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CENTER FOR JUSTICE &
DEMOCRACY
****NEWS****

Dear Friends,

As the holiday season fast approaches, the recent, and seemingly never-ending, toy recall by Mattel and other toy makers reminds us not to take the safety of our children's playthings for granted.

Events that led to the toy recall—as well as the recent crib, pet food and toothpaste recalls—remind us that, very often, the civil justice system is the last wall of protection for the American consumer. Sometimes, only the threat of a lawsuit can provide the proper incentive for a company to not market an unsafe product. Regulation and liability go hand-in-hand.

The vast majority of those who seek redress in the courts are average Americans who simply want justice and accountability, and to be made whole after a catastrophe most of us couldn't imagine in our worst nightmare.

Sincerely,

Joanne Doroshov
Executive Director

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UNSAFE DEVELOPMENTS

In April 2005, nine-month-old Liam Johns died from suffocation in his Simplicity crib. The drop rail had separated from its plastic track and formed a gap, which Liam slipped into feet-first. Instead of falling to the floor, Liam's head became wedged between the broken drop rail and the mattress, trapping him in a hanging position where he was smothered to death.

The Consumer Product Safety Commission (CPSC) - the federal agency charged with protecting the public, especially children, from serious injury or death from consumer products - never inspected Liam's crib and never attempted to track down the crib model or manufacturer.

Despite Liam's death, two more infant deaths, seven non-fatal cases of infants getting caught and 55 other incidents, all involving Simplicity's drop-rail, the CPSC did nothing. It took an investigation by the *Chicago Tribune* for the agency to recall nearly one million Simplicity cribs in September 2007.

“We get so many cases,” explained Michael Ng, the CPSC investigator assigned to look into Liam's death. “Once I do a report, I send it in and that's it. I go to the next case. We could spend more time, but we are under the gun. We have to move on.”

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UNDER THE RADAR - EXECUTIVE ORDER 13422

On January 18, 2007, within weeks of Democrats taking control of Congress, President Bush quietly amended a Clinton-era executive order to give his administration greater control over agencies and their regulatory policies. This new directive, Executive Order (E.O.) 13422, shifts regulatory power away from federal agencies - power Congress directly delegates to agencies through legislative enactments - and centralizes it in the White House-controlled Office of Information and Regulatory Affairs (OIRA), the regulatory arm of the Office of Management and Budget (OMB).

Unfortunately, OIRA is currently run by Susan Dudley, former director of the Mercatus Center, an industry-funded, anti-regulatory advocacy organization. While at Mercatus, Dudley attacked proposed regulations and orchestrated campaigns to strike down existing environmental, health and safety safeguards, including: the EPA's efforts to keep arsenic out of drinking water and lower levels of disease-causing smog; NHTSA's life-saving air bag regulations; and the Department of Transportation's rules to keep sleep-deprived truck drivers off the roads.

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The CPSC's missteps continued even after the cribs were recalled. The agency did not compel Simplicity to have repair kits immediately available for parents wanting to fix their defective cribs nor did it bar Simplicity from sending out non-CPSC approved

replacement parts without installation instructions.

Such lapses prompted Illinois Attorney General Lisa Madigan to call on the company to provide consumers with refunds or new cribs instead of repair kits. The CPSC opposed Madigan's proposals, arguing that the Attorney General's office was doing a "disservice to consumers."

Unfortunately, the CPSC's failure to protect the public comes as no surprise. This past summer, the agency recalled millions of Mattel toys that were contaminated with lead paint - actions that came too late for countless numbers of children who had already been exposed to the lead-tainted toys.



Similarly, an article in the September 2, 2007 *New York Times* described the current CPSC as an agency plagued by budget woes, inadequate staffing, conflicts of interest and regulatory inaction. "Buyer beware - that is all I have to say," warned Suzanne Barone, former head of the CPSC poison prevention unit, who quit when a cost-benefit analysis stalled efforts to require inexpensive child-resistant caps on hair care products that had burned toddlers.



The sorry state of today's CPSC is indicative of what's happened to key health and safety agencies under the Bush administration. Over the last six and a half years, many of these agen-

cies have been led by a revolving door of industry loyalists, who have undermined, and at times eliminated, critical health and safety protections. To make matters worse, President Bush recently amended a key executive order giving his administration, and by extension private industry, more power over agencies that enforce health, safety and environmental protections (see "Under the Radar - Executive Order 13422").

In addition, the White House has been spearheading an unprecedented campaign to simultaneously weaken the agencies themselves and eliminate the public's ability to file lawsuits for injuries caused as a direct result of agency enforcement failures. This strategy uses agency rulemaking or regulation to wipe out the rights of injured people to sue and collect compensation from those who cause them harm. As Senator Patrick Leahy (D-Vt.) explained during a September 12, 2007 Senate Judiciary meeting:

[W]e are now witnessing agency rulemaking turned into a mechanism to immunize powerful corporations at the expense of ordinary Americans. Rather than issuing regulations based on facts and science to benefit the American people, the process has apparently been hijacked. The intended result of this politically-motivated version of rulemaking not only slams the local courthouse door shut on injured victims but it prevents State law, State regulators and State courts from protecting their citizens.

The Bush administration has radically transformed the mission of federal agencies from safeguarding citizens to safeguarding corporations, which will have detrimental, long-term effects not only on the efficacy of federal agencies but also on the nation's collective wellbeing.



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UNDER THE RADAR - EXECUTIVE ORDER 13422 *continued...*

Closer examination of E.O. 13422, which took effect July 24, 2007, reveals that the order could undermine a broad range of public health and safety protections, all to the benefit of corporate interests. Among the more alarming changes:

- Every agency will have a presidentially-appointed Regulatory Policy Officer (RPO), who oversees all agency decisions about regulations and coordinates regulatory matters with OIRA.
- Even if agencies identify threats to public health and safety that warrant regulation, OIRA can argue that private markets will correct the social problem on their own, making regulation unnecessary.
- No rulemaking can commence unless agencies estimate the combined aggregate costs and benefits of all planned regulations for the calendar year, which allows economic analysis, rather than public need, to dictate regulatory decisions.
- OIRA will have the authority to review and oversee agencies' development, issuance and use of guidance documents - informal, non-binding materials that tell regulated industries how agency rules will be enforced, which often cost businesses millions of dollars to comply with.

“The new Executive Order that results from these amendments will further threaten public protections,” said OMB Watch in its March 2007 report, *A Failure to Govern*. “It codified regulatory delay, further removes agency discretion over legislative implementation, and centralizes control over the regulatory process into a small executive office. It substitutes free market criteria for public values of health, safety, and environmental protections, and substitutes executive authority for legislative authority. In the process, it further tilts the regulatory playing field in favor of corporate interests.”

Sally Katzen, former OIRA Administrator during the Clinton Administration, echoed these sentiments in recent testimony before the House Subcommittee on Investigation and Oversight. “With its most recent actions, the Bush Administration has again restricted agency discretion and made it more difficult for them to do the job that Congress has delegated to the Federal agencies.” According to Katzen, “[I]t will be even more difficult for agencies to do their jobs because regulations are disfavored in this Administration,” adding that the

new Executive Order was in essence “a codification of an anti-regulatory manifesto.”

The amendments have prompted similar concerns in Congress. “This order allows political appointees to dictate decisions out of the shadows on health and safety issues, even if impartial scientific experts decide otherwise,” said Representative Brad Miller, chairman of the House Investigations and Oversight Subcommittee, who is spearheading congressional efforts to learn more about the creation of E.O. 13422 and its potential impact on regulatory procedures. The directive is “another avenue for special interests to slow down and prevent agencies from protecting the public,” explained Miller. “It is not good government when agency action is based on economic or political back room deals rather than environmental or public health consequences.”

Although the House has voted to block OIRA from implementing E.O. 13422, it is unclear whether that action will have any effect.

LAWSUITS PROTECT THE PUBLIC WHEN FEDERAL AGENCIES DON'T

Civil lawsuits have forced countless corporations to redesign their products, take them off the market or change their behavior. Below are some examples:

BIC Lighters

Lawsuits over injuries caused by the lighter's failure to extinguish prompted a congressional investigation, which resulted in Bic's agreeing to put warning labels on every new lighter until the company designed one that was both child-proof and convenient.



Chromium Exposure

After 650 residents of Hinkley, California filed suit against Pacific Gas & Electric (PG&E) for contaminating their water supply with cancer-causing chromium, PG&E agreed to clean up the environment and stop using chromium.



Dalkon Shield IUD

The female contraceptive caused infections, septic abortions, infertility and death in many women. After numerous lawsuits, the company finally agreed to urge doctors and women to remove the Dalkon Shield and offered to pay for the removal.

Firestone Tires

Information uncovered in litigation about deaths and injuries caused by Firestone tires on the Ford Explorer led to a massive recall of the unsafe tires.



WIPING OUT STATE LAWS

Under the Bush administration, regulatory agencies have been allowed to simply wipe out or render meaningless the legal rights of consumers hurt by the very dangerous products and practices that the agencies themselves were created to safeguard against and have failed to prevent. How are they doing this? By inserting lawsuit preemption provisions into new federal regulations.

According to the September 16, 2007 *New York Times*, federal agencies' willingness to include preemption language has largely motivated the recent surge in industry requests for new federal regulations. Such preemptions "bar consumers from filing liability claims in courts and supersede any tougher state regulations, extremely valuable protections for a major manufacturer," explained the Times. Below are some recent examples:

Drug labeling. In 2006, the FDA included a new policy in the preamble of its drug-labeling rule that prevents injured consumers from bringing state product liability suits against drug makers whose

medication labels have been approved by the FDA. Most of the public, including state officials, were deprived of any chance to weigh in before the rule was finalized.

Mattress flammability. In 2006, the CPSC sought to preempt tort liability in the preamble of its mattress-flammability rule. The agency's own data show that from 1999-2002 mattresses or mattress bedding were the first item to ignite in 15,300 residential fires, causing 350 deaths and 1,750 injuries and resulting in property loss of \$295 million. According to the Center for Progressive Reform, the CPSC never allowed the public to review, evaluate or comment on the preemption provision and never cited "any instances from its 33-year history in which tort liability interfered with the implementation of its statutory mandate."

Roof-crush. In 2005, NHTSA included a provision in the preamble of its proposed new vehicle roof strength rule that would bar injured consumers from suing automakers in state court if their vehicles'

roofs met minimum federal safety standards. Although NHTSA recently announced that it's still working on a final roof-crush rule, there is no indication that the agency plans to remove the lawsuit preemption language. As a result, if courts agree, accident victims hurt in a rollover or similar crash would not be able to file product liability suits against manufacturers as long as they meet NHTSA's standards, regardless of how weak or obsolete such standards may be.

The bar against lawsuits would apply even if a car company knew of safety problems with its products and refused to take actions to make them reasonably safe.

To put this in perspective, rollover accidents cause 24,000 injuries and kill 10,000 people annually, accounting for one-third of all people killed in auto crashes. When promulgating the "roof-crush" rule, NHTSA estimated that the new regulation would save only 13 to 44 lives a year. Moreover, most automakers already meet the proposed standard.



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