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CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, D.C. 20207

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JUL 3 1 1974

James A. Brodsky, Esquire
Consumers Union of America
Washington, D. C. 20036

Dear Mr. Brodsky:

This letter is in response to your letter of May 23, 1974, regarding the potential tort liability of offerors for negligently developing a standard and the potential liability of offerors to the Commission.

With respect to an offeror's potential tort liability, it is our view that an offeror should not be held liable in tort for negligently developing a standard. This view is expressed in recognition of the fact that a court in a private law suit against an offeror would not be bound by our view on this matter.

Our opinion rests primarily on the observation that the Commission has the sole responsibility for issuing an effective and reasonable standard, whereas the offeror is responsible for developing one or more requirements that will not have the force of law until evaluated by the Commission and subjected to public scrutiny in a rulemaking proceeding including the opportunity for judicial review based on substantial evidence on the record. Translated into the terminology of the law of torts, we believe that even if it could be determined that the offeror owes a duty of due care to consumers, the offeror's lack of control over the subsequent proceedings insulates him from liability because the opportunity for scrutiny and rejection of the requirements constitutes, as suggested in your letter, a superseding intervening cause.

In response to your question concerning the offeror's potential liability to the Commission, we find it impossible to set forth all of the theoretically possible misdeeds of an offeror and then to theorize on all of the possible remedies. Although the regulations for developing standards under the Consumer Product Safety Act state one remedy for the misuse of contributed funds (16 CFR 1105.9, 39 FR 16206) the stated remedy is not necessarily exclusive.

Please let me know if I can provide you with any further information.

Sincerely,

Michael A. Brown
General Counsel

ADVISORY OPINION

cc: David A. Swankin, Swankin, Turner & Koch
Counsel for National Consumers League, 1755 Massachusetts Ave., NW
Washington, D. C. 20036

May 23, 1974

Michael Brown, Esq.
General Counsel
Consumer Product Safety Commission
Washington, D.C. 20207

Dear Mr. Brown:

To confirm our telephone conversation earlier today, I would appreciate receiving an opinion letter from you as to the potential liability one who participates in the Commission's standards-writing program as an offeror may assume as a result of that participation. In particular, and hypothesizing a worst case, what in your opinion would be the liability of an offeror who developed a consumer product safety standard for Commission consideration which was then proposed, without change, as a rule and eventually issued by the Commission in final form again without changes. Assuming the worst case, if that offeror recklessly or negligently disregarded available evidence in the formulation of this proposal to the Commission, could that offeror be subjected to a successful tort suit by one injured by a product complying with the standard developed by the offeror and issued by the Commission.

In addition, what is your opinion as to the potential liability assumed by an offeror in the Commission's program vis a vis the Commission? Is such liability limited to action by the Government to recover misappropriated Commission funds, if any, which had been extended by the Commission in the course of the standard's development?

As I noted when we spoke, I believe that such an opinion letter from you would provide useful information to all who contemplate participating in the Commission's offeror program. I agree that published authorities which might offer some guidance are sparse. My own very preliminary research has revealed some cases in the private standards sector which might shed some light on the problem. See, e.g., Hall v E.I. DuPont deNemours, 345 F. Supp. 353 (E.D. N.Y. 1972); Hempstead v General Fire Extinguisher Corp., 269 F. Supp. 109 (D. Del. 1967). Also, the Commission's standards themselves are apparently admissible in private tort actions. See CPSA § 25. Perhaps analogies may be drawn to existing governmental standards programs under OSHA or NHTSA. And there is the intervening and possibly supervening action of the government in adopting the offeror's proposal as its own and thereby giving it the force of law.

I greatly appreciate your pledge to explore these issues in an opinion letter. Recognizing the very heavy demands made upon your time, is it possible to estimate when such an opinion letter may be forthcoming?

Thank you for all your help.

Sincerely,

James A. Brodsky
Attorney
Washington Office