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ADVISORY OPINION #258

UNITED STATES GOVERNMENT

U.S. CONSUMER PRODUCT SAFETY COMMISSION

# Memorandum

TO: Catherine C. Cook, Director, CEPD
Through: Theodore J. Garrish, General Counsel
Through: Stephen Lemberg, Assistant General Counsel

DATE: January 26, 1978

FROM: Alan C. Shakin, OGC

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SUBJECT: Jurisdiction over competition snowmobiles

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In a January 12, 1978 memorandum you ~~requested the~~ opinion of this office on whether competition snowmobiles are "consumer products" within the meaning of section 3(a)(1) of the Consumer Product Safety Act (CPSA, 15 U.S.C. 2052(a)(1)). You attached some materials from three companies which manufactured competition snowmobiles for the 1977-78 racing season.

In our view the following points are supported by the materials:

1. Competition snowmobiles are designed differently from other snowmobiles which are sold for a wide variety of consumer uses.

2. Competition snowmobiles are promoted, marketed, and intended solely for use on special racing tracks. This is reflected by the labeling on competition snowmobiles and by the owners manuals which accompany them.

3. Competition snowmobiles are intended solely for use by qualified racing drivers.

4. In comparison with other snowmobiles, competition snowmobiles are manufactured in relatively small numbers and are selectively distributed.

Under the CPSA, "[t]he term 'consumer product' means any article, or component part thereof, produced or distributed (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent, or temporary household or residence, a school, in recreation, or otherwise; but such term does not include... any article which is not customarily produced or distributed

for sale to, or use or consumption by, or enjoyment of a consumer..." Neither the CPSA nor its legislative history defines "consumer," but the legislative history does provide some guidance on types of products that are excluded from CPSA jurisdiction because of their use in non-consumer settings:

> It is not intended that true "industrial products" be included within the ambit of the Product Safety Commission's authority. Thus, your committee has specifically excluded products which are not <u>customarily</u> produced or distributed for sale to or use of consumers. The occasional use of industrial products by consumers would not be sufficient to bring the product under the Commission's jurisdiction. The term "customarily" should not be interpreted as intending strict adherence to a quantum test, however. Your committee is aware that some products which were initially produced or sold solely for industrial application have often become broadly used by consumers. If the manufacturer or distributor of an industrial product fosters or facilitates its sale to or use by consumers, the product may lose its claim for exclusion if a significant number of consumers are thereby exposed to hazards associated with the product. (House Committee Report at 27)

It is the OGC view that such an analysis properly applies to products used in any commercial setting, and not just in a factory, as the word "industrial" could be narrowly interpreted. In the past, for example, OGC has considered use of artificial turf and helmets by professional football players to be non-consumer use.

With this background in mind, the crucial question is the extent to which competition snowmobiles are used by "professionals" and the extent to which they are used by "consumers." (The legislative history clearly states that use of a product by consumers is sufficient for jurisdiction and that ownership of the product by consumers is not necessary.) Despite the absence of definitions for these terms, we believe that the financial and occupational status of the drivers of competition snowmobiles is a crucial consideration. If the drivers are largely unremunerated and

largely engaged in recreation, as weekend golfers and tennis players generally are, they would probably be consumers within the meaning of the CPSA. If the drivers, on the other hand, make a living or a portion of their living from their racing activities, they would seem to be professionals rather than consumers.

The materials provided by the manufacturers do not clarify the status of the drivers of competition snowmobiles as much as we would like. However, the following points taken from the materials indicate to us that the drivers are professionals rather than consumers:

1. Some drivers of competition snowmobiles are under contract to the manufacturer of the snowmobile, and in some cases to a distributor, for an entire racing season. The manufacturers publicize the accomplishments of their drivers by issuing press kits, as one example. In fact, a press release issued by one manufacturer reported that it had "signed" a particular driver.

2. Some snowmobile dealers and other local business-people sponsor drivers by providing them with the competition snowmobiles and with "parts supply, equipment, salary, etc...etc...."

3. Drivers of competition snowmobiles travel the racing circuit of the United States Snowmobile Association, the major racing association in North America. Races are scheduled to take place in Canada, Sweden, and various states in the U.S. in 1978.

4. One manufacturer has offered a "cash prize of $5000 plus free parts" to the winner of a particular race.

In contrast to these points, the only evidence we could find in the materials indicating that the competition snowmobiles would be used by consumers was a consumer registration card included in the owners manual of one of the competition snowmobiles. Despite the label "consumer," such a card is not necessarily inconsistent with the sale of a product used by professionals.

Please note that consumer use is not limited to activities in which the participant has no financial gain at all. For example, OGC has considered a jurisdictional issue raised by Petition CP 75-18, regarding harness horse racing sulkies. Many people used these sulkies in racing activities and earned incidental prize money, but the main threat of this use was recreational rather than occupational. The prize money did not cause these people to lose their status as consumers engaging in recreational activity and did not remove the sulkies from the category of consumer products.

Professional status cannot rely on any pre-determined formula concerning the amount of money earned from an activity or the number of hours devoted to it. Rather, we must make our judgments case-by-case and based on the available information. In the present case it seems to us that competition snowmobiles are not generally used by consumers and are therefore not consumer products.

We point out that this conclusion would have limited impact on our consideration of the jurisdiction over other products because it is based largely on factual findings. If use patterns change, we might even find in the future that competition snowmobiles are consumer products under the CPSA. In addition, competition snowmobiles other than the ones described in the materials you sent to us might currently be consumer products if their use patterns are different from the ones described.

Section 31 of the CPSA (15 U.S.C. 2081) imposes a limitation on the Commission's CPSA jurisdiction that relates to the distinction between professional and consumer use of a product. Specifically, it takes away Commission authority to regulate a risk of injury associated with a consumer product "if such risk could be eliminated or reduced to a sufficient extent by actions taken under the Occupational Safety and Health Act of 1970." Because we have concluded that competition snowmobiles are not consumer products, we need not reach the issue raised by this jurisdictional limitation.

As you requested, we are returning the materials to you.

Enclosures