup>98</sup> *Id.*

<sup>99</sup> Notably, the November 13, 1974 memorandum did not conclude that the CPSC retained blanket jurisdiction over all amusement rides. Indeed, the General Counsel’s office exculpated “kiddie rides” from CPSC jurisdiction when it concluded that such rides would be regulated by Section 2(f)(1)(D) of the Federal Hazardous Substance Act which specifically covered “any toy or other article intended for use by children which...presents an electrical, mechanical or thermal hazard.” The Act also allows the CPSC to ban a “hazardous substance” if it would be dangerous even with cautionary labels. *See* Federal Hazardous Substance Act, 15 U.S.C §§ 1261-1278 (2003).

<sup>100</sup> *CPSC v. Chance Mfg. Co., Inc.*, 441 F.Supp. 228 (D.C.Cir. 1977).

<sup>101</sup> A more extensive technical description of the Zipper ride can be found at 441 F.Supp. at 230-231.

<sup>102</sup> Press Release, United States Consumer Product Safety Commission, Urgent Warning Issued On “Zipper” Amusement Park Ride (Sept. 7, 1977), *available at* <http://www.cpsc.gov/cpscpub/prerel/prhtml77/77098.html>, (last visited Feb. 27, 2004).

<sup>103</sup> 441 F.Supp. at 229.

<sup>104</sup> *Id.*

of a “consumer product” under the CPSA and, therefore, did not fall within the CPSC’s jurisdiction.<sup>105</sup>

While recognizing the “closeness” of the issue and that its decision rested on “narrow grounds”, the court ultimately held that the Zipper was a “consumer product” and thus subject to CPSC jurisdiction.<sup>106</sup> In making this decision, the court looked to the CPSC’s definition of “consumer product”:

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  
...<sup>107</sup>

After reviewing this definition, the court agreed that the Zipper *did not* fall within Part (i) of the same definition since the ride was not sold directly to consumers.<sup>108</sup> However, contrary to the defendant’s primary argument, the court found that the Zipper *did* fall within Part (ii) of the definition because it was produced and distributed for the personal use and enjoyment of the consumer in recreation.<sup>109</sup> Notably, because it concluded that the “consumer product” definition itself was ambiguous, the court opted to rely upon its interpretation of various legislative history sources as a basis for this finding.<sup>110</sup> In particular, the court found especially persuasive the fact that: “[t]he most unequivocal expression of congressional intent to be gleaned from the legislative history of the Act is that the definition of “consumer product” be construed broadly to advance the Act’s articulated purpose of protecting consumers from hazardous products.”<sup>111</sup>

From here, the court rejected the defendant’s argument that the Zipper could not be a “consumer product” because the rider had no possessory interest over the ride and, instead, maintained at most “an abstract right to occupy an amusement device.”<sup>112</sup> In other words, the defendant essentially argued that a product could only be a *consumer* product if the consumer could maintain some control over the product. However, the court found that this element of “control” was not actually required by the definition at issue and, in making this finding, ultimately concluded that “personal use, consumption or enjoyment” can exist absent any control or possession by the consumer.<sup>113</sup>

Essentially, the *Chance* matter revolved around the issue of statutory interpretation and did not address the legal appropriateness of the statute itself. In fact, not a single word of dicta is given to the issue of whether the federal government even had a right to regulate products, such as amusement rides, that had traditionally been

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 233.

<sup>107</sup> 15 U.S.C. § 2052(a)(1).

<sup>108</sup> 441 F.Supp. at 231.

<sup>109</sup> *Id.* at 233.

<sup>110</sup> *Id.* at 231-232.

<sup>111</sup> *Id.* at 231.

<sup>112</sup> *Id.* at 232, *citing* *Albert v. State*, 80 Misc.2d 105, 362 N.Y.S.2d 341, 344 (1974).

<sup>113</sup> 441 F.Supp. at 233.

governed by the states—this despite the fact that the issue of what fell within the scope of the Commerce Clause remained a pressing discussion among the courts at the time.<sup>114</sup>

The fact that neither the defendant nor the court even considered the interstate commerce implications of federalizing amusement park safety regulations seems further indicative of the fact that the federal right to regulate this area is not contingent or based upon the Commerce Clause. Rather, the federal government’s ability to enter this field of regulation could be premised on the fact that, as a sovereign governmental entity (like the states), it too possesses an inherent right to protect the safety of its citizens through police powers.<sup>115</sup> Regardless of the answer to the question of whether the federal government does maintain an inherent police power, even if the defendant had prevailed in *Chance*, the victory could have been short-lived as Congress could simply have chosen to revise the definition of “consumer product” to include amusement rides.

As the following discussion on the current legislative efforts to federalize fixed-site amusement park safety regulation will show, this point is very important because it helps clarify that the real underlying issue is not whether the federal government *can* regulate amusement rides but whether it *should* do so (or, conversely, whether it should yield to the states on this issue). In the case of amusement rides, the facts clearly demonstrate that the CPSC ignored the propriety of its entering this regulatory field and, instead, opted to bull-headedly charge into this matter with little, if any, consideration about the effects—or even the need—for it to do so.

Apparently emboldened by its relative success in the *Chance* matter, the CPSC quickly entered into a series of additional lawsuits in its increased efforts to regulate amusement rides. One such example was the CPSC’s announcement on August 29, 1980 that it had contemporaneously filed a formal complaint against the State Fair of Texas arising from a fatal accident on that park’s “Skyride” as well as two other complaints against the Marriott Corporation relating to two of its “Great America” parks located in Santa Clara, California and Gurnee, Illinois.<sup>116</sup> The CPSC’s simultaneous filing of these complaints represented the largest regulatory effort to date against fixed-site attractions and set the stage for the political and legal fights that would finally answer the question of whether the CPSC provided the CPSC with regulatory authority over amusement attractions in fixed-site parks.

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<sup>114</sup> Around this very time, various interests were hotly debating the scope of the federal government’s power to regulate under the Commerce Clause. After various courts disagreed as to the allowed scope that the Commerce Clause created, the Court addressed this issue, *National League of Cities v. Usery*, 426 U.S. 833 (1976) which itself was later overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)—generally considered to be the current state of Commerce Clause jurisprudence.

<sup>115</sup> See discussion *infra* section II.A.

<sup>116</sup> Press Release, United States Consumer Product Safety Commission, Commission Files Complaints Following Fatal Accidents On Amusement Park Rides (Aug. 29, 1980), *available at* <http://www.cpsc.gov/cpscpub/prerel/prhtml80/80032.html> (last visited Feb. 27, 2004). The CPSC and Marriott settled this complaint on January 27, 1981 after Marriott made certain ride modifications, and agreed to both pay a civil penalty of \$70,000.00 and comply with certain CPSC accident reporting requirements. Marriott entered into this settlement without conceding that the incidents in question were within the CPSC’s jurisdiction. Press Release, United States Consumer Product Safety Commission, Commission Announces Settlement Of Civil Penalty Action Involving Amusement Rides (Jan. 27, 1981), *available at* <http://www.cpsc.gov/cpscpub/prerel/prhtml81/81004.html> (last visited Feb. 27, 2004).

The allegations against Marriott involved a roller-coaster operating under the name of “Willard’s Whizzer”.<sup>117</sup> In particular, the CPSC alleged that Marriott failed to report several incidents in which the braking mechanism on this ride failed to properly engage, thus causing serious rider injuries—including an incident on March 29, 1980 in which a thirteen-year-old child was killed on the ride at Marriott’s Santa Clara park.<sup>118</sup>

In *The State Fair of Texas v. United States Consumer Products Safety Commission*,<sup>119</sup> the plaintiff sought to quash an administrative warrant by the CPSC seeking to inspect the “Swiss Skyride”<sup>120</sup> located at the Texas State Fair. The CPSC sought the warrant following two separate accidents involving the Swiss Skyride in which several of the gondolas collided, resulting in various injuries and the death of one person.<sup>121</sup>

In determining whether or not to quash the warrant, the trial court identified two issues which must first be answered: 1) was the Swiss Skyride a “consumer product” and 2) if so, did the CPSC have authority to inspect the Swiss Skyride located on the premises of the Texas State Fair?<sup>122</sup> As to the first issue, the court looked to the *Chance* decision as support in holding that the Swiss Skyride was a “consumer product” because it was produced for the “personal use, consumption and enjoyment” of consumers.<sup>123</sup> The court relied upon either legislative history or its own statutory interpretation to dismiss the Texas State Fair’s following five primary arguments offered against defining the Swiss Skyride as a consumer product:

1. The Swiss Skyride was not intended as a form of consumer recreation or enjoyment;<sup>124</sup>
2. The definition of “consumer product” only includes household products and, by its very size and nature, the Swiss Skyride is not a household product;<sup>125</sup>

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<sup>117</sup> CPSC Complaint against Marriott Corporation, 45 Fed. Reg. 70964 (U.S. Consumer Prod. Safety Comm’n Oct. 16, 1980).

<sup>118</sup> *Id.*

<sup>119</sup> *The State Fair of Texas v. United States Consumer Products Safety Commission*, 481 F.Supp. 1070 (N.D. Tex. 1979). The Texas State Fair is identified as the plaintiff in this matter because, technically, it filed suit to quash the administrative warrant filed against it by the CPSC. *Id.* at 1073.

<sup>120</sup> The Swiss Skyride was an attraction in which guests traveled between two fixed points in gondolas attached to an overhead cable. While these rides were popular in previous generations, they are not currently as widespread as they once were.

<sup>121</sup> The Texas accident occurred when four gondolas fell to the ground after colliding mid-air. While only one passenger was killed in Texas, a similar accident caused three deaths in Missouri soon after. Following the accident at the state fair Swiss Skyride, state fair officials apparently permitted a CPSC engineer to observe the ride at a distance but would not allow the engineer to inspect the actual ride. *See The State Fair of Texas v. United States CPSC*, 650 F.2d 1324, 1326 (5<sup>th</sup> Cir. 1981).

<sup>122</sup> 481 F.Supp. at 1076.

<sup>123</sup> *Id.* at 1077.

<sup>124</sup> The court rejected this argument by concluding that “[i]t can hardly be maintained that aerial tramways are produced for any reason but for the use or enjoyment of a consumer: the ride is simply not an industrial product.” *Id.* at 1077-1078.

<sup>125</sup> The court rejected this argument as a matter of statutory interpretation by concluding that the definition’s use of the term ‘in recreation’ was an independent basis for jurisdiction rather than simply a modifier of the terms in or around a “household”, “residence”, or “school”. *Id.* at 1077.

3. The definition of “consumer product” requires the consumer to have a level of “personal” control over a product for it to fall within said definition;<sup>126</sup>
4. The Swiss Skyride is not a “consumer product” because it is not sold directly to consumers;<sup>127</sup>
5. The definition of “consumer product” requires that the CPSC be able to obtain a free “sample” of a product or purchase a product at cost—neither of which requirements are practicable for the Swiss Skyride.<sup>128</sup>

After concluding that the Swiss Skyride was indeed a “consumer product”, the court considered whether the CPSA authorized the CPSC to enter the state fairgrounds to inspect the Swiss Skyride located there. On this issue, the court concluded that the CPSC had not yet satisfied the statutory requirements necessary in order to obtain a warrant to enter the Texas State Fair property.<sup>129</sup> The court based this ruling on the fact that Section 2065(a) of the CPSA limits the CPSC inspection jurisdiction to “any factory, warehouse, or establishment in which consumer products are manufactured or held, in connection with distribution in commerce.”<sup>130</sup> In light of this requirement, the court concluded that the CPSC had not established that the Texas State Fair fell within the scope of these limits and, therefore, the CPSC could not enter and inspect because the “multitudinous facets of the right to be let alone are not merely classroom ideals but are core constitutional concepts.”<sup>131</sup>

The end result was that the trial court agreed with the CPSC that the Swiss Skyride was a “consumer product” but disagreed that the CPSC had the authority to enter the state fairgrounds to inspect this consumer product. Unfortunately for the Texas State Fair, this “procedural” victory was to be short-lived as the Fifth Circuit would soon demonstrate.

Both sides appealed the trial court’s judgment; the Texas State Fair appealed the ruling that the Swiss Skyride was a “consumer product” and the CPSC appealed the ruling that it did not have authority to enter the state fairgrounds to inspect the Swiss Skyride.<sup>132</sup> In a split decision, the majority upheld the trial court’s ruling that the Swiss Skyride was a “consumer product” and overturned the trial court’s ruling that the CPSC had not established any basis by which it was authorized to enter the state fairgrounds to inspect the Swiss Skyride.<sup>133</sup> In particular, the circuit court found that the trial court’s

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<sup>126</sup> The court rejected this argument for essentially the same reasons that the *Chance* court rejected this argument. *Id.* at 1077-1078.

<sup>127</sup> The court rejected this argument because it failed to consider Section (ii) of the “consumer product” definition that provided “production for consumer” use as an alternative to Section (i)’s production for consumer sale option. *Id.* at 1078.

<sup>128</sup> This argument is the only one that the court considered “forceful” in any respect. Even so, the court ultimately dismissed this argument too by finding that “[a]ny inconsistency is peripheral at best because there is nothing in the idea that the Commission is authorized to obtain samples that leads one to the conclusion that where it is impractical to do so, no right of inspection was intended. The Commission is authorized, not required to, sample.” *Id.*

<sup>129</sup> *Id.* at 1082.

<sup>130</sup> 15 U.S.C. § 2065(a).

<sup>131</sup> 481 F.Supp. at 1081.

<sup>132</sup> *The State Fair of Texas v. United States CPSC*, 650 F.2d 1324, 1325 (5<sup>th</sup> Cir. 1981).

<sup>133</sup> *Id.*

interpretation of where a consumer product could be inspected was too narrow because the Skyride was indeed “assembled” at the Texas State Fair.<sup>134</sup> The court based this finding on what it perceived to be the impractical consequences of the trial court’s ruling: “[w]henever a product can be assembled only on the purchaser’s site, the Commission must either have the authority to inspect the functioning product there or be in most circumstances unable to inspect it at all.”<sup>135</sup>

On the issue of whether the Swiss Skyride was a “consumer product”, the majority opinion essentially adopted the reasoning of the trial court in rejecting the Texas State Fair’s arguments. The result is that, like *Chance*, this case was ultimately decided by statutory interpretation and legislative histories findings. In other words, the parties continued to approach the issue from an angle of “can the CPSC” instead of “should the CPSC”.<sup>136</sup> While the *Chance* and *State Fair of Texas* decisions seemed to demonstrate a trend toward defining amusement rides as “consumer products”, two other cases were working themselves through the courts and would ultimately hold just the opposite.

On April 17, 1979—roughly eight months before the trial court’s ruling in the *State Fair of Texas* case—a federal court in California issued the first opinion holding that amusement rides *did not* fall within in the CPSC’s definition of “consumer product”. *Walt Disney Productions v. United States CPSC*<sup>137</sup> also involved an attempt by the CPSC to inspect other Skyride-like attractions—in this case at the Disneyland park in Anaheim, California and at the Walt Disney World park in Lake Buena Vista, Florida. This dispute began, on December 5, 1978, when the CPSC sent letters to Disney announcing that it was opening an investigation into Skyrides and that Disney must provide the CPSC certain information regarding its Skyrides pursuant to this investigation.<sup>138</sup>

In response to these letters, Disney sought declaratory relief from the court in the form of a judgment that these Skyrides did not fall within the CPSC’s definition of “consumer product”. The court granted such relief after concluding that the rides at issue are not “consumer products” because “the Act and its history supports an interpretation limiting the term ‘consumer product’ to products that might customarily be owned and/or operated by consumers.”<sup>139</sup> In particular, the court concluded that:

When a customer at Disneyland or Walt Disney World purchases a ride on a Skyride, he or she purchases only the right to occupy the installation

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<sup>134</sup> *Id.* at 1334.

<sup>135</sup> *Id.*

<sup>136</sup> In fact, of these two matters, the only mention of the propriety of the CPSC attempts to federalize amusement park regulation occurs in a footnote of the dissenting opinion in the *State Fair of Texas* matter. In that note, the dissent concluded its opinion by pointing out that, even if the definition of “consumer product” was interpreted to exclude amusement rides from the CPSC’s jurisdiction, the exclusion would not expose riders to unregulated safety risks: “[t]here is no absence of governmental regulation of the State Fair grounds. Safety of the buildings and structure has been provided for since 1941 under the Dallas City Code.” *Id.* at 1336. Based upon this fact, one might reasonably argue that the safety of amusement riders at the State Fair would be better regulated by the entity which had been doing so for nearly 30 years (the City of Dallas) rather than the CPSC who—at that time—had just started regulating fixed-site park attractions.

<sup>137</sup> *Walt Disney Productions v. United States CPSC*, 1979 U.S. Dist. LEXIS 12996 (C.D. Cal. April 17, 1979)(rev’d on other grounds, No. 80-1006 (9th Cir. May 4, 1981)).

<sup>138</sup> *Id.* at 4-5.

<sup>139</sup> *Id.* at 7.

passively. The only ‘consumer product’ purchased is the [ride] ticket. The ride apparatus as a whole is not produced ‘for the personal use, consumption or enjoyment of a consumer...so it is not a consumer product.’<sup>140</sup>

As part of this holding, the court deftly addressed not only whether the CPSC *can* regulate amusement rides, but also whether it *should*: “[t]oo expansive a reading of the Act’s definition of a ‘consumer product’ could result in the Commission spreading [its] limited resources too thinly, and might rob consumers of the specialized agency expertise that Congress has attempted to guarantee.”<sup>141</sup>

While this decision was ultimately reversed on other grounds<sup>142</sup>, this ruling provided an important glimpse into the critical question of whether the CPSC’s entry into the field of amusement park safety regulation might actually end up decreasing overall safety in the amusement industry by replacing existing state regulatory mechanisms with the CPSC’s nascent fixed-site attraction regulatory effort. Notably, the *Disney* case was not the only decision to conclude that amusement rides were not “consumer products” though. In fact, early the next year, a decision would be issued which would ultimately place two federal circuits at odds on this matter.

In *Robert K. Bell Enterprises, Inc. v. Consumer Product Safety Commission*,<sup>143</sup> an amusement park operator again brought an action for declaratory relief against the CPSC following the Commission’s attempt to obtain information concerning another skyride-type attraction—this time located at the Tulsa, Oklahoma State Fairgrounds.<sup>144</sup> The declaratory relief action sought a judgment that the CPSC did not have jurisdiction over amusement rides at the Oklahoma State Fair.<sup>145</sup> Similar to the plaintiffs in the *State Fair of Texas* and *Disney* matters, the plaintiff in this case argued that the skyride at issue did not fall within the definition of “consumer product” and, in doing so, basically adopted the same arguments relied upon by the plaintiff in *State Fair of Texas* matter.<sup>146</sup>

And, just as the *Bell* plaintiff used similar arguments as the *State Fair of Texas* plaintiff, the trial court in *Bell* reached a similar conclusion as the trial court in *State Fair of Texas* when it concluded that the skyride at issue did indeed fall within the definition of “consumer product”.<sup>147</sup> In opting to agree with the *State Fair of Texas* court rather than the *Disney* court, this court noted the “minimal consideration of legislative history in *Disney* compared to that in *Chance*” and, as a result, decided that: “this Court will follow

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<sup>140</sup> *Id.* at 7-8 (citation omitted).

<sup>141</sup> *Id.* at 8.

<sup>142</sup> *See infra* note 136.

<sup>143</sup> *Robert K. Bell Enterprises, Inc. v. Consumer Product Safety Commission*, 484 F.Supp. 1221 (N.D.Ok. 1980).

<sup>144</sup> *Id.* at 1222.

<sup>145</sup> *Id.*

<sup>146</sup> In particular, the plaintiff focused on how the CPSC could not obtain “free samples” of the skyride and how Congress had couched much of the debate involving the original passage of the CPSA in terms of regulating “household products”. *Id.* at 1222, 1223. The plaintiff also argued that the skyride was a transportation device, rather than a consumer product, and therefore did not fall within the CPSC’s jurisdiction. *Id.*

<sup>147</sup> *Id.* at 1223.

the apparently more thoroughly researched and better-reasoned decision in *Chance*, supported by the decision in *State Fair*.”<sup>148</sup>

However, the similarity between the trial courts’ findings in *Bell* and *State Fair of Texas*, did not extend to the appellate courts’ conclusions in those matters. Where the Fifth Circuit agreed with its trial court that an amusement attraction fell within the CPSA’s definition of “consumer product”, the Tenth Circuit overturned the *Bell* trial court’s ruling of the same.<sup>149</sup>

Up until then, all of the decisions on this issue had agreed that amusement rides did not fall within the scope of the CPSA’s subsection (i) definition of “consumer product” because the Skyrides were obviously not produced or distributed “for sale” to consumers as is required by that subsection.<sup>150</sup> The primary debate was whether the same rides fell within subsection (ii)’s “for personal use” language. Until the Tenth Circuit’s decision in *Bell*, the courts appeared to make the assumption that the purpose of subsection (ii) was to enlarge the scope of what products constituted “consumer products”. In *Bell*, the Tenth Circuit rejected that conclusion.

Instead, the Tenth Circuit concluded that subsection (ii) was created only to ensure that all manners of product distribution were covered by the CPSA--beyond simply Section (i)’s inclusion of products that were *sold* to consumers.<sup>151</sup> Thus, subsection (ii) served the purpose of also including within the CPSA products that were leased to consumer, given as samples to consumers, or otherwise provided to consumers by means different from a sale and consumer purchase:

Then with the concern over distribution to consumers of articles as free samples, on approval, on lease, on loan, etc., the second clause (ii) was added. This was added to include distribution to consumers of the same things but without a sale, and thereby to include articles produced or distributed ‘for personal use, consumption or enjoyment of a consumer.’ This with (i) was to cover all types of distribution.<sup>152</sup>

The Tenth Circuit’s conclusion that subsection (ii) “was added to cover all manner of distribution and for this alone,”<sup>153</sup> led to its holding that amusement attractions did not fall within the CPSA’s definition of “consumer product” and, therefore, did not

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<sup>148</sup> *Id.* at 1226. The plaintiff in *Bell* also argued that the CPSA’s provision allowing the CPSC to enter certain premises to inspect consumer products violated the Fourth Amendment’s prohibition against certain search and seizures since the CPSA provision permitted the CPSC to inspect some records without a search warrant. *Id.* at 1222. The court rejected this argument by finding “no abusive process” or “unconstitutional encroachment on plaintiff’s privacy” resulting from the CPSA’s inspection provisions.

<sup>149</sup> *Robert K. Bell Enterprises, Inc. v. Consumer Product Safety Commission*, 645 F.2d 26 (10<sup>th</sup> Cir. 1981).

<sup>150</sup> 15 U.S.C. § 2052 (a)(1).

<sup>151</sup> 645 F.2d at 29.

<sup>152</sup> *Id.* at 28; *see also* *Consumer Product Safety Commission v. Anaconda Co.*, 593 F.2d 1314, 1320 (D.C.Cir. 1979)(“The legislative history reveals that clause (ii) was intended to complement clause (i) by reaching situations in which a consumer acquires the use of a product other than through a direct sale transaction...[t]ogether, clauses (i) and (ii) were designed to ensure that the definition of consumer product would encompass the various modes of distribution through which consumers acquire products and are exposed to the risks of injury associated with those products”).

<sup>153</sup> *Id.*

fall within the CPSC's jurisdiction.<sup>154</sup> The result of this decision was that the Fifth Circuit and Tenth Circuit had now issued conflicting opinions (both of which were majority 2 to 1 decisions) regarding the identical issue (whether an amusement ride falls within the CPSA's definition of "consumer product") and, remarkably, involving the same type of amusement ride (a gondola-like skyride) located at similar venues (state fairgrounds). Obviously, this matter was ripe for Supreme Court review and, indeed, the Supreme Court granted certiorari in *State Fair of Texas*.<sup>155</sup>

However, this hardly constituted a "traditional" grant of certiorari for, in the very same order, the Court also vacated the *State Fair of Texas* judgment and remanded the entire matter back to the trial court "with directions to dismiss as moot."<sup>156</sup> What caused this strange procedural posture where a case was simultaneously granted certiorari and mooted? The simple answer is: a 1981 Congressional amendment to the CPSA that occurred during the very pendency of this appeal and that finally answered the issue of whether amusement attractions fall within the CPSA's definition of "consumer product". Quite simply, rather than let the judicial branch attempt to divine the scope of the CPSA's "consumer product" definition, the 1981 amendment swiftly and precisely clarified that amusement attractions located at fixed sites do not fall within the CPSC's jurisdiction and, thus, are not subject to regulation or inspection by it.<sup>157</sup> However, while this

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<sup>154</sup> *Id.* at 30. While the most prominently discussed reason for its holding was the conclusion that Section (ii) did not simply expand the reach of Section (i) but instead addressed entirely different modes of distribution, the court cited three other arguments. Those arguments included what weight should be given to the distinction between *where* a product is used and *why* a product is used; whether the product was normally produced or distributed "for sale to consumers or for the use of consumers"; and whether a product must be under both the control and possession of the user. *Id.* at 29-30.

<sup>155</sup> *State Fair of Texas v. United States Consumer Product Safety Commission*, 454 U.S. 1026 (1981).

<sup>156</sup> *Id.*

<sup>157</sup> Significantly, this amendment did not address amusement rides operated in mobile venues such as traveling carnivals. In fact, even after 1981, the CPSC has continued to issue safety warnings regarding "mobile" amusement rides. Examples include the CPSC's investigation and eventual settlement with operators of the mobile version of the "Enterprise" amusement ride following an October 17, 1983 incident at the Texas State Fair. See Press Release, United States Consumer Product Safety Commission, CPSC Issues Alert on Amusement Park Ride (Nov. 1983), available at <http://www.cpsc.gov/cpsc/pub/prerel/prhtml83/83056.html> (last visited Feb. 24, 2004). As opposed to the Swiss Skyride which was the subject of the earlier litigation, the Enterprise was a mobile ride that was not affixed to the state fairgrounds. See also Press Release, United States Consumer Product Safety Commission, CPSC Announces Corrective Action Plan for Popular "Enterprise" Amusement Park Ride (May 10, 1984), available at <http://www.cpsc.gov/cpsc/pub/prerel/prhtml84/84031.html> (last visited Feb. 21, 2004) (detailing the corrective action plan entered into between the CPSC and the owners of mobile versions of the Enterprise ride).

Another example involved a CPSC safety bulletin issued for the "Monster" amusement ride following a November 1988 incident in which one person was killed and six others were injured on a mobile version of that ride located at the Broward County, Florida Fair. See Press Release, United States Consumer Product Safety Commission, CPSC Wants "Monster" Ride Inspected for Defects (Dec. 28, 1998), available at <http://www.cpsc.gov/cpsc/pub/prerel/prhtml88/88116.html> (last visited Feb. 6, 2004). Especially interesting about this bulletin was the fact that, even though it acknowledged that the CPSC has no jurisdiction over versions of the "Monster" ride situated at fixed locations, the bulletin was nevertheless sent to owners of both the mobile and fixed versions of the ride "in an effort to ensure total ride safety." *Id.* This represents a great example of how the CPSC can still provide a valuable service to fixed-site amusement rides even in the absence of regulatory jurisdiction.

amendment promptly mooted the legal disputes over this issue, it hardly created peace in the valley. In fact, the fervor enveloping these legal disputes would pale in comparison to the legislative and political uproar that this amendment would end up causing in Congress.

### **3. 1981 Amendment to the Consumer Product Safety Act**

As with other agencies, Congress must periodically reauthorize the CPSC in order to continue its existence. The decision to reauthorize an agency is generally preceded by hearings regarding the continued necessity and viability of that agency. While these hearings are often replete with hard questions and the occasioned political grandstanding, the vast majority normally result in Congress reauthorizing the agency. However, normality was nearly the exception in 1981 when the CPSC, faced with criticism from industry and consumer groups alike came within one vote before the Health and Environment Subcommittee of the House Committee on Energy and Commerce of being effectively abolished as an independent agency.

One of the major resulting changes was that Congress implemented several new procedures that forced the CPSC to, among other things, work with industries to establish voluntary standards before it promulgated mandatory standards.<sup>158</sup> Another less comprehensive, but equally notable, change was the clarification that amusement rides at fixed-site theme parks did not fall within the CPSC's regulatory jurisdiction.<sup>159</sup> These changes would allow states to exercise their traditional police power over safety issues while simultaneously allowing the CPSC to conserve the funds and manpower that would have been necessary for a nationwide regulatory effort of fixed-site amusement parks.<sup>160</sup>

While it survived the 1981 oversight hearings, the CPSC's budget was cut 26 percent and required to enact certain reforms.<sup>161</sup> In addition to the large budget cut, one of the major 1981 Congressional mandates was a required focus on voluntary, rather than mandatory, standards.<sup>162</sup> The result of these reforms was: "to require the Commission to

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Finally, as recently as 1999, the CPSC issued a safety bulletin for the "Himalaya" amusement ride. See Press Release, United States Consumer Product Safety Commission, CPSC, Reverchon Industries Announce Repair Program for Himalaya Amusement Rides (Mar. 23, 1999), available at <http://www.cpsc.gov/cpscpub/prerel/prhtml99/99083.html> (last visited Feb. 17, 2004). This bulletin arose out of a series of incidents on this ride, including one in which three riders in Austin, Texas were ejected from their ride vehicle resulting in two serious injuries and one death. As with the "Monster" bulletin, the CPSC exercised its jurisdiction over mobile versions of the ride and also notified state safety inspectors of this potential problem with fixed-site versions.

<sup>158</sup> Pub. L. No. 97-35, 95 Stat. 724 (1981).

<sup>159</sup> *Id.*

<sup>160</sup> Admittedly, several individuals involved in the debate of the 1981 Amendment suggested that ulterior motives were the actual reason for its passage. One such individual was a former CPSC investigator, Albert Limberg, who argued that Congress actually passed the 1981 Amendment in an attempt to shield large, corporate-owned parks, such as Marriott's Great America in Santa Clara, California, from CPSC investigation and punishment. See Suzanne Espinosa Solis, *Lack of Theme Park Safety Rules Troubles Legislators*, SAN FRANCISCO CHRONICLE, June 21, 1997, available at <http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/1997/06/21/MN60781.DTL#sections>.

<sup>161</sup> H.R. REP. NO. 97-208, at 1 (1981).

<sup>162</sup> S. REP. NO. 97-102, at 4 (1981). Congress' desire for the CPSC to focus on voluntary standards rather than mandatory standards was nothing new to the CPSC. Apparently though, Congress had found the CPSC's earlier response on this issue to be insufficient:

rely more on industry self-regulation to eliminate needless overregulation and to take a closer look at its regulatory priorities in deciding how best to carry out its statutory mandate.”<sup>163</sup>

In order to accomplish the Congressional mandates of the 1981 Amendment, the CPSC recognized that, based upon its reduced funding and manpower, it must “manage [its] resources more efficiently” and place “an increased emphasis on cooperation among government, industry, and consumers.”<sup>164</sup> To do so, the CPSC would have to dramatically revise its method of operation. Among other things, these changes included an elimination of the Directorate of Field Operations, a reduction of field offices from 13 to 5, and an overall reduction in travel funds.<sup>165</sup>

These internal changes not only reduced the CPSC’s operating expenses, they also highlighted the practicality of another reform initiated by the 1981 Amendment: the clarification that fixed-site amusement parks were not included within the CPSA’s definition of “consumer product”.<sup>166</sup> The goal of this reform was to encourage states to “assume greater responsibility for the safety of amusement rides located at permanent sites.”<sup>167</sup> At first glance, the proposition of keeping fixed-site amusement attraction regulation within the states’ province seemed like a strong idea because of the practical budgetary problems faced by the CPSC as well as the theoretical federalism issues involved in the federal government usurping an area of traditional police power. However, as with many things, looks can be either deceiving or, at least, perceived to be deceiving. Such was the case as this issue entered the often-curious world of Congressional debate.

#### **4. The Continued Battles in Congress Over the 1981 Amendment: 1983-1988**

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Many witnesses testified that the Commission has failed to encourage or support voluntary efforts by industry members to improve product safety. In addition, many believe that the Commission has overused mandatory product safety standards and bans as compared with less intrusive alternatives such as voluntary industry standards and requirements for warning labels or instructional materials for consumer information.

*Id.* at 2. The result of this insufficient response was Congress’ inclusion in the 1981 Amendment language that required the CPSC to first rely upon voluntary product standards when practicably possible. *See infra* note 158.

<sup>163</sup> *Hearing Before the Senate Subcomm. for Consumers of the Senate Comm. on Commerce, Science, and Transportation*, 97<sup>th</sup> Cong. 1 (1981)(statement of Sen. Robert W. Kasten, Jr.)

<sup>164</sup> *Id.* at 2. In fact, at the time, one CPSC commissioner describing the effect of the 1981 Amendment on the CPSC said, “[w]e have suffered a hurt. We have suffered a wound. We have suffered a debilitating blow...the monitoring agency that they expect is out there looking into the safety of these products is not going to be able to perform in the way it has in the past”. *Id.* at 11.

<sup>165</sup> *Id.* at 3.

<sup>166</sup> S. REP. NO. 97-102, at 5 (1981). “Such term includes any mechanical device which carries or conveys passengers along, around, or over a fixed or restricted route or course or within a defined area for the purpose of giving its passengers amusement, which is customarily controlled or directed by an individual who is employed for that purpose and who is not a consumer with respect to such device, and which is not permanently fixed to a site. Such term does not include such a device which is permanently fixed to a site.” Pub. L. No. 97-35, § 1213, 95 Stat. 724 (1981).

<sup>167</sup> H.R. REP. NO. 98-114, at 27 (1983).

Despite the passage of the 1981 Amendment, some legislators still felt strongly that Congress should assign regulatory authority over fixed-site amusement parks to the CPSC. As a result, beginning with the very next session, Congressmen introduced a number of bills with the intent of accomplishing that goal.

**a. 1983—1988**

The ink on the 1981 Amendment had hardly had time to dry by the time several Congressman introduced a new bill titled the Consumer Product Safety Act of 1983. This bill sought in part to provide the CPSC with regulatory jurisdiction over fixed-site amusement parks.<sup>168</sup> While not allowing the CPSC to utilize all of its statutory tools (such as the promulgation of mandatory product standards) in regulating fixed-site attractions, this bill did seek to permit the CPSC to 1) collect amusement ride information, 2) investigate amusement ride accidents, and 3) order corrective actions for certain amusement rides.<sup>169</sup>

As grounds for this quick reversal of the 1981 Amendment, the bill's proponents argued that the states had not adequately acted to institute amusement park safety laws in light of the 1981 Amendment.<sup>170</sup> Moreover, even in those states that had promulgated fixed-site attraction safety regulations, those regulations were "uneven and inconsistent."<sup>171</sup> The bill's proponents went so far as to claim that:

[t]he committee has reviewed the agency's technical capability to assume this task and believes it has the technical expertise necessary to discharge the responsibilities authorized by this section. [The] CPSC has a technical staff with expertise in the fields of mechanical, electrical and structural engineering and a staff of field personnel trained in investigative procedures.<sup>172</sup>

In fact, the supporters of the bill went even farther and suggested that the CPSC should also carefully monitor the State's own amusement park safety enforcement efforts.<sup>173</sup> Somewhat curiously though, the bill's proponents expected the CPSC to do all of this despite the fact that the CPSC had just eliminated half of its field offices addition to drastically cutting its travel funding and budget in general.

This apparent contradiction did not fall on deaf ears in Congress. In fact, the House Report on this bill contains the views of several Congressman who recognized the financial imprudence of giving an agency such as the CPSC, which had just undergone severe budget cuts, even more regulatory responsibility.<sup>174</sup> The impractical and ill-prepared nature of this immediate attempt to rescind the 1981 Amendment on this issue was summarized by the dissenting views to this bill:

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<sup>168</sup> H.R. 2668, 98th Cong. (1983).

<sup>169</sup> *Id.*; see also H.R. REP. NO. 98-114, at 27.

<sup>170</sup> H.R. REP. NO. 98-114, at 27.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 28.

<sup>173</sup> *Id.* at 29.

<sup>174</sup> *Id.* at 48.

This amendment, unwisely in our view, reverses action taken by Congress in 1981 denying the CPSC jurisdiction over fixed-site amusement parks. At that time, Congress was persuaded that the States can sufficiently regulate such parks and that the Commission is ill-equipped to so regulate. We are unaware of any facts that have occurred in the last 2 years which would lead us to conclude that a change in the present law is warranted.<sup>175</sup>

While the bill did pass out of committee, the committee's dissenting view ultimately prevailed and the bill was defeated. However, the effort to reverse the 1981 Amendment would not end with that defeat for, on June 6, 1984 Representative Paul Simon of Illinois introduced the Amusement Park Safety Act of 1984.<sup>176</sup> This bill sought to permit (but not require) the CPSC to inspect fixed-site amusement parks in states without existing regulations or, in the case of a fatality or personal injury requiring hospitalization, any state regardless of whether it had legislation in place.

Representative Simon's interest in this issue was piqued following several amusement park incidents at parks located in Illinois, including a May 22, 1984 incident at the Great America amusement park in Gurnee, Illinois where three riders were injured after falling 60 feet to the ground while their ride vehicle was ascending the attraction.<sup>177</sup> This bill passed the House of Representatives but failed to pass out of committee in the Senate.<sup>178</sup> Later that year, Congressman Simon was elected to one of Illinois' United States Senate seats. And, with him to the Senate, went his efforts to federalize fixed-site amusement park safety regulation.

On March 20, 1985, now-Senator Paul Simon introduced the Amusement Park Safety Act.<sup>179</sup> This bill, supported by three of the major consumer groups at the time<sup>180</sup>, sought to empower the CPSC to regulate fixed site amusement parks in those states (26 at the time<sup>181</sup>) that had not passed state regulations.<sup>182</sup> This bill also sought to grant the CPSC authority to investigate any serious accident or fatality—again regardless of whether the state in which the incident occurred had passed legislation governing fixed-site amusement parks.<sup>183</sup> In essence, this bill created a dual system where states would have the first opportunity to enact safety regulations and, if they chose not to do so, then the federal government would then assume that responsibility: “[f]or those States that have no regulation, the Simon [bill] would authorize the Consumer Protection Safety

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<sup>175</sup> *Id.* at 56.

<sup>176</sup> H.R. 5790, 98th Cong. (1984).

<sup>177</sup> 131 CONG. REC. S 8606 (daily ed. June 20, 1985)(statement by Sen. Simon).

<sup>178</sup> Thomas Legislative Information on the Internet, Bill Summary and Status for the 98th Congress, available at <http://thomas.loc.gov/bss/d098query.html> (last visited Mar. 9, 2004).

<sup>179</sup> Sen. 702, 99th Cong. (1985).

<sup>180</sup> The Consumer Federation of America, the Consumer Union, and Congress Watch all supported Sen. 702. See 131 CONG. REC. S9999 (daily ed. July 24, 1985)(statement by Sen. Simon). In fact, the sponsor of the House companion bill, Rep. Waxman, claimed that “every industry group, other than the amusement park industry, is fully supportive of this bill.” See 132 CONG. REC. H380 (daily ed. Feb. 6, 1986)(statement of Rep. Waxman). Not surprisingly, no actual proof of this claim was ever entered into the official Congressional record.

<sup>181</sup> 131 CONG. REC. S9999 (daily ed. July 24, 1985)(statement by Sen. Simon).

<sup>182</sup> The House companion version of this bill was introduced by Rep. Henry Waxman on March 19, 1985 and assigned as H.R. 1596.

<sup>183</sup> S. 702, 99th Cong. (1985).

Commission to inspect rides. If a State like New Jersey maintains a system for inspection, that system would not be preempted.<sup>184</sup>

The argument for this approach was similar to the previous arguments that the federal government must get involved because too many states had still failed to pass fixed-site attraction safety regulations and, many of those that did, lacked sufficient uniformity to ensure a consistent level of public safety: “[s]ome 26 states have no amusement-ride legislation or regulation; and there are wide variations in the 24 states which do have regulations.”<sup>185</sup>

While this approach was a marked change from the initial post-1981 efforts to grant the CPSC exclusive safety governance over fixed-site attractions, both the Reagan administration and the CPSC opposed this bill.<sup>186</sup> The CPSC’s opposition was based on the fact that it did not have the budget, expertise, or manpower to do what this bill sought to do:

The Consumer Product Safety Commission and the administration oppose the Simon [bill]. The Consumer Product Safety Commission takes the position that it has other matters on its agenda of things that it thinks it should be doing, which it believes should take priority. It says that it does not have the manpower and it does not have the funds to undertake an inspection service for all the fixed-ride programs in the country.<sup>187</sup>

Not only did the CPSC oppose this approach, but it was also opposed by the amusement industry. As an alternative, the amusement industry had decided to support a different approach—in this case, Senator John Danforth’s Amusement Ride Safety Commission Act.<sup>188</sup> Under Senator Danforth’s amendment, rather than specifically deciding which level of government should regulate the safety of fixed-site attractions, Congress would establish a five-person commission charged with conducting an 18 month study of this issue and, upon its conclusion, preparing a final report for Congress.<sup>189</sup> The amendment also provided that, in the interim, the Commerce Department’s National Bureau of Standards would have the power to investigate serious accidents at fixed-site attractions if the State or local government where the accident occurred requested such assistance.<sup>190</sup>

This approach was patterned after the original NCPS bill which too provided for a study committee and final report on the issue of consumer safety regulation. The rationale for this approach was two-pronged. First, this approach would cost less than Senator Simon’s bill and did not force the CPSC to regulate an area of consumer safety the agency itself was on record as saying that it did not have the funds or expertise to effectively do so. Second, the supporters of this approach adopted a classic states’ rights argument to bolster their position: “[w]here possible...where feasible, should not our

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<sup>184</sup> 131 CONG. REC. S9999 (daily ed. July 24, 1985)(statement by Sen. Lautenberg).

<sup>185</sup> 131 CONG. REC. S9999 (daily ed. July 24, 1985)(statement of Sen. Simon).

<sup>186</sup> 131 CONG. REC. S9999 (daily ed. July 24, 1985)(statement of Sen. Danforth).

<sup>187</sup> *Id.*

<sup>188</sup> 131 CONG. REC. S9999, 43 (daily ed. July 24, 1985)(amendment offered by Sen. Danforth).

<sup>189</sup> The House companion version of this bill was introduced by Rep. Henry Hyde and assigned as H.R.J. Res. 230.

<sup>190</sup> 131 CONG. REC. S9999, 43 (daily ed. July 24, 1985)(amendment offered by Sen. Danforth).

basic predisposition in Congress be that regulation should be done at the local level and at the State level if it can be effectively done at that place?”<sup>191</sup>

After much debate on the propriety of these two approaches and a flurry of proposed amendments from both sides, both Senator Simon’s bill and Senator Danforth’s amendment ended up failing to pass out of Senate committee during that session.<sup>192</sup> This mirrored the result in the House of Representatives where a similar debate between these two approaches had ensued and where neither approach obtained enough support to pass the entire House.<sup>193</sup>

Rather than passing on, however, the issue returned again to Congress during the next session when Representative Waxman re-introduced the Amusement Park Safety Act on October 1, 1987.<sup>194</sup> This bill followed an approach similar to his earlier 1985 bill in that it sought to provide the CPSC limited jurisdiction and regulatory powers over fixed-site amusement parks:

The Commission and its enforcement staff will not be permitted to conduct routine inspections of amusement park rides in states which have passed inspection laws. The only time [the] CPSC could inspect an amusement ride in such states would be following an accident on an amusement park ride which involved a fatality or personal injury requiring hospitalization....the CPSC would be prohibited from issuing industrywide product safety standards or banning an amusement ride.<sup>195</sup>

By now, however, the moment seemed to have passed for expanding the CPSC’s jurisdiction to include fixed-site amusement parks and, thus, the bill failed to even pass out of committee. No additional bills to reverse the 1981 Amendment were introduced during the remainder of the session.

#### **b. 1989-1990**

The next session of Congress brought another effort to expand the CPSC’s regulatory jurisdiction to fixed-site amusement parks. This effort commenced on January 31, 1989 when Representative Frank Guarini introduced the Amusement Parks Safety Act.<sup>196</sup> This bill was broader than the previously introduced legislation on this issue in that it did not limit the CPSC’s jurisdiction to just those states without existing fixed-site

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<sup>191</sup> 131 CONG. REC. S9999 (daily ed. July 24, 1985)(statement of Sen. Danforth).

<sup>192</sup> One additional effort to pass a bill establishing a temporary amusement park safety commission was made on February 6, 1986 when Rep. Dannemeyer from California introduced House Amendment 743 to Rep. Waxman’s Amusement Park Safety Act. *See* H.R. Amend. 743, 99th Cong. (1986) (amendment to H.R. 1596). This amendment failed by a vote of 189 ayes to 200 nays. *See* 132 CONG. REC. H380 (daily ed. Feb. 6, 1986). Also, Rep. Waxman’s bill died after it was added to House Resolution 3456 that was later tabled by the full House of Representatives. *See* H.R. REP. NO. 99-377 (1985).

<sup>193</sup> For a text of the major (and quite interesting) House floor debate on these approaches, *see* 132 CONG. REC. H380 (daily ed. Feb. 6, 1986).

<sup>194</sup> H.R. 3412, 100th Cong. (1987).

<sup>195</sup> 133 CONG. REC. E3809 (daily ed. Oct. 1, 1987)(statement of Rep. Waxman).

<sup>196</sup> H.R. 729, 101st Cong. (1989). Rep. Guarini had also introduced this bill in the previous session. *See* H.R. 165, 100<sup>th</sup> Cong. (1987).

attraction safety regulations. Instead, the bill sought to allow the CPSC to inspect all amusement devices “at reasonable times and in a reasonable manner.”<sup>197</sup>

While this bill was never passed out of committee, the limited CPSC jurisdiction approach previously advocated by Representative Waxman was re-introduced during the same session as part of the Consumer Product Safety Improvement Act of 1989—a bill which dealt with a variety of CPSC governance issues in addition to fixed-site attraction safety regulation.<sup>198</sup> However, following a series of legislative maneuvers where this bill was, at several different stages: a) combined with another bill; b) tabled; and, c) then re-considered as part of another Senate bill, the part of the bill that assigned fixed-site attraction jurisdiction to the CPSC was ultimately removed from the final conference report in order to secure passage of other portions of the bill (including, most notably, the federal regulation of All Terrain Vehicles—a topic that was quickly replacing amusement parks as public safety enemy #1 in the eyes of many legislators and consumer groups).<sup>199</sup> This removal concluded a tumultuous ten-year debate on this issue which at least one legislator termed the CPSC’s “difficult decade”.<sup>200</sup> Following this defeat, the issue then disappeared from Congress for nearly an entire decade.

### c. 1991-2004

From 1991 through 1998, the supporters of reversing the 1981 Amendment and providing the CPSC with regulatory jurisdiction over fixed-site attractions appeared to be on hiatus, with very little legislative discussion being directed toward the issue. In 1999, however, this highly controversial issue was revisited for the first time in nearly a decade when Representative Edward Markey from Massachusetts led a renewed effort to grant the CPSC regulatory jurisdiction over fixed-site attractions by introducing the National Amusement Safety Act of 1999.<sup>201</sup>

Representative Markey introduced this bill following a series of amusement park fatalities during the last week of August 1999. During that week—one which a leading national magazine termed “one of the most calamitous weeks in the history of America’s amusement parks”<sup>202</sup>—a 12-year-old child died after falling through a harness on a ride at Great America’s Santa Clara park and a 20-year-old man, as well as a 39-year-old woman and her 8-year-old daughter, died on roller coasters at Paramount’s King’s Dominion Park in Virginia and Gillian’s Wonderland Pier park in New Jersey respectively.<sup>203</sup> While admitting that “roller coasters are, in general, quite safe”,

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<sup>197</sup> *Id.*

<sup>198</sup> H.R. 1762, 101st Cong. (1989).

<sup>199</sup> 136 Cong. Rec. H11906 (daily ed. Oct. 23, 1990)(conference report on H.R. 5465).

<sup>200</sup> *Id.* at 2.

<sup>201</sup> H.R. 3032, 106th Cong. (1999).

<sup>202</sup> Marc Silver et al., *Fatal Attractions*, U.S. NEWS AND WORLD REPORT, Sept. 13, 1999.

<sup>203</sup> The 12-year old boy somehow fell from the Drop Zone freefall thrill ride. His safety harness was locked both before and after the ride. Park officials said that the boy had “severe mental and physical handicaps”, but nothing that would disqualify him from riding. Ultimate Rollercoaster.com, *12-Year Old Falls to Death at Paramount’s Great America*, (Aug. 24, 1999), at [http://www.ultimaterollercoaster.com/news/archives/august99/stories/082499\\_01.shtml](http://www.ultimaterollercoaster.com/news/archives/august99/stories/082499_01.shtml) (last visited Feb. 27, 2004).

The college student was riding the Shockwave roller coaster when he “squeeze[ed] and wiggle[d]” his way out of his harness, according to a friend riding with him. He then came out of the car when it

Representative Markey concluded that the potentially “catastrophic” consequences of amusement parks without federal regulation outweighed any existing safety record.<sup>204</sup>

Notably, this short, one page bill eschewed the previous 1980s attempts by Senator Simon and others to divide regulatory responsibilities between the states and the federal government and, instead, sought to empower the federal government with near exclusive regulatory authority over fixed-site attractions by closing what Representative Markey was calling the 1981 “Rollercoaster Loophole”<sup>205</sup>:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

#### SECTION 1. SHORT TITLE.

This Act may be cited as the ‘National Amusement Park Ride Safety Act of 1999’.

#### SEC. 2. JURISDICTION OVER FIXED SITE AMUSEMENT RIDES.

Section 3(1) of the Consumer Product Safety Act (15 U.S.C. 2052(1)) is amended--

(1) in the second sentence, by striking ‘, and which is not permanently fixed to a site’; and

(2) by striking the third sentence.

#### SEC. 3. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated to the Consumer Product Safety Commission \$500,000 for each fiscal year to enable the Commission to carry out the Consumer Product Safety Act as amended by section 2.<sup>206</sup>

As opposed to the extensive efforts of the Simon approach or the Danforth approach during the 1980s to federally address the issue of fixed-site attraction safety, the Markey approach essentially did nothing more than specifically repeal the 1981 Amendment concerning fixed-site attractions. In other words, the Markey bill simply sought to restore the 1981 *status quo*. Considering that the status quo was that two circuit courts had disagreed whether fixed-site attractions fell within the CPSC’s definition of

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passed around the final corner. The Shockwave is a stand-up style roller coaster that reaches speeds of 50 mph. According to park officials, this was the first serious injury or death on the coaster since it opened in 1986. Ultimate Rollercoaster.com, *Shockwave Coaster Accident Blamed On Rider Misconduct* (Aug. 31, 1999), at [http://www.ultimaterollercoaster.com/news/archives/august99/stories/083199\\_02.shtml](http://www.ultimaterollercoaster.com/news/archives/august99/stories/083199_02.shtml) (last visited Feb. 27, 2004).

The mother and child were riding the Wild Wonder roller coaster that opened the previous July. A car ahead of them slipped back down the hill, rounded a corner and crashed into the pair’s waiting car. Ultimate Rollercoaster.com, *Two Killed In Roller Coaster Mishap Saturday* (Aug. 31, 1999), at [http://www.ultimaterollercoaster.com/news/archives/august99/stories/083199\\_04.shtml](http://www.ultimaterollercoaster.com/news/archives/august99/stories/083199_04.shtml).

<sup>204</sup> 145 CONG. REC. E2042 (daily ed. Oct. 6, 1999)(statement of Rep. Markey).

<sup>205</sup> Interestingly, Rep. Henry Waxman—who had previously sponsored the 1980s legislation that would have allowed states with safety regulations to retain such regulatory authority—was also one of the original sponsors of this current legislation which did not contain such a balance of responsibilities between the states and the federal government.

<sup>206</sup> H.R. 3032, 106th Cong (1999).

“consumer product” and that the United States Supreme Court had not yet finally resolved that disagreement among the circuit courts, the reality of this approach was that it simply restored the pending litigation regarding what activities or products fell within the definition of “consumer product” under the CPSA.

On May 16, 2000, the House Subcommittee on Telecommunications, Trade, and Consumer Protection held an extensive hearing on this issue.<sup>207</sup> During this hearing, representatives from both industry groups and consumer groups, as well as personnel from the CPSC, offered testimony on this issue.<sup>208</sup> Predictably, the testimony cut along lines with the amusement industry opposed to the Markey bill and consumer groups supporting it. Ultimately, the bill died in committee during that session.

However, as was the case in the early 1980s, the proponents of this effort would not go quietly. On April 4, 2001, Representative Markey re-introduced the National Amusement Park Ride Safety Act of 2001.<sup>209</sup> This bill was essentially the same as the Amusement Park Ride Safety Act of 1999 in that it sought to rescind the 1981 amendment and appropriate \$500,000 to the CPSC to regulate fixed-site attractions.

Notably, this bill did differ from the 1999 legislation in that the 1999 bill had 52 cosponsors and received a full subcommittee hearing while the 2001 bill could garner only 19 cosponsors and did not receive a subcommittee hearing.<sup>210</sup> Ultimately, the one major trait that the 2001 bill had most in common with the 1999 bill was that it also died in committee.

Despite its apparent declining support, on May 22, 2003, Representative Markey again returned to this issue when he introduced the National Amusement Park Ride Safety Act of 2003.<sup>211</sup> This bill was essentially a duplicate of the 1999 and 2001 bills again primarily seeking to repeal the 1981 amendment. Apparently hoping to avoid the same fate as his previous two bills, Representative Markey publicized that a variety of consumer groups, as well as the American Academy of Pediatrics, as supporting this bill.<sup>212</sup> This bill also attempted to seize upon the fact that, several weeks before its introduction, an 11 year old child died while riding a rollercoaster at the Six Flags Great America park in Gurnee, Illinois.<sup>213</sup>

As of the date of this article, the 2003 bill remains in committee. No hearings have occurred on this bill and fewer than 20 co-sponsors have signed on. Nevertheless, because this issue is just one or two deadly accidents away from being thrust back into the public spotlight, one very important question must still be addressed: should the safety of fixed-site amusement parks be federally or state regulated? A careful review of all the facts concerning this issue demonstrates that the current federal effort to assign

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<sup>207</sup> 146 CONG. REC. D474 (daily ed. May 16, 2000).

<sup>208</sup> *Id.*

<sup>209</sup> H.R. 1488, 107th Cong. (2001).

<sup>210</sup> See Lexis 1999 Bill Tracking H.R. 3032; 106 Bill Tracking H.R. 3032 and Lexis 2001 Bill Tracking H.R. 1488; 107 Bill Tracking H.R. 1488.

<sup>211</sup> H.R. 2207, 108th Cong. (2003).

<sup>212</sup> 149 CONG. REC. E1060 (daily ed. May 22, 2003)(statement of Rep. Markey).

<sup>213</sup> On May 11, 2003, while riding the “Raging Bull” roller coaster, the child went into apparent respiratory distress. Reports at the time suggested that the child had choked on a piece of gum. NBC Chicago Affiliate, *Is Rollercoaster Thrill Worth The Ride* (May 13, 2003), at <http://www.nbc5.com/news/2198299/detail.html> (last visited Mar. 9, 2004). Ultimately, the coroner’s report concluded that the child suffered a cardiac event that led to her death.

jurisdiction over fixed-site attractions to the CPSC is founded upon faulty facts and a flawed rationale—and may even go so far as to decreasing, rather than increasing, consumer safety.

### **III. A Critical Analysis of Why Fixed-Site Amusement Park Safety Regulation Should Remain a State-Governed Issue.**

The current efforts, led by Representative Markey, to re-assign safety regulatory authority over fixed-site park attractions to the CPSC are based on four general arguments.<sup>214</sup> Significantly, a careful review of each argument reveals that all four are flawed to the point of fundamentally undermining objective support for this proposed action. These flaws are best demonstrated by the faulty facts and logic upon the proponents of NAPRSA base their arguments.

The end result is that enacting NAPRSA would create such procedural and substantive confusion and inefficiency that it enacting could very well *increase* the safety risk to guests at fixed-site attractions rather than decrease it. As a result, the following analysis seeks to debunk the primary arguments in favor of NAPRSA and demonstrate why fixed-site amusement park safety regulation should remain a state-governed issue.

In addition, appended to this section is a spreadsheet that contains a detailed analysis of all existing state fixed-site attraction safety regulations. Finally, based upon this extensive analysis, this section offers a proposed model state law for the safety governance of fixed-site amusement attractions.

#### **Error #1:**

*“The number of serious injuries on ‘fixed location’ rides has risen dramatically from 1994 through 1998.”<sup>215</sup>*

During each of the three Congressional sessions that the NAPRSA has been introduced, its supporters have relied upon the argument that fixed-site attraction accidents have been on the increase: “[t]he accident statistics highlight the folly of granting an exemption from federal safety regulation to amusement park rides. Injuries are rising rapidly on the one category of amusement park rides that the CPSC is barred from overseeing.”<sup>216</sup>

Specific claims by the bill’s supporters have included: “[e]mergency room injuries more than doubled in the last five years”<sup>217</sup> and “[b]eginning in 1996, a sharp upward trend can be seen in hospital emergency room visits by passengers on ‘fixed’ rides...These injuries soared 96 percent over the next five years.”<sup>218</sup>

As a basis for these claims, the bill’s proponents have relied upon consumer injury statistics derived from the National Electronic Injury Surveillance System (“NEISS”). However, a careful review of the NEISS reveals that its statistics regarding

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<sup>214</sup> While other arguments than these may certainly exist, a review of available public materials regarding the current bill reveals that most efforts and comments by the bill’s supporters are centered around these four general arguments.

<sup>215</sup> 145 CONG. REC. E2042 (daily ed. Oct. 6, 1999)(statement of Rep. Markey).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> 149 CONG. REC. E1060 (daily ed. May 22, 2003)(statement of Rep. Markey).

consumer injuries on fixed-site attractions is simply unreliable—primarily because of the flawed methodology used to develop these statistics. In fact, not only have independent studies recognized these flaws, but the CPSC itself has now acknowledged that the NEISS fixed-site attraction injury statistics are unreliable. To understand why these statistics are unreliable, one must first understand the NEISS itself.

**A. The History and Development of the National Electronic Injury Surveillance System.**

The CPSC uses the NEISS to provide it with consumer injury statistics involving fixed-site attractions. It is a “probability sample of hospital emergency departments in the United States and its territories.”<sup>219</sup> The NEISS is designed to “produce national estimates of the number of consumer products-related injuries treated in hospital emergency rooms.”<sup>220</sup> Essentially, the NEISS is analogous to a national political poll on an issue or candidate. Like those polls, the NEISS results are not generated from a complete census of all hospitals (or voters) but are obtained using a mathematical equation to create a reliable representative sample of hospitals (or voters).

The NEISS was created in 1971<sup>221</sup> using a sample of 119 hospitals in an attempt to quantify the number of consumer product injuries.<sup>222</sup> In October 1978, the NEISS was redesigned using a new sample based upon an updated inventory of U.S. hospitals.<sup>223</sup> The 1978 redesign also changed the way the NEISS was organized by dividing the sample hospitals into four strata based on size.<sup>224</sup> This stratified approach allows for a more precise manipulation of the NEISS data than the initial non-stratified approach because it further sub-categorizes the data itself.

In 1989 and 1991, the NEISS sample was again updated to use a more updated hospital inventory in the former case and to increase the overall sample size in the latter case.<sup>225</sup> The NEISS sample was again redesigned in 1997 to incorporate the latest available U.S. hospital inventory as well as make minor structural changes.<sup>226</sup> Finally, in 1999, the CPSC began to adjust the NEISS sample annually to insure that it used the most updated hospital inventory (and, thus, obtained the most reliable data).<sup>227</sup>

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<sup>219</sup> TOM SCHROEDER & KIMBERLY AULT, U.S. CONSUMER PROD. SAFETY COMM’N THE NEISS SAMPLE (DESIGN AND IMPLEMENTATION) 1997 TO PRESENT 1 (2001), *available at* <http://www.cpsc.gov/neiss/2001d010-6b6.pdf> (last visited Mar. 9, 2004).

<sup>220</sup> *Id.*

<sup>221</sup> Because the CPSC did not become operational until July 1973, the Food and Drug Administration’s Bureau of Product Safety initially administered the NEISS from its creation in May 1971 until the CPSC’s commencement in July 1973. *Id.*

<sup>222</sup> TOM SCHROEDER & KIMBERLY AULT, U.S. CONSUMER PRODUCT SAFETY COMMISSION THE NEISS SAMPLE (DESIGN AND IMPLEMENTATION) 1979 TO 1996 1 (2001), *available at* <http://www.cpsc.gov/neiss/2001d011-6b6.pdf> (last visited Mar. 9, 2004).

<sup>223</sup> *Id.* The original plan was for the new sample to use a total of 130 hospitals; however, budget cuts reduced the sample amount to only 74 hospitals. This sample was further reduced to only 64 hospitals following a series of 1984 budget reductions. *Id.* at 2.

<sup>224</sup> *Id.* at 1. A fifth stratum was created exclusively for hospitals that maintained burn centers.

<sup>225</sup> *Id.* at 2.

<sup>226</sup> SCHROEDER & AULT, *supra* n. 5, at 1. One such change was revising the fifth stratum to represent children’s hospitals rather than hospitals with burn centers.

<sup>227</sup> *Id.* at 2-3.

Another major change occurred in 2000 when the CPSC decided to expand the NEISS to collect data on all hospital treated injuries rather than just those resulting from consumer product use.<sup>228</sup> This expansion allowed the CPSC to generate data from a variety of other circumstances, including injuries in which there is no specific product mentioned and injuries for products that fall outside the jurisdiction of the CPSC.<sup>229</sup>

Information is collected for analysis under the NEISS by four methods:

1. continual and routine surveillance of emergency department injuries from NEISS sample hospitals;
2. non-routine special surveillance projects (this method is usually reserved for CPSC research into specific types of injuries or products);
3. CPSC telephone interviews of specific injury victims or witnesses (this method constitutes less than 1% of all cases and is usually also reserved for specific research projects);
4. CPSC on-site investigations (this method is utilized even less often than the telephone interviews).<sup>230</sup>

The procedure for obtaining data generated by the continual and routine surveillance method involves a system in which the type of injury and other basic patient information is entered onto the patient's medical record each time a patient presents herself to a NEISS sample hospital's emergency department.<sup>231</sup> Each evening, a hospital-designated NEISS coordinator enters the relevant information using a special NEISS coding manual and then transmits that data via electronic means to the CPSC's internal database where it is then manipulated to generate consumer injury statistics.<sup>232</sup>

Overall, the NEISS appears to be a highly-credible source for statistical consumer injury information. And, in fact, proponents of NAPRSA have supported their claims that fixed-site amusement ride injuries have dramatically increased by using NEISS-generated data. Simply put, the presumed credibility of the NEISS injury data serves as a core foundation for NAPRSA's attempt to federalize fixed-site amusement park safety regulations. It stands to reason then that, if the NEISS data relied upon by proponents of NAPRSA to evidence an alleged increase in fixed-site amusement ride injuries was flawed, then that argument itself would be flawed and unreliable.

#### **B. Independent Studies Have Concluded that the NEISS Statistics for Consumer Fixed-site Attraction Injuries are Unreliable.**

While the NAPRSA proponents point to an alleged "dramatic" increase in fixed-site attraction injuries as grounds for federalizing fixed-site attraction regulation, several recent independent studies have demonstrated that, not only have such injuries *not* increased, but, in some instances, they have actually decreased. One report, for example,

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<sup>228</sup> U.S. CONSUMER PROD. SAFETY COMM'N, NEISS: THE NATIONAL ELECTRONIC INJURY SURVEILLANCE SYSTEM: A TOOL FOR RESEARCHERS 6 (2000), *available at* <http://www.cpsc.gov/neiss/2000d015.pdf> (last visited Mar. 9, 2004).

<sup>229</sup> *Id.* at 6.

<sup>230</sup> *Id.* at 7-11.

<sup>231</sup> *Id.* at 8.

<sup>232</sup> *Id.* at 9.

involved a detailed analysis of various engineering and scientific literature (including CPSC materials).<sup>233</sup> This report plainly concluded that a variety of deficiencies precluded any credible reliance on the NEISS injury data as developed by the CPSC:

The use of a single product code that includes amusement attractions of all types, the mis-match between the geographic distribution of amusement parks and NEISS hospitals, changes in the sample of hospitals beginning in 1997, and the redaction of ride and park specific identifiers reduces the usefulness of NEISS data for estimating amusement park ride injuries and assessing trends.<sup>234</sup>

These deficiencies clearly demonstrate the inherent unreliability of the claims by the supporters of NAPRSA that consumer fixed-site attraction injuries are increasing—since those claims are based on the CPSC’s flawed methodology of using the NEISS data.

The report, however, did not just demonstrate the unreliability of the CPSC’s use of the NEISS data. Instead, the report took the important additional step of re-analyzing the raw NEISS data in light of the identified deficiencies in the CPSC’s methodology for analyzing the same data. After developing a revised and more accurate methodology for analyzing the raw NEISS statistics, this report concluded (among other things) that:

1. “[A]nalysis of CPSC NEISS data from 1997-2001 showed no statistical increase in the national estimate of the number of injuries associated with fixed site amusement park attractions over that time period while attendance has increased.”<sup>235</sup>
2. “[A]nalysis of CPSC NEISS data from 1997 to 2001 indicate[s] that risk of injury associated with fixed site amusement parks has not exhibited a statistically significant trend during that time. Risk of injury associated with fixed site amusement park attractions has dropped in each of the last two years.”<sup>236</sup>

The clear result is that, while NAPRSA proponents assert that consumer fixed-site attraction injuries have increased—thus, warranting federal intervention—an independent analysis of the raw injury statistics directly refutes that claim.

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<sup>233</sup> EXPONENT FAILURE ANALYSIS ASSOCIATES, INVESTIGATION OF AMUSEMENT PARK AND ROLLER COASTER INJURY LIKELIHOOD AND SEVERITY (2002), *available at* <http://www.emerson-associates.com/safety/articles/ExponentReport.pdf> (last visited Mar. 9, 2004). While a fixed-site park operator commissioned this report, there is no indication, much less accusation, that that commission has affected the results of this report.

<sup>234</sup> *Id.* at 2.

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* Again, while the findings refers to “NEISS data”, the methodology of analyzing the NEISS data for this report differed from the CPSC’s methodology of analyzing the same data and resulted in a more accurate measurement of consumer fixed-site park injuries. For a comparison of the two methodologies, *see Id.* at 44. In the end, it is not the concept of the NEISS that is flawed but, rather, the CPSC’s execution of that concept.

Another report, this one prepared by the American Association of Neurological Surgeons, further demonstrated the inherent flaws of the CPSC NEISS data relied upon by the supporters of NAPRSA.<sup>237</sup> Like the first study, this study also found various deficiencies with the CPSC's NEISS data, including injury coding that was too generalized, hospital reporting abnormalities, and ineffective sampling methods such as small sample numbers that could "significantly skew results."<sup>238</sup> These deficiencies led the report to conclude that "[w]hile the CPSC data is probably useful for well distributed, and clearly identified product categories (*e.g.* toasters), it is not designed for determining incidence rates for these exceedingly rare and difficult to identify events."<sup>239</sup>

Other independent reports have further characterized the unreliability of the CPSC's NEISS data as everything from being plagued with a "high degree of imprecision"<sup>240</sup> to being nothing more than a "wild ass guess".<sup>241</sup> In sum, the independent reports and studies that have considered the CPSC NEISS incident statistics have roundly criticized those figures as unreliable and certainly not a sound basis for arguing that consumer fixed-site attraction injuries are on the increase. However, those outside the CPSC have not only leveled this criticism. In fact, recently, even the CPSC has acknowledged the unreliability of its very own NEISS statistics.

**C. The CPSC Itself Has Concluded that the NEISS Statistics for Consumer Fixed-Site Attraction Injuries are Unreliable.**

The CPSC itself has now concluded that its own reliance upon the NEISS statistics it generated was flawed since its current methodology is simply unreliable. In particular, the CPSC recently published a report titled, *Amusement Ride-Related Injuries and Deaths in the United States: 2003 Update*,<sup>242</sup> that stated:

Because fixed-site injuries occur in a relatively small number of locations, the sites of amusement and theme parks, the number of recorded injuries in NEISS depends to a large degree on the geographical closeness of the

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<sup>237</sup> NEURO-KNOWLEDGE, FIXED THEME PARK RIDES AND NEUROLOGICAL INJURIES: EXPERT PANEL CONSENSUS REPORT (2002), available at <http://www.emerson-associates.com/safety/articles/AANSreport.pdf> (last visited Mar. 9, 2004).

<sup>238</sup> *Id.* at 8.

<sup>239</sup> *Id.* at 8; the report was generally referring to consumer fixed-site amusement park injuries while specifically focusing on the subset of neurological injuries for the primary thrust of the report.

<sup>240</sup> *Amusement Park Industry Issues Analysis Faulting CPSC Injury Report*, CPSC Monitor, Sept. 2000, at 1, 2, available at <http://www.consumeralert.org/pubs/monitor/2000/Sep00.htm> (last visited Mar. 9, 2004)(quoting Ed Heiden, former CPSC chief policy planning economist and now principal with Heiden Associates).

<sup>241</sup> Michael W. Lynch, *Roller Coaster Regulation: Federal Safety Busybodies Turn Their Sights on Amusement Parks*, REASON ONLINE, June 28, 2001, at <http://www.reason.com/ml/ml062801.shtml> (last visited Mar. 9, 2004)(quoting Howard Fienberg, research analyst with Statistical Assessment Service, a non-profit organization that monitors the misuse of statistics in journalism and public policy areas).

<sup>242</sup> MARK S. LEVENSON, U.S. CONSUMER PROD. SAFETY COMM'N, AMUSEMENT RIDE-RELATED INJURIES AND DEATHS IN THE UNITED STATES: 2003 UPDATE (2003), available at <http://www.cpsc.gov/LIBRARY/Amus2003.pdf> (last visited Mar. 9, 2004).

NEISS hospitals to the parks. **Thus, the utility of NEISS for estimating fixed-site ride injuries may be limited.**<sup>243</sup>

The CPSC found the utility of the NEISS to estimate fixed-site attraction injuries to be so limited that it did not even include such injuries in the body of the report.<sup>244</sup> In fact, not only did the CPSC find the original NEISS statistics to be unreliable, but, upon re-analyzing these statistics, the CPSC even found at least one recent instance where yearly fixed-site attraction injuries had actually *decreased*:

Since the last report, the NEISS injury records for amusement rides have been extensively reviewed. Based on this review, historical estimates that appear in this report differ from those of previous reports. The largest difference is for the year 2001, **in which the fixed-site estimate is lower** and the mobile estimate is higher than in the previous report.<sup>245</sup>

So what does this report mean? Basically, it means that the CPSC itself does not believe that the NEISS accident statistics relied upon by the NAPRSA proponents are reliable. Considered alongside the fact that independent studies have also found these accident statistics to be unreliable, the clear import of these findings is that the claim that “the number of serious injuries on ‘fixed location’ rides has risen dramatically from 1994 through 1998” lacks any objective support and certainly does not serve as a legitimate basis for removing the responsibility of fixed-site attraction safety regulation from the states and assigning jurisdiction to the CPSC.

### **Error #2:**

*“[M]any states have simply failed to step in where the federal safety agency has been excluded.”*<sup>246</sup>

As an additional basis for federalizing all fixed-site attraction safety regulation, the proponents of NAPRSA have repeatedly pointed to the fact that several states maintain no fixed-site attraction safety law while several others maintain only cursory laws that lack any real regulatory power. While it is true that two states have not passed a fixed-site attraction safety law, and that several other states passed law with only minimal enforcement provisions, the argument that these states are “many” in nature is simply inaccurate. This inaccuracy is demonstrated by the comparative study of existing state fixed-site safety laws that is attached to this article as *Appendix A*.

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<sup>243</sup> *Id.* at 2 (emphasis added).

<sup>244</sup> *Id.* at 2 (“Because of these concerns about fixed-site injury estimates, the body of this report does not provide fixed-site ride injury estimates”).

<sup>245</sup> *Id.* at 6 (emphasis added). This finding is even more noteworthy when one considers that the type of amusement attraction that the CPSC currently regulates (mobile attractions) actually increased while the type of amusement attraction that the states regulate (fixed-site attractions) decreased.

<sup>246</sup> 145 CONG. REC. E2042 (daily ed. Oct. 6, 1999)(statement of Rep. Markey).

**A. A Review of Existing State Fixed-Site Attraction Safety Laws Reveals that the Vast Majority of States are Properly Exercising their Traditional Police Power over Public Safety.**

The study whose results are memorialized in *Appendix A* was conducted by identifying all existing state laws and/or regulations<sup>247</sup> addressing fixed-site attraction safety and then analyzing the similarities (and dissimilarities) of these laws. A review of *Appendix A* clearly reveals that a vast majority of states maintain extensive safety laws that regulate a variety of issues involving fixed-site amusement parks most notably including:

1. The requirement of pre-operation and post-operation inspections
2. The requirement that operators maintain liability insurance
3. The requirement that operators report certain types of fixed-site attraction incidents
4. The authority of the state to close or suspend operation of an attraction
5. The authority of the state to fine or otherwise penalize fixed-site attraction operators
6. The authority of the state to require certain attraction safety postings for guests<sup>248</sup>

While not all of the existing state fixed-site attraction safety laws maintain all of these types of provisions, the laws of over 40 states currently maintain at least four of these provisions (as well as additional provisions identified in *Appendix A*). Quite clearly, an actual objective review of these existing laws reveals that there is not the widespread lack of state-based fixed-site attraction regulations as claimed by the NAPRSA proponents. Simply repeating this myth at every opportunity does not prove it true. Instead, short of the states beginning a mass repeal of existing fixed-site attraction safety laws, the reality is just the opposite of the argument propounded by the NAPRSA proponent—“many states” *do* have fixed-site attraction safety laws that provide a broad range of regulatory mechanisms.

**B. State-Based Regulation of Fixed-Site Attractions Offers Concrete Advantages Over Federal-Based Fixed-Site Attraction Regulation.**

The question of *does* the federal government have legal authority to regulate fixed-site attraction (whether it be through the Commerce Clause, some type of police powers of its own that it might have accrued as a sovereign governmental entity or by other means) certainly serves as an interesting legal theory debate. However, it avoids the practical question of *should* the federal government seek to regulate fixed-site attractions. Even if the federal government maintained such a right in theory, it simply

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<sup>247</sup> In addition to those 42 states that have codified some version of a fixed-site park safety law, several other states have also promulgated additional administrative regulations that govern fixed-site attraction safety and serve to complement the codified law. *See supra* Appendix A.

<sup>248</sup> *See supra* Appendix A.

could not prudently displace the states prudently as the primary regulator of fixed-site attractions. In fact, the CPSC itself has previously recognized that, even though might have the legal authority to exercise regulatory jurisdiction in some instances, the safety issue might still be best addressed by the state governments: “[e]ven though the Consumer Product Safety Commission has authority to regulate the safety of paddle boats, the problem in this case could probably be best solved by the state or local authorities.”<sup>249</sup>

In the case of fixed-site amusement attractions, there are concrete advantages to maintaining state safety regulation of this area. For example, the CPSC has not inspected or otherwise regulated a single fixed-site attraction since 1980. Importantly, during these last twenty plus years, the engineering, operating, and maintaining of fixed-site amusement attractions has changed, with today’s attractions not only going faster, higher, and farther, but—with the development of computers and other technology—becoming much more complex than any fixed-site attraction that the CPSC briefly regulated from roughly 1976 to 1980.

Conversely, the states have much more experience at inspecting and regulating fixed-site attractions. Some states have regulated these attractions even prior to 1976, while still others have developed their programs during the interim. This has resulted in the states employing or contracting with personnel, such as attraction inspectors, who over this time have developed expertise concerning the increased complexities of fixed-site amusement attractions. If fixed-site attraction regulation was suddenly re-assigned to the federal government, the federal government would have to either train new inspectors from scratch or hire away currently trained inspectors from the states (since the states would no longer need such inspectors).

In doing so, the federal government would have to choose between relocating all of its inspectors to a central location or open up a series of regional and/or local inspection offices across the country. After all, unlike nearly all of the consumer products that the CPSC regulates, fixed-site amusement attractions cannot be shipped to a central CPSC office for testing. Either approach will result in a great expense to the CPSC to simply set up the inspection system, much less actually conduct inspections at the approximately 600 fixed-site parks across the country. The reality is that, even before the CPSC actually inspects a single fixed-site attraction, it will have invested thousands—if not millions—of dollars re-creating a system that currently exists in nearly all states.

Moreover, federalizing the entire fixed-site amusement regulation system would also eliminate the inherent advantages of maintaining an inspection operation near the actual fixed-site attractions since those attractions cannot practically be shipped to a centralized CPSC testing facility. Again, while the proximity of the inspectors might not matter if the product was one that could be promptly and, if needed, regularly shipped to a central CPSC testing facility (such as a blender or lawn mower), because of its very nature, this cannot be done with a fixed-site attraction. Thus, if an incident did occur on a fixed-site attraction, in order to most quickly respond to that incident, the CPSC would have to maintain a large set of regional and/or local offices—a very costly proposition that the CPSC has previously dismantled.

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<sup>249</sup> Memorandum from Jeanette Michael, to Harold Pellerite 1 (Oct. 21, 1975), *available at* <http://www.cpsc.gov/LIBRARY/FOIA/advisory/225.pdf> (last visited Jan. 15, 2004).

This problem goes directly to the question of whether Congress *should* federalize fixed-site amusement attraction regulation (even if it legally *could* do so) and was directly addressed during the contentious debates that followed the 1981 Amendment. In particular, during a 1985 hearing on the issue, one of the CPSC commissioners succinctly outlined the practical problem with federalizing fixed-site attraction regulation:

The record before us does not indicate a crying need that should override our current system of federalism with the practical effect of reinventing the wheel at the Federal level. The State and local governments, in cooperation with industry, have logged impressive safety records. In light of their fine work, I do not feel it is necessary to embark on a duplicative, costly Federal program. We ought to instead encourage adoption of an inspection program in those States that do not have them, but where there is a need.<sup>250</sup>

Ultimately, this CPSC commissioner concluded that the determination of who *should* regulate fixed-site attractions ought not to turn on who legally *could* but rather what level of government was best situated to do so: “[i]f we are really concerned with maximizing consumer safety...we should first ask if this job is really the legitimate function of the Federal Government or if the State and local governments are not the more appropriate holders of this regulatory responsibility.”<sup>251</sup>

A careful review of the existing state fixed-site safety laws demonstrates that, while a few exceptions do exist, state governments clearly maintain an expertise and scope of knowledge and experience that vastly outweighs the brief fixed-site safety regulatory foray by the CPSC from the late 1970s. This alone is a compelling reason why, even if the federal government *could* legally exert regulatory authority in this area, the state governments are certainly “the more appropriate holders of this regulatory responsibility.”<sup>252</sup>

C. **Even if Several States Have Not Promulgated Fixed-Site Attraction Safety Regulations, that Does Not Serve as a Sound Basis for Removing Regulatory Authority from those States that Have Promulgated Safety Regulations.**

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<sup>250</sup> *Hearing on Amusement Park Safety Before the House Subcomm. on Health, and the Environment of the House Comm. on Energy and Commerce, 98<sup>th</sup> Cong. 771 (1984).*

<sup>251</sup> *Id.* at 772.

<sup>252</sup> Transcripts of interviews and debates between the primary amusement industry trade group, the International Association of Amusement Parks and Attractions, and Congressman Markey or former CPSC Chairman Ann Brown can be found at: CBS, *How Safe Are Roller Coasters?* (June 25, 2002), available at <http://www.cbsnews.com/stories/2002/06/25/earlyshow/living/parenting/main513414.shtml> (as of Feb. 15, 2004); CNN Crossfire, *More Regulation for Roller Coasters?* (July 3, 2002), available at <http://www.cnn.com/TRANSCRIPTS/0207/03/cf.00.html> (as of Feb. 15, 2004). Both transcripts provide differing views into the current state of amusement park regulation and, in both cases, the IAAPA official discloses the fact that, while under the CPSC’s regulatory authority, the number of injuries on amusement attractions at mobile site locations has proportionally increased, thus calling into question the wisdom of any Congressional decision to further expand the scope of the CPSC’s amusement park regulatory authority if injuries are increasing within the segment of amusement attractions it currently regulates.

One of the main reasons that NAPRSA proponents offer for eliminating all state based fixed-site attraction regulation is because a very small number of states have not passed any fixed-site amusement law or have passed only cursory regulations that barely serve to provide regulatory safeguards. This is hardly a sound basis for federalizing this entire field because, as demonstrated above, it would eliminate a vast regulatory network currently in place for fixed-site attraction guests.

However, the question can be reasonably asked, *what about guests in those small minority of states with no or little safety regulation of fixed-site attractions?* Two reasonable options seem to exist: 1) permit the CPSC to regulate those states without fixed-site attraction safety laws (similar to the approach taken in the mid-1980s by Senator Simon's bill) or 2) persuade those states with no, or very little, safety regulation of fixed-site attractions to promptly pass a comprehensive fixed-site amusement attraction safety law.

When fully considered, the second option is rife with potential because it would allow the individual states to continue to experiment with the most effective methods for safeguarding guest safety on fixed-site attractions, while at the same time saving the CPSC from having to establish a nationwide inspection and enforcement network. In light of these practical benefits that could be realized by convincing states to adopt comprehensive regulations, this project undertook an effort to carefully analyze the various state-based approaches toward regulating fixed-site attractions. This effort resulted in the comparative study of all state fixed-site attraction safety laws that accompanies this article as *Appendix A*.

Persuading those states with little or no safety regulation that some legislation is required is only half the battle though. Instead, one should provide these states with guidance in drafting and enacting such a law. Therefore, in addition to the comparative study, this project has also prepared the model state fixed-site attraction safety law that is attached hereto as *Appendix B*. This model law was drafted to include those provisions from existing fixed-site attraction safety laws that were deemed to best safeguard guests. The goal of this model law is to provide all states with a framework of significant provisions from existing state laws while specifically providing those states with little or no regulation an efficient means to begin formulating a comprehensive state-based fixed-site park safety regulation.

### **Error #3:**

*"[S]tates are not equipped and not inclined to act as a national clearinghouse of safety problems associated with particular rides or with operator or patron errors."*<sup>253</sup>

As a further basis for their effort, NAPRSA proponents have essentially argued that the states are not equipped to regulate fixed-site amusement attractions and, therefore, Congress should re-assign the responsibility of fixed-site attraction regulation to the CPSC. However, in addition to the fact (as discussed above) that the CPSC currently does not possess any expertise or experience in this field, this argument fails for a very threshold reason: the CPSC does not have sufficient funding to regulate fixed-site attractions. In fact, the disparity between the amount that NAPRSA would appropriate to

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<sup>253</sup> 145 CONG. REC. E2042 (daily ed. Oct. 6, 1999)(statement of Rep. Markey).

the CPSC for this responsibility and the amount that the CPSC itself is on record as stating it will need to actually execute this new responsibility is huge.

NAPRSA seeks to appropriate \$500,000 to the CPSC to regulate fixed-site attractions: “[t]here are authorized to be appropriated to the Consumer Product Safety Commission \$500,000 for each fiscal year to enable the Commission to carry out the Consumer Product Safety Act as amended by this Act.”<sup>254</sup>

As early as 1999, however, the CPSC advised Congress that, in addition to extra staff (and the attendant costs incurred with adding staff), the CPSC would also require millions of dollars to regulate fixed-site attractions: “The Commission would require at least \$5 million dollars and additional staff to address the safety of these products.”<sup>255</sup>

Now, five years later, NAPRSA still seeks to apportion millions of dollars less the amount that CPSC has stated it would need to actually regulate fixed-site attractions.

This disparity represents a very real threat to consumer safety at fixed-site attractions and raises alarming questions regarding whether the federal government really would be sufficiently equipped to conduct a comprehensive and nationwide fixed-site attraction regulatory effort. This question must be confronted at the same time that, not only has not a single state repealed its fixed-site attraction safety law but, in fact, several states (including California, the state with the most fixed-site parks) have bolstered their own fixed-site safety regulations. Clearly, the claim by NAPRSA proponents that the states are unequipped to regulate fixed-site attractions ignores the current standing of existing state regulations as well as the financial realities that the CPSC would face were it to engage in a nationwide fixed-site regulatory program—a reality that even the CPSC itself recognizes would be substantially under funded by the proposed appropriations under NAPRSA.

The real and tangible danger confronted by fixed-site attraction guests under a federalized approach to fixed-site attraction regulation was succinctly described, by a CPSC commissioner no less, nearly twenty years ago during Congressional hearings on this issue: “[t]o provide jurisdiction over 660 fixed-site parks without the ability to properly inspect them, as obviously we could not, would be nothing short of a regulatory mirage. Sometimes in a well-intended quest for consumer guardianship we turn too easily to the Federal quick fix...”<sup>256</sup>

Nearly two decades later, NAPRSA still remains nothing more than shiny, high publicity mirage whose primary effect will be to disguise a grossly under funded and ill-equipped regulatory scheme dressed up with a glossy public relations outfit—a truly modern example of an emperor without clothes.

#### **Error #4:**

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<sup>254</sup> H.R. 2207, 108th Cong. (2003).

<sup>255</sup> Letter from Ann Brown, Consumer Product Safety Commission Chairman, to Rep. Edward Markey, D-Mass. (Sept. 15, 1999), *available at* [http://www.house.gov/markey/Issues/iss\\_parkrides\\_ltr990915.pdf](http://www.house.gov/markey/Issues/iss_parkrides_ltr990915.pdf) (last visited Feb. 27, 2004).

<sup>256</sup> *Hearing on Amusement Park Safety Before the House Subcomm. on Health, and the Environment of the House Comm. on Energy and Commerce, 98<sup>th</sup> Cong. 772 (1984).*

*“The manufacturer or owner of every other consumer product in America is required by law to inform the CPSC whenever it becomes aware that the product may pose a substantial risk of harm.”<sup>257</sup>*

NAPRSA proponents have repeatedly claimed that “[e]very other consumer product affecting interstate commerce...endures CPSC oversight.”<sup>258</sup> This argument seems to suggest that, since everything else is CPSC-regulated, then fixed-site attractions should be CPSC-regulated as well. The danger with this argument is that it emphasizes form over substance because it fails to reveal any specific reason why the CPSC would be a better regulator of this field.

Worse yet, the statement itself is inaccurate. First, it assumes that fixed-site attraction attractions are “consumer products” despite the fact that, as discussed earlier in this article, two different circuits have disagreed on that issue and the Supreme Court has not resolved this disagreement between the circuits. However, that is not the limit of this argument’s inaccuracy though.

Instead, as also discussed earlier in this article, contrary Congressman Markey’s misstatement, a variety of other products used by consumers are *not* regulated by the CPSC. The CPSC does not, for example, regulate consumer boat safety, consumer drugs, food, cosmetics, or medical devices, consumer motor vehicles or tires or consumer aircraft safety. Rather, all of these areas are regulated by federal entities other than the CPSC. Moreover, the safety of some products used by consumers—such as consumer office buildings, meeting places or homes—are not regulated by the federal government at all, but, instead, are regulated by state and local authorities.

The simple fact is that, even if NAPRSA supporters could reveal a compelling reason why consumers would actually benefit from amassing the safety regulation of all products under a single roof, the reality is that they have not. Quite simply, NAPRSA supporters erroneous statements notwithstanding, all products used by consumers are not regulated by the CPSC. Therefore, it is highly dubious for NAPRSA proponents to rely on such a claim as a basis for dismantling the existing state-based regulatory structure and replacing it with an under funded, inexperienced, and ill-equipped federal regulatory device.

#### **IV. Conclusion**

Fixed-site amusement parks are a unique type of product because all interaction with these products—whether it be their use, inspection, or otherwise—must come to the attraction rather than bringing the attraction to the one seeking interaction. For practical reasons, this has resulted in states regulating the safety of fixed-site amusement attractions within their own borders. The states have been empowered to engage in this regulation through their traditional police powers over their citizenry’s safety.

As the trend toward federalizing other types of products used by consumers has expanded, so has the pressure to fold fixed-site attraction safety regulation into the federal tent. In fact, for a brief time, the federal government—through the CPSC—engaged in such regulation. However, in 1981, Congress clarified the question that had

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<sup>257</sup> 145 CONG. REC. E2042 (daily ed. Oct. 6, 1999)(statement of Rep. Markey).

<sup>258</sup> 149 CONG. REC. E1060 at 2 (daily ed. May 22, 2003)(statement of Rep. Markey).

divided the circuit courts: did fixed-site attractions fall within the scope of the CPSC's regulatory authority? In answering no to this question, Congress opted to leave states in charge of regulating fixed-site attractions.

Since that time, nearly all of the states have passed laws doing just that, although, admittedly, a few states remain that have either no fixed-site attraction regulation or just the barest of legislation. Because effective fixed-site attraction regulation is a compelling need for the public, several members of Congress—aided by various advocacy groups—have renewed the effort to federalize fixed-site attraction regulation within the CPSC. In doing so, these proponents have offered a variety of reasons, including the erroneous assertion that fixed-site amusement ride safety has dramatically decreased during recent years as well as the inaccurate assumption that the CPSC is better-situated to conduct such a regulatory effort.

All of these arguments are fatally flawed in that they are either premised on inaccurate information or unsound logic. In fact, a careful review and analysis of existing state fixed-site attraction safety laws reveals just the opposite of what these arguments suggest. States are engaging in an increasingly thorough and, based upon independent empirical studies, more effective governance of fixed-site attraction safety. The prospect of removing this authority from the states and reassigning it to a federal agency--that admittedly has neither the funding nor the manpower to undertake such an effort--demands an immediate and objective evaluation of whether this should occur. The mere fact that the federal government may or may not have a legitimate basis for exercising such authority does not automatically mean that it *should* exercise such authority.

In the case of fixed-site amusement parks, there is absolutely no objective evidence that the federal government can more competently or effectively regulate this important and growing field. The only exception to this might be for the federal government to intervene and regulate fixed-site attractions in those states that have failed to pass a fixed-site safety law (or have failed to pass a law that is more than the barest of bones in nature). Other than these two isolated situations, once the rhetoric and demagoguery are stripped away, the result is that the objective facts and data simply do not demonstrate a need to federalize fixed-site attractions.

For these reasons, this article has endeavored to provide a detailed and objective examination into the development of this area of law as well as the existing state of fixed-site amusement attraction regulation. Upon doing so, the conclusion is very clear: the states are better-equipped and better-situated to regulate consumer use of fixed-site amusement park attractions, and should maintain their jurisdiction over the issue.

## APPENDIX A

Jurisdiction	Statutory Citation	Required Pre-Operation Inspections?	Required Inspections During Operation?	If YES, How Often?	Required Daily Inspection by Operator?	Required Government Certification or Employment of Inspectors?	Authority to Order Attraction Repairs?	Authority to Close Attraction?	Authority to Charge Permit or Inspection Fees?	Authority to Assess Penalties?	Specific Provision for Appealing Penalties?
Alabama	ALA. CODE §§ 11-51-102 (2003); 40-12-47	NO	NO	-----	NO	NO	NO	NO	YES	NO	NO
Alaska	ALASKA STAT. §§ 05.20.010-05.20.120 (2003); ALASKA ADMIN. CODE tit. 8, §§ 78.010-78.180 (2003)	YES	YES	Annually	YES	YES	YES	YES	NO	NO	YES
Arizona	NO STATUTE	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----
Arkansas	ARK. CODE ANN. §§ 23-89-501 to 23-89-518 (2003)	YES	YES	Semi-annually	NO	YES [1]	YES	YES	YES	YES	YES
California	CAL. LAB. CODE ANN. §§ 7900-7932 (LEXIS 2003)	YES	YES	Annually	NO	NO	YES	YES	YES	YES	YES
Colorado	COLO. REV. STAT. § 8-20-101 (2003); 8 COLO. CODE REGS. 1101-12 (2002)	NO	NO	-----	NO	YES	YES	YES	YES	YES	NO
Connecticut	CONN. GEN. STAT. §§ 29-129 to 29-143(a) (2003)	YES	YES	Annually	NO	YES	YES	YES	YES	YES	YES
Delaware	DEL. CODE ANN. tit. 16 § 6401-6409 (2003)	NO	YES	Annually	NO	NO	NO	YES	YES	YES	NO
DC	D.C. CODE § 47-2823 (2003)	NO	NO	-----	NO	NO	NO	NO	YES	NO	NO
Florida	FLA. STAT. § 616.242 (2003)	YES	YES [2]	Semi-annually	YES	YES	YES	YES	YES	YES	NO
Georgia	GA. CODE ANN. §§ 34-12-1 to 34-12-21 (2002)	YES	YES	Annually	NO	YES	YES	YES	YES	YES	NO
Hawaii	HAW. REV. STAT. §§ 397-1 to 397-12 (2003)	YES	YES	Semi-annually	NO	YES	YES	YES	YES	YES	YES
Idaho	IDAHO CODE §§ 54-1001 to 54-1020 (2003)	YES	NO	-----	NO	YES	YES	YES	YES	YES	NO
Illinois	430 ILL. COMP. STAT. 85/2-1 to 85/2-19 (2003)	YES	YES	Annually	NO	NO	YES	YES	YES	YES	YES
Indiana	IND. CODE §§ 22-12-1-19.1 to 22-12-4.5-8 (2003); 685 IND. ADMIN. CODE 1-1-1 to 1-5-36 (2003)	YES	YES	Annually	NO	YES	YES	YES	YES	YES	YES
Iowa	IOWA CODE §§ 88A.1-88A.17 (2003)	YES	YES	Annually	NO	NO	YES	YES	YES	YES	YES
Kansas	KAN. STAT. ANN. §§ 40-4801 to 40-4804 (2002)	NO	NO	-----	NO	NO	YES	NO	NO	NO	NO
Kentucky	KY. REV. STAT. ANN. §§ 247.232 to 247.236 (LEXIS 2002)	YES	NO	-----	NO	YES	NO	YES	YES	YES	NO
Louisiana	LA. STAT. ANN. §§ 40:1484.1 to 40:1484.13 (2003)	YES	YES	Annually	NO	YES	YES	YES	YES	YES	YES
Maine	8 ME. REV. STAT. ANN. §§ 501-502, 801-806 (2003)	YES	YES	Annually	YES	YES	YES	YES	YES	YES	NO
Maryland	MD. BUS. REG. CODE ANN. §§ 3-101 to 3-601 (2003); CODE MD. REGS. tit. 9.12§62.00-62.20 (2004)	YES	YES	Annually	YES	YES	YES	YES	NO	YES	YES
Massachusetts	MASS. ANN. LAWS ch. 140, § 205A (LEXIS 2003); 520 Code Mass. Regs. 1.00-13.14 (2004)	YES	YES	Annually	YES	YES	YES	YES	YES	YES	YES
Michigan	MICH. COMP. LAWS §§ 408.651-408.670 (2003)	YES	YES	Annually	NO	NO	YES	YES	YES	YES	NO
Minnesota	MINN. STAT. §§ 184B.01-184B.07 (2002)	YES	YES[3]	Annually	NO	NO	NO	NO	NO	YES	NO
Mississippi	MISS. CODE ANN. §21-19-33 (2003)	NO	NO	NO	NO	NO	NO	NO	NO	NO	NO

[1]Arkansas law only requires government certification or employment of inspectors for inspections during operation. [2]Florida law exempts "permanent facilities that employ at least 1,000 full-time employees and that maintain full-time, in-house safety inspectors" from its codified safety regulations. [3] Minnesota law exempts fixed-site amusement facilities that have in-house inspectors, a daily ride inspection program and a liability insurance policy not less than \$50,000,000.00 from its safety inspection regulation set forth in Minn. state. ss 184B.03.

Jurisdiction	Required Liability Insurance or Bond?	If YES, What Amount?	Required Incident Reporting?	If YES, What Type of Injuries?	If YES, Within What Time Frame?	Required Retention of Inspection or Maintenance Records?	Provision Describing Duties of Guests?	Required Posting of Safety Instruction Signs?	Ride Operator Age Restrictions?	Provision for Requesting Variance from Safety Regulations?	Provision Allowing Concurrent Municipal Regulations?	Provision Establishing Dedicated Attraction Fund?
Alabama	NO	-----	NO	-----	-----	NO	NO	NO	NO	NO	YES	NO
Alaska	YES	1 million	YES	Death/Serious Inj.	48 hrs	NO	NO	YES	YES (18)	YES	YES	NO
Arizona	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----
Arkansas	YES	1 million	YES	Death/Serious Inj.	24 hrs	YES	YES	YES	YES (16)	NO	NO	YES
California	YES	1 million	YES	Death/Serious Inj.	Immediately	NO	NO	NO	NO	YES	YES	YES
Colorado	YES	Varies	YES	"any accident"	Every two years	YES	NO	NO	NO	NO	YES	NO
Connecticut	YES	1 million	YES	Death/Serious Inj.	4 hrs	NO	NO	NO	NO	NO	NO	NO
Delaware	YES	1 million	NO	-----	-----	NO	NO	NO	NO	NO	NO	NO
DC	NO	-----	NO	-----	-----	NO	NO	NO	NO	NO	NO	NO
Florida	YES	1 million	YES	Hospitalization	4 hrs	YES	NO	YES	NO	NO	NO	NO
Georgia	YES	No set amount	YES	Death/Serious Inj.	Next Bus Day	YES	NO	NO	YES (16)	NO	NO	NO
Hawaii	NO	-----	NO	-----	-----	NO	NO	NO	NO	YES	NO	NO
Idaho	NO	-----	NO	-----	-----	NO	NO	NO	NO	NO	YES	NO
Illinois	YES	Varies	NO	-----	-----	NO	NO	NO	NO	YES	YES	NO
Indiana	NO	-----	YES	Death/Serious Inj.	4 hrs	YES	NO	NO	NO	NO	NO	NO
Iowa	YES	Varies	NO	-----	-----	NO	YES	YES	NO	NO	YES	NO
Kansas	YES	1 million	NO	-----	-----	NO	NO	NO	NO	NO	YES	NO
Kentucky	YES	Varies	NO	-----	-----	NO	NO	NO	NO	NO	NO	YES
Louisiana	YES	1 million	NO	-----	-----	NO	NO	NO	NO	NO	YES	NO
Maine	YES	No set amount	[4]	-----	-----	NO	YES	YES	NO	NO	NO	YES
Maryland	YES	Varies	YES	Death/Serious Inj.	24 hrs	YES	NO	YES	NO	YES	YES	NO
Massachusetts	YES	1 million	YES	Medical Treatment	48 hrs	YES	NO	YES	NO	NO	NO	NO
Michigan	YES	300k	[4]	-----	-----	NO	YES	YES	NO	YES	NO	NO
Minnesota	YES	1 million	NO	-----	-----	NO	NO	NO	NO	NO	NO	NO
Mississippi	NO	-----	NO	-----	-----	NO	NO	NO	NO	NO	YES	NO

[4]Maine, Michigan, Montana, and Nevada laws require guests, rather than operators, to report incidents involving injuries to themselves.

Jurisdiction	Statutory Citation	Required Pre-Operation Inspections?	Required Inspections During Operation?	If YES, How Often?	Required Daily Inspection by Operator?	Required Government Certification or Employment of Inspectors?	Authority to Order Attraction Repairs?	Authority to Close Attraction?	Authority to Charge Permit or Inspection Fees?	Authority to Assess Penalties?	Specific Provision for Appealing Penalties?
Missouri	MO. REV. STAT. §§ 316.200-316.237 (2003)	YES	YES	Annually	NO	NO	YES	NO	YES	YES	NO
Montana	MONT. CODE ANN. §§ 27-1-741 to 27-1-745 (2003)	NO	NO	-----	NO	NO	NO	NO	NO	NO	NO
Nebraska	NEB. REV. STAT. §§ 48-1801 to 48-1820 (2003)	YES	YES	Annually	NO	YES	YES	YES	YES	YES	NO
Nevada	NEV. REV. STAT. §§ 455B.010-455B.100 (2003)	NO	NO	-----	NO	NO	NO	NO	NO	NO	NO
New Hampshire	N.H. REV. STAT. ANN. §§ 321-A:1 to 321-A:9 (2002)	YES	YES	Annually	YES	YES	YES	YES	YES	YES	YES
New Jersey	N.J. STAT. ANN. §§ 5:3-31 to 5:3-59 (2003); N.J. ADMIN. CODE 5:14A-1.1 to 5:14A-9 (2004)	YES	YES	Annually	YES	YES	YES	YES	YES	YES	YES
New Mexico	N.M. STAT. ANN. §§ 57-25-1 to 57-25-6 (2003)	YES	YES	Annually	YES	YES	YES	YES	YES	YES	NO
New York	N.Y. LAB. LAW §§ 870-a to 870-m (Consol. 2003)	YES	YES	Annually	NO	NO	YES	YES	YES	YES	NO
North Carolina	N.C. GEN. STAT. §§ 95-111.1 to 95-111.18 (2003)	YES	YES	Annually	NO	NO	YES	YES	YES	YES	YES
North Dakota	N.D. CENT. CODE §§ 53-05.1-01 to 53-05.1-05 (2003)	YES	NO	-----	NO	NO	NO	NO	NO	YES	NO
Ohio	OHIO REV. CODE ANN. §§ 1711.50-1711.99 (Anderson 2003)	YES	YES	Annually	NO	YES	YES	YES	YES	YES	YES
Oklahoma	OKLA. STAT. tit. 40, §§ 460.1-469 (2003)	YES	YES	Annually	NO	NO	YES	YES	NO	YES	NO
Oregon	OR. REV. STAT. Ann. §§ 460.310-460.370 (2001)	YES	YES	Annually	NO	NO	YES	YES	YES	NO	YES
Pennsylvania	4 PA. CONSOL. STAT. ANN. §§ 401-419, 501-507 (2003)	YES	YES	Monthly	NO	YES	YES	YES	NO	YES	YES
Rhode Island	R.I. GEN. LAWS §§ 23-34.1-1 to 23-34.1-18 (2002)	YES	YES	Annually	YES	YES	YES	YES	YES	YES	NO
South Carolina	S.C. CODE ANN. §§ 41-18-10 to 41-18-150 (2002); S.C. CODE REGS. 71-4000 to 71-4950	YES	YES	Annually	YES	YES	YES	YES	YES	YES	YES
South Dakota	S.D. CODIFIED LAWS §§ 42-10-1 to 42-10-3 (2003)	NO	NO	-----	NO	NO	NO	NO	NO	NO	NO
Tennessee	TENN. CODE ANN. § 56-38-101 to 56-38-105 (2003)	NO	NO	-----	NO	NO	NO	NO	NO	YES	NO
Texas	TEX. OCC. CODE ANN. §§ 2151.001-2151.153 (2003); TEX. ADMIN. CODE tit. 28, §§ 5.9001-5.9014 (2003)	YES	YES	Annually	NO	NO	YES	[5]	YES	YES	YES
Utah	UTAH CODE ANN. § 78-27-61 (2003)	NO	NO	-----	NO	NO	NO	NO	NO	NO	NO
Vermont	Vt. STAT. ANN. tit. 31, §§ 721-724 (2003)	NO	NO	-----	NO	NO	NO	NO	YES	YES	NO
Virginia	VA. CODE ANN. § 36-98.3 (2003); 13 VA. ADMIN. CODE 5-31-10 to 5-31-180 (2003)	YES	YES	Annually	NO	NO	YES	NO	YES	NO	YES
Washington	WASH. REV. CODE §§ 67.42.010-67.42.901 (2003)	YES	YES	Annually	NO	NO	YES	YES	YES	YES	YES
West Virginia	W. VA. CODE §§ 21-10-1 to 21-10-19 (2003)	YES	YES	Annually	NO	YES	YES	YES	YES	YES	NO
Wisconsin	Wis. Stat. § 101.12 (2002); Wis. ADMIN. CODE, Com. §§ 34.001-34.43 (2003)	YES	YES	Annually	YES	YES	YES	YES	YES	YES	YES
Wyoming	NO STATUTE FOR FIXED-SITE ATTRACTIONS	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----

[5]Texas law exempts fixed-site amusement facilities with attendance greater than 200,000 guests in the preceding year from the state's authority to prohibit operation of an amusement attraction.

Jurisdiction	Required Liability Insurance or Bond?	If YES, What Amount?	Required Incident Reporting?	If YES, What Type Injuries?	If YES, Within What Time Frame?	Required Retention of Inspection or Maintenance Records?	Provision Describing Duties of Guests?	Required Posting of Safety Instruction Signs?	Ride Operator Age Restrictions?	Provision for Requesting Variance from Safety Regulations?	Provision Allowing Concurrent Municipal Regulations?	Provision Establishing Dedicated Attraction Fund?
Missouri	YES	1 million	YES	Death/Serious Inj.	Immediately	YES	YES	NO	NO	NO	YES	NO
Montana	NO	-----	[4]	-----	-----	NO	YES	YES	NO	NO	NO	NO
Nebraska	YES	[6]	YES	Death/Serious Inj.	No Specific Time	YES	NO	NO	YES (16)	NO	YES	YES
Nevada	NO	-----	[4]	-----	-----	NO	YES	YES	NO	NO	YES	NO
New Hampshire	YES	Varies	NO	-----	-----	NO	NO	NO	NO	NO	NO	NO
New Jersey	YES	1 million	YES	Non-minor injuries	Immediately	YES	YES	YES	YES (16)	YES	YES	NO
New Mexico	YES	3 million	NO	-----	-----	NO	NO	NO	NO	NO	NO	YES
New York	YES	Varies	YES	Death/Serious Inj.	Next Bus Day	NO	NO	YES	NO	NO	YES	NO
North Carolina	YES	Varies	YES	Death/Serious Inj.	24 hours	NO	NO	NO	YES (18)	YES	NO	NO
North Dakota	YES	Varies	YES	Accident	No Specific Time	YES	NO	NO	YES (16)	NO	NO	NO
Ohio	YES	Varies	YES	Accident	24 hours	YES	YES	YES	YES (16)	YES	NO	YES
Oklahoma	YES	1 million	NO	-----	-----	YES	YES	YES	NO	YES	YES	NO
Oregon	YES	Varies	NO	-----	-----	NO	NO	NO	NO	NO	NO	NO
Pennsylvania	YES	Varies	YES	Death/Serious Inj.	48 hours	NO	YES	NO	NO	YES	NO	NO
Rhode Island	YES	1 million	YES	Death/Serious Inj.	24 hours	YES	NO	NO	YES (18)	NO	NO	NO
South Carolina	YES	Varies	YES	Death/Serious Inj.	Next Bus Day	YES	NO	NO	NO	YES	NO	NO
South Dakota	YES	1million	NO	-----	-----	NO	NO	NO	NO	NO	YES	NO
Tennessee	YES	250k	NO	-----	-----	NO	NO	NO	NO	NO	NO	NO
Texas	YES	Varies	YES	Non-minor Injuries	Quarterly	YES	NO	YES	NO	NO	NO	NO
Utah	NO	-----	NO	-----	-----	NO	YES	YES	NO	NO	NO	NO
Vermont	YES	1 million	NO	-----	-----	NO	NO	NO	YES (18)	NO	NO	NO
Virginia	YES	200k	YES	Death/Serious Inj.	24 hours	NO	NO	NO	YES (16)	YES	NO	NO
Washington	YES	1 million	NO	-----	-----	NO	NO	NO	NO	NO	YES	NO
West Virginia	YES	Varies	YES	Death/Serious Inj.	24 hours	NO	YES	NO	YES (16)	NO	NO	YES
Wisconsin	NO	-----	YES	"more than first-aid"	24 hours	YES	NO	NO	YES (18)	YES	NO	NO
Wyoming	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----

[6]Nebraska law provides that the "minimum amount" of liability insurance shall not be greater than one million dollars per occurrence." Neb. Rev. Stat. Ss48-1806

## APPENDIX B

### **A Model State Statute for Fixed-Site Amusement Attraction Safety Regulation.**

#### **SECTION 1. Introduction and Purpose.**

The purpose of this [Act] shall be to establish uniform standards for the design, construction, maintenance, operation, and inspection of fixed-site amusement attractions.

#### **SECTION 2. Short Title.**

This [Act] shall be cited as the Fixed-Site Amusement Attraction Safety Act.

#### **Comment**

The statistics set forth in the Comment sections to this proposed model act have been obtained from an analysis of all existing state fixed-site amusement attraction safety laws. A compilation of the results of this research and analysis is set forth in *Appendix A* to the article entitled: *The Growing Showdown Over Who Should Regulate Amusement Attraction Safety: A Critical Analysis of Why States Should Regulate Fixed-Site Amusement Attraction Safety* by Chad D. Emerson, Assistant Professor of Law at Faulkner University, Thomas Goode Jones School of Law.

Please note that, in some cases, a state may engage in a fixed-site amusement attraction regulatory practices that are not specifically provided for by that state's fixed-site amusement attraction safety law or regulations. The compilation has attempted to include those instances within the research and analysis results when possible. Nevertheless, there may still be some states that engage in certain regulatory practices outside the specific and express scope of that state's regulatory law or regulations. Therefore, in addition to relying upon the compiled research and analysis, the author of this compilation recommends directly contacting the state entity charged with regulating fixed-site amusement attractions if more specific questions arise. A directory of state amusement attraction safety regulators can be found at: <http://www.cpsc.gov/CPSCPUB/PUBS/amuse.PDF>.

48 states and the District of Columbia currently have laws that regulate certain safety aspects of fixed-site amusement attractions. The two states without any such law are Arizona and Wyoming. At least eight other states and the District of Columbia have laws that regulate certain aspects of fixed-site amusement attraction operation, but do not require safety inspections of fixed-site amusement attractions.

#### **SECTION 3. Definitions.**

The foregoing terms in this [Act] are defined as follows:

- (A) "Amusement Attraction" means any building or structure around, over or through which persons may move or walk, without the aid of any moving device integral to the building or structure, which provides amusement, pleasure, thrills or excitement or any mechanical device which carries or conveys passengers along, around, through or over a fixed or restricted route or course or within a

defined area, for the purpose of giving its passengers amusement, pleasure, thrills or excitement.

(B) “Attendant” means an employee or agent of an amusement attraction operator responsible for controlling guest access and use of an amusement attraction.

(C) “Operator” means any person or entity that owns, leases, manages, or otherwise controls or maintains legal title to an amusement attraction.

(D) “Commissioner” means the head of the state governmental department, division, or agency that has safety regulatory jurisdiction over fixed-site amusement attractions.

(E) “Department” means the state governmental department, division, or agency that has safety regulatory jurisdiction over fixed-site amusement attractions.

(F) “Fixed-Site” means an amusement attraction that is constructed to remain in a single, affixed location and that is not removed from that single, affixed location.

(G) “Guest” means an individual who is preparing to enter, entering, preparing to use, using, preparing to leave, or leaving an amusement attraction for amusement purposes.

(H) “Qualified Inspector” means an individual who is an employee or independent contractor of a public or private agency and who has satisfied the qualifications set forth in Section 8 of this [Act].

### **Comment**

Many states choose to regulate this field using language such as amusement *rides* or *devices*. The proposed model act does not use these terms but, instead, uses the term *attraction* as that term is more effective because a growing number of amusement activities do not involve guests riding actual rides. The broader scope of the term “attraction” allows the proposed model act to encompass not only amusement rides, but also various non-ride amusement attractions such as interactive shows.

Many states also use language that regulates fixed-site amusement *parks* rather than *attractions*. This approach is less desirable than the approach taken by the proposed model act of regulating “amusement attractions” because, in various states, amusement attractions are being operated outside the confines of an “amusement park”. One such example is the operation of a carousel inside a shopping mall. Regulating specific attractions, rather than parks, clarifies that all fixed-site attractions fall within the scope of the Act regardless of their location.

## **SECTION 4. Duties and Responsibilities of the Department.**

(A) The Commissioner of the Department shall be responsible for enforcing all provisions of this [Act]. The Commissioner of the Department may delegate to a third party or other governmental entity those responsibilities under this [Act] as the Commissioner deems reasonably necessary so long as the third party or other governmental entity executes such responsibility in complete accordance with the provisions of this [Act].

(B) The Commissioner of the Department shall be responsible for promulgating all reasonable administrative regulations in furtherance of the purposes of this [Act] as the Commissioner deems reasonably necessary so long as such regulations are in compliance with the [State's Administrative Procedures Act or equivalent].

### **Comment**

Currently, over 15 states have placed fixed-site amusement attraction regulation within the Department of Labor (or its equivalent within said state). Five or more states have placed such regulation within either the Department of Agriculture (or its equivalent within said state) or the Department of Public Safety (or its equivalent within said state).

The remaining states have placed such regulation within the a variety of other governmental departments, divisions, or entities such as: Department of Community Affairs, Department of Consumer Services, Department of Insurance, Department of Administration, Department of Housing, Department of Licensing and Regulation, Secretary of State, State Fire Marshall's Office, Division of Building Safety or a specially-established governing board.

### **SECTION 5. Exemptions.**

This [Act] shall not apply to the following attractions:

- (A) Non-mechanized playground equipment when admission is not charged for use of the equipment.
- (B) Coin-operated or other single use-operated attractions designed for two or fewer guests when admission is not charged for access to the premises on which such attraction is located.
- (C) Attractions owned and operated by the State or any political subdivision of the State.
- (D) Activities principally devoted to the exhibition of agricultural, educational, scientific, religious, or artistic products.

### **Comment**

Over 40 states have exempted certain fixed-site amusement attractions from the scope of their regulatory act. The most commonly exempted attractions are playground equipment, coin-operated attractions, state-operated attractions, and museum-related attractions. Other types of attractions that have been exempted include: locomotives, bumper boats, inflatable attractions, simulators, those located at trade shows, those located at amusement parks with a certain number of employees, and even “articles of husbandry incidental to any agricultural operation.” *See* Okla. Stat. tit. § 461 (2003).

## **SECTION 6. Designated Safety Standards.**

(A) Fixed-site amusement attractions subject to this [Act] shall be designed, constructed, operated, and maintained pursuant to the following safety standards:

- (1) [state-designated mechanical code or standard];
- (2) [state-designated electrical code or standard];
- (3) [state-designated building code or standard];
- (4) [state-designated fire code or standard];
- (5) [state-designated plumbing code or standard]; and,
- (6) [any other state-designated code or standard deemed necessary by the Department]

(B) An operator of an amusement attraction shall not be considered a common carrier.

### **Comment**

States have adopted a variety of different uniform codes and standards—often with certain revisions—as the governing safety standards for fixed-site amusement attractions within their borders. Several states have also promulgated entirely original standards. The proposed model act highly recommends adopting existing uniform codes or standards—with limited revisions, if needed—rather than promulgating entirely original standards, as the existing uniform codes and standards have been subject to extensive third-party evaluation and review.

Based upon an extensive review of the uniform codes and standards currently utilized by existing state fixed-site amusement attraction safety laws, the proposed model act recommends adoption of the following uniform codes and standards: 1) the Uniform or International Building Code; 2) the National Fire Protection Code; 3) the National Electric Code; 4) the Uniform Plumbing Code; and 5) the American Society for Testing and Materials *World Standard* for the Regulation of Amusement Devices.

## **SECTION 7. Requirement of Pre-Operational and Operational Inspections.**

(A) Prior to commencing initial operation for guests of a new amusement attraction subject to this [Act], an amusement attraction operator shall obtain an initial inspection certificate from a qualified inspector pursuant to the following procedures:

- (1) The amusement attraction operator must make a written request for inspection to the Department at least 60 days prior to commencing operation of a new amusement attraction for guests.
- (2) The Department shall then notify the amusement attraction operator in writing of the inspection date.
- (3) The amusement attraction operator shall submit the proper inspection fee (as set forth in Section 13 of this [Act]) to the Department at least 5 days prior to a scheduled inspection.
- (4) If the qualified inspector identifies any deficiencies or other reasonable cause to prohibit the initial operation of a new amusement attraction for guests, the amusement attraction operator must remedy all deficiencies or other reasonable causes identified by the qualified inspector before being issued an initial inspection certificate.
- (5) Before being issued an initial inspection certificate, the amusement attraction operator must obtain written confirmation from a qualified safety inspector that the amusement attraction operator has remedied all such deficiencies or other reasonable causes.
- (6) The initial inspection certificate shall be valid for one year from the date of issuance.

(B) After the expiration of the initial inspection certificate, all amusement attractions subject to this [Act] shall annually obtain a renewal inspection certificate from a qualified inspector. The amusement attraction operator shall be responsible for requesting a renewal inspection at least 30 days prior to the expiration of an initial inspection certificate or a renewal inspection certificate.

(C) In the event that a qualified inspector cannot conduct a timely renewal inspection, the existing initial inspection certificate or existing renewal inspection certificate shall remain valid until such time that a qualified inspector conducts a renewal inspection.

(D) All initial and renewal inspection certificates for an amusement attraction shall be available for public review during regular business hours in a single location designated by the operator.

### Comment

Of the 48 states that currently have laws governing fixed-site amusement facilities, at least 30 of those states expressly and specifically require that fixed-site amusement attractions obtain a *pre-operation* inspection prior to opening to guests.

Of the same 48 states, at least 35 states expressly and specifically require that fixed-site amusement attractions obtain a *re-inspection* after the attraction has been opened to guests. At least 31 of these states require that this re-inspection occur annually while four of these states require semi-annual re-inspections.

## **SECTION 8. Hiring and Qualifications of Inspectors**

(A) No individual may conduct an inspection pursuant to Section 7 of this [Act] without first obtaining certification as a qualified inspector from the Department. Any individual seeking certification as a qualified inspector shall meet at least one of the following qualifications:

- (1) Is certified by the National Association of Amusement Ride Safety Officials as a Level I, Level II, or Level III amusement ride safety inspector; or
- (2) Is a licensed mechanical or structural engineer; or
- (3) Has a minimum of five (5) years work experience in the field of amusement attraction design, construction, or maintenance.

(B) Qualified inspectors shall pay a yearly registration fee of [\$]. All such fees shall be deposited into the Amusement Attraction Safety Fund created by Section 20 of this [Act].

### **Comment**

At least 24 states require fixed-site amusement attractions to be either employed by the regulating governmental entity or obtain certification from the regulating governmental entity. The proposed model act does not distinguish between whether the inspector is employed by the regulating governmental entity or by a private entity in the marketplace.

Instead, the proposed model act adopts an approach that focuses on the qualifications of the inspector rather than the specific employer of the inspector. The proposed model act does not believe that amusement attraction safety requires that the regulating governmental entity directly employ inspectors—especially in light of a growing trend by state governments toward utilizing contract labor—but, rather, this issue should solely focus on the objective qualifications and competency of the inspector.

## **SECTION 9. Powers and Duties of Inspectors and Department**

(A) If a qualified inspector has reasonably concluded that an amusement attraction presents an imminent hazard to guests, the Commissioner may issue a temporary cease and desist order that prohibits the operation of the amusement attraction until such time as the Department has reasonably concluded that the amusement attraction operator has mitigated the imminently hazardous condition.

(B) If a qualified inspector has reasonably concluded that an amusement attraction presents an imminent hazard to guests, the Commissioner may order the amusement attraction operator to make specific repairs or modifications to mitigate the imminently hazardous condition.

(C) The Department shall mail a copy of any order that it issues under subsection (A) or (B) to an amusement attraction operator by certified mail, return receipt requested. The amusement attraction operator shall have the right to appeal or contest any such order pursuant to the [State's Administrative Procedures Act or equivalent]

(D) The Commissioner may enforce any order issued under this Section by seeking an injunction or writ of mandamus from a court of competent jurisdiction.

### **Comment**

At least, 36 states have laws that expressly allow inspectors to order repairs to amusement attractions. At least 34 states also permit either an inspector or the Commissioner to order that an amusement attraction be closed for a specified period of time because of a safety hazard.

## **SECTION 10. Requirement of Liability Insurance**

(A) An amusement attraction operator must maintain one of the following forms of indemnity at all times during operation of an amusement attraction:

(1) An insurance policy in an amount not less than [\$] per occurrence for any injury or death to a guest or other individual involving the amusement attraction; or,

(2) A bond in an amount not less than [\$], except that the aggregate liability of the surety under that bond shall not exceed the face amount of the bond; or,

(3) The amusement attraction operator satisfies all self- insurance standards promulgated by the [State's Department of Insurance or equivalent] demonstrating that the amusement attraction operator maintains sufficient financial assets to cover any liability for an injury or death to a guest or other individual involving the use of the amusement attraction.

(B) An insurance policy or bond procured to satisfy the requirements of this Section must be obtained from an insurer or surety licensed by [State's Department of Insurance or equivalent] to do business in this state.

### **Comment**

At least 39 states require fixed-site amusement attraction operators to maintain some type of liability insurance or bond. The amount of insurance required by these 39 states is as follows: 18 states require at least \$1,000,000 in liability coverage; two states require between \$250,000 and \$1,000,000 in liability coverage; one state requires less than \$500,000 in liability coverage; three states do not specify a required amount of liability coverage; and 15 states require amounts that vary based upon factors such as the type of attraction.

## **SECTION 11. Requirement of Incident Data Reporting**

(A) In the event of a fatality or serious injury requiring immediate overnight hospitalization arising out of the operation of an amusement attraction, the operator of the amusement attraction shall file a incident report with the Department within 48 hours from the time of the fatality or serious injury requiring immediate overnight hospitalization.

(B) The incident report shall be in writing on a form promulgated by the Department and shall identify the amusement attraction on which the incident occurred, the identity of all individuals suffering a fatality or serious injury requiring immediate overnight hospitalization and shall generally describe the nature of the incident.

(C) In addition to filing a written incident report, an amusement attraction operator shall also immediately notify a designated agent or employee of the Department by telephone of any incident resulting in a fatality.

(D) Written and verbal incident reports filed with the Department shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any incident subject to the provisions of this Section.

### **Comment**

At least 24 states have a fixed-site amusement attraction safety law which requires that amusement attraction operators report certain injury incidents to the State. All such states require that amusement attractions operators report deaths and serious injuries to the state regulating entity. At least eight states have laws that may require the reporting of non-serious injuries. The types of incidents required by these states to be reported include: injuries requiring medical treatment, injuries requiring hospitalization, “any accident”, non-minor injuries, and injuries requiring “more than first aid.”

The time frame for reporting such incidents range from immediately to within four hours to by the next business day to within 48 hours. At least one state only requires incidents to be reported on a quarterly basis while at least one other state requires that such incidents be reported every two years. At least two states have laws that do not specifically state the time frame within which incidents must be reported.

At least four states place the burden of reporting an incident upon the injured guest rather than the fixed-site amusement attraction operator.

## **SECTION 12. Requirement of Records Retention**

(A) An amusement attraction operator shall retain the following records for a period of five years:

- (1) the name and last known address of each individual that suffers a serious injury requiring immediate overnight hospitalization; and
- (2) the initial inspection certificate and all renewal inspection certificates for each amusement attraction.

(B) Records whose retention is required by subsection (A) shall be available for inspection by the Commissioner or the Commissioner's designee during normal business hours.

#### **Comment**

At least 17 states require fixed-site amusement attractions operators to maintain incident records or maintenance records for varying lengths of time.

### **SECTION 13. Inspection Fees**

A fee in the following amount shall accompany any application for an amusement attraction inspection:

- (A) [\$] for an initial application for a pre-operation inspection;
- (B) [\$] for an application for all subsequent inspections.
- (C) All such fees shall be deposited into the Amusement Attraction Safety Fund created by Section 20 of this [Act].

#### **Comment**

While the amount of fees is left for each State to determine, it is highly recommended that these fees be specifically assigned to a separate amusement attraction safety fund in order to mitigate increased state expenditures that might result from the enactment of such a law.

### **SECTION 14. Requirements of Amusement Attraction Attendants**

- (A) An amusement attraction attendant shall:
  - (1) be at least 16 years of age;
  - (2) control only one amusement attraction at a single time;
  - (3) remain within the immediate proximity of the amusement attraction under the attendant's control; and,
  - (4) not be under the influence of alcohol or any controlled substance.
- (B) An amusement attraction operator shall not be responsible for the conduct of any attendant who purposefully violates the requirements of this Section unless the operator had sufficient prior notice to reasonably prevent such conduct.

### Comment

At least 13 states have laws that require attraction attendants to be of a minimum age. Five of these states require that the ride operator be at least 18 years of age while eight of these states require that the ride operator be at least 16 years of age.

### **SECTION 15. Requirement of Safety Information Posting**

(A) An amusement attraction operator shall post in a conspicuous and permanent location at each amusement attraction the following safety information:

- (1) A concise summary of guidelines for safe guest use of the amusement attraction; and,
- (2) A concise summary of recommended and/or mandatory guest use restrictions of the amusement attraction; and,
- (3) A concise summary of prohibited guest conduct relative to the use of the amusement attraction; and,
- (4) A statement that reads: "State law requires guests to obey all warnings and directions for this attraction and behave in a manner that will not cause or contribute to injuring themselves or others. Violators may be punished by fine and/or imprisonment."

(B) Nothing in this Section shall operate to limit an amusement attraction operator's right to revoke a guest's admittance privilege or otherwise implement reasonable administrative measures to address guest violations of this Section, Section (17) of this [Act], or Section (18) of this [Act].

### Comment

At least 16 states have laws that require an amusement attraction operator to post for guests certain safety information related to the amusement attraction.

### **SECTION 16. Requests for Regulatory Variances**

(A) An amusement attraction operator may apply to the Commissioner for a variance from the requirements of this [Act] or any regulation promulgated pursuant to this [Act] if:

- (1) a variance is necessary to prevent an undue hardship upon the amusement attraction operator; and,
- (2) the Department has concluded that the issuance of the variance will not limit or prejudice the safe use of the amusement attractions by guests.

(B) No variance shall be issued for an amusement attraction that has previously failed to pass an inspection pursuant to Section 7 of this [Act].

### Comment

At least, 14 states have laws that provide a mechanism for an amusement attraction operator to request a variance from existing safety regulatory requirements.

## **SECTION 17. Right to Refuse Entry**

(A) An amusement attraction operator may refuse entry to the amusement attraction to any guest if the operator reasonably believes that allowing the guest to enter may jeopardize the safety of the guest or any other individual including, without limitation, other guests, employees of the operator, agents of the operator or bystanders.

(B) An operator shall not be held criminally or civilly liable for any refusal to permit entry if the operator's refusal is based upon a reasonable belief that the guest's entry may jeopardize the safety of any individual.

### Comment

At least 13 states permit amusement attraction operators the right to refuse entry to certain members of the general public if necessary for safety requirements. While intended to address situations where certain physical characteristics of an individual might increase safety risks to that individual or others, such provisions must obviously be drafted to avoid a violation of the American with Disabilities Act or similar type of statute.

## **SECTION 18. Guest Safety Duties**

(A) Each guest shall comply with the following safety duties related to the use of an amusement attraction:

(1) Each guest shall comply with all written warnings and directions that require a person to satisfy certain conditions or to refrain from certain actions regarding use of amusement ride; and,

(2) Each guest shall refrain from engaging in any behavior or conduct during use of an amusement attraction that may cause or contribute to injuring the guest or any other individual.

(B) Any guest that fails to comply with any of the safety duties in this Section shall be considered in breach of that duty and subject to a misdemeanor offense pursuant to [State's criminal code or equivalent].

### Comment

At least 13 states have laws that contain a provision outlining the duties and responsibilities of guests of an amusement attraction. These laws, often termed Rider

Responsibility Laws, generally prohibit a guest from engaging in certain conduct that might increase the safety risks to that individual or other guests.

### **SECTION 19. Enforcement and Penalties**

(A) Criminal Penalty. An amusement attraction operator who violates this [Act] is guilty of a [misdemeanor] [felony] and, upon conviction, is punishable by [fine and/or imprisonment].

(B) Administrative Penalty. The Commissioner may assess an administrative penalty against an amusement attraction operator not to exceed [\$] for a violation of this [Act].

#### **Comment**

Of the 48 states that currently have laws regulating fixed-site amusement attractions, 38 of those states have provisions that allow the Commissioner (or other state governmental authority) to assess administrative fines against an amusement attraction operator for violating the law or regulations.

The procedure for imposing an administrative penalty under this Act and complying with due process requirements are hereby reserved for the State's administrative procedures law or equivalent law.

### **SECTION 20. Amusement Attraction Safety Fund**

(A) All inspection fees received under this [Act] shall be deposited into a special revenue account located in the state treasury and known as the "Amusement Attraction Safety Fund".

(B) The Department shall use the monies in this account to enforce the provisions of this article, subject to disbursement guidelines promulgated by the [State Treasurer or equivalent].

#### **Comment**

At least eight states have provisions within their fixed-site amusement attraction safety law that establish a dedicated amusement attraction fund. The establishment of such a dedicated fund is recommended as a method for tracking the expenses of a fixed-site amusement attraction regulatory effort as well as ensuring that the fees and fines generated from that effort are utilized to pay for at least a portion of the additional expenditures resulting from this effort.

### **SECTION 21. Limitation of Governmental Liability**

No portion of this [Act] shall be construed as subjecting the State or any political subdivision of the State to any liability resulting from any injury or damages involving an amusement attraction.

**SECTION 22. Confidentiality of Proprietary Information**

The Department shall not disclose any information submitted to the Department by an amusement attraction operator pursuant to the requirements of this [Act] that is marked as “Proprietary” or “Confidential” by the operator unless the Department is directed to do so by an order or decree from a court of competent jurisdiction.

**SECTION 23. Severability.**

If any provision of this [Act] is held invalid by a court of competent jurisdiction, the remainder of this [Act] shall be remain valid and enforced.

**SECTION 24. Repealed Acts and Chapters.**

The following acts and parts of acts are hereby repealed: [ ]

**SECTION 25. Effective Date.**

This [Act] shall take effect as of [ ].