U.S. CONSUMER PRODUCT SAFETY COMMISSION
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# Statement of Commissioner Robert Adler on the Petition of the Juvenile Products Manufacturers Association Requesting Commission Action Regarding Crib Bumpers

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The Commission recently voted unanimously to grant a petition from the Juvenile Products Manufacturers Association (JPMA) to commence rulemaking with respect to crib bumpers, albeit not precisely along the lines requested by JPMA.[1] In fact, the Commission expanded the remedy sought by JPMA and directed staff to explore all rulemaking options in addition to those requested in the petition.

I write to express my views regarding two issues in the briefing package: (i) what the proper role for the agency is when it comes to regulating products that pose a hazard in combination with other risk factors and (ii) whether the Commission can regulate a product even when the risk stems from foreseeable consumer misuse of the product. These are issues that I have long thought and written about, so I feel it useful to share my views on them.[2]

## The Causal Nexus

Products such as bumper pads present a challenge to the agency because it is sometimes difficult to determine the exact extent to which such products play a role in causing infant deaths. With respect to bumper pads, causal confounds such as victims' pre-existing physical conditions or the existence of other potential suffocation hazards such as blankets or pillows may have contributed to some of

[1] JPMA specifically requested that the Commission initiate rulemaking to distinguish and regulate "hazardous pillow-like" crib bumpers from "non-hazardous traditional" crib bumpers under sections 7 and 9 of the Consumer Product Safety Act.

[2] For a full exposition of my views, one may look to "Addressing Product Misuse at the Consumer Product Safety Commission: Redesigning People Versus Redesigning Products," University of Virginia Journal of Law & Politics Vol. XI, No. 1 (Winter 1995) pp. 79-127.

their deaths. In many other cases, however, if one believes the carefully documented reports of medical examiners/pathologists, there is considerable evidence that bumper pads have played a significant role in causing the deaths of young children.[3] Based on the data in the staff briefing package, I find it inconceivable that bumper pads played no role in most of the infant deaths given the number discovered with their faces pressed directly against – or close to[4] – the pads.

That said, based on the discussion in the staff briefing package, I feel the need to address whether the agency would be justified in regulating bumper pads even assuming, *arguendo*, they were only one of several causes leading to infant deaths. To be more precise, could the agency act where a product was but one link in a chain of causes – and not necessarily the "primary" one? I believe the answer is an easy one: Yes. To understand why I say this, I restate views that I have previously expressed:

> Although causation often presents extremely difficult questions of the law, there is no need to explore its infinite nuances in order to develop a useful sense of the role it plays in consumer product safety. With respect to CPSC regulation, the question of whether a product "caused" a consumer injury is rarely a difficult one. The threshold test for causation in the product safety context is relatively easy to meet: an unreasonable risk need only be "associated with" a consumer product in order to be considered "caused by" the product.[5]

In selecting the words "associated with" in the Consumer Product Safety Act, Congress chose the term that policy experts and scientists have long considered the broadest possible way of connecting two events. In fact, the term "associated with" is typically the starting point to determine whether two events have a real causal connection rather than mere correlation or coincidence.[6] What this means

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[3] The two scenarios that point directly to the bumper pad are those where infants were found dead wedged between a crib bumper and another object and those where the dead infant's face was against the bumper with no wedging reported.

[4] As I understand it, an infant does not need to have its nose and mouth totally blocked to asphyxiate. Merely being close enough to a bumper pad to deprive an infant of fresh oxygen is sufficient.

[5] Adler article at 116-7.

[6] See, e.g., Aleks Jukelin, "Distinguishing Association from Causation," http://andrewgelman.com/2007/10/29/distinguishing/ ; Mark Zweig, "Does the Language Fit the Evidence: Association Versus Causation," http://www.healthnewsreview.org/toolkit/tips-for-understanding-studies/does-the-language-fit-the-evidence-association-versus-causation/ ; and Journal of American Statistical Association, "From Association to Causation in Observational Studies: The Role of Tests of

for CPSC purposes is that Congress clearly intended that even very remote connections between two events would suffice for purposes of CPSC jurisdiction.

A review of CPSC advisory opinions over the years confirms this judgment. For example, the Commission has determined that the following circumstances present enough of a causal nexus for the Commission to exercise jurisdiction over a product despite its not being the primary cause of the risk of injury: medicine cabinets manufactured without locks,[7] fire extinguishers that fail to put out fires,[8] and traffic signals that fail to direct traffic properly.[9] Accordingly, I see no serious objection to the Commission exercising jurisdiction over bumper pads even if their risk is only one among several causes – and not necessarily the "primary" one.[10]

In fact, the great challenge for the agency in most instances is not whether we have authority to act, but rather whether we can do so in a way that improves safety at minimal cost and market disruption. Protecting the public, not demanding causation sufficient for a tort case, is where Congress wanted the agency to pay the greatest attention as it addresses consumer product risks.

**Consumer Misuse**

This vote also raised concerns about the appropriateness of the Commission involving itself in developing standards where parents have failed to install and secure bumper pads according the manufacturer's instructions[11] or where infants were not placed in a recommended safe sleep setting.[12] This gives rise to the question: may the Commission seek to write a safety standard for a product notwithstanding the presence of consumer misuse as a factor leading to the risk of injury or death?

On this point, I think the law is quite clear. Even a casual review of the CPSA's legislative history demonstrates a strong congressional intent to protect consumers

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Strongly Ignorable Treatment Assignment,"
http://amstat.tandfonline.com/doi/abs/10.1080/01621459.1984.10477060.

[7] CPSC, Office of General Counsel, Advisory Opinion # 81 (January 31, 1974).

[8] CPSC, Office of General Counsel, Advisory Opinion # 154 (November 14, 1974).

[9] CPSC, Office of General Counsel, Advisory Opinion # 181 (February 12, 1975).

[10] Again, a point not conceded, but assumed for the sake of argument.

[11] Of course, manufacturers do not have the final say on the adequacy of their instructions. The test is not what the manufacturer says in its instructions; it is whether the instructions are reasonable. And that ultimately is a judgment for the Commission to make, not the manufacturer.

[12] According to the public health and medical communities, this means having the infants placed on their backs in a crib that meets applicable safety standards. *See* http://www.nichd.nih.gov/SIDS/Pages/sids.aspx.

despite their actions contributing to their injury (or their child's injury). For example, the Senate Report on the Consumer Product Safety Act states:

> The definition of "use" includes exposure to any normal use. In addition, it includes reasonably foreseeable misuse. The ambit of risk, then, extends beyond exposure and normal use to those risks presented by consumer products being misused if such misuse is "reasonably foreseeable."[13]

The courts agree. In the *Southland Mower* case, for example, the court noted that neither consumer misuse nor assumption of the risk limits CPSC regulatory authority:

> … Congress intended for injuries resulting from foreseeable misuse of a product to be counted in assessing risk…. This principle, and not the tort liability concept of "assumption of the risk," governs the Commission's authority to treat consumers' foreseeable action of removing safety shields as creating an unreasonable risk of injury and to issue rules addressing that danger.[14]

Thus, the Commission acts well within the law and sound public policy to regulate even in the face of consumer misuse.[15] I say this without taking a position on the degree, if any, to which consumer misuse actually exists in the bumper pad fatalities. I merely address the issue of whether the Commission can act if misuse exists.

In fact, I note that one of the fundamental premises of CPSC's product safety authority is the ubiquity of consumer misuse. If consumers always acted responsibly, most CPSC safety standards would not be necessary. If adults did not leave prescription medicines where children could access them, if consumers did not fall asleep while smoking in bed, if homeowners did not stick hands under the housing of their lawnmowers, if children did not improperly play with matches or get too close to burning stoves in loose pajamas, then there would be little need for CPSC safety standards. The fact is, however, that consumer misuse is often quite

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[13] S. Rep. No. 749, 92 Cong., 2d Sess. 33 (1972).
[14] *Southland Mower Company v Consumer Product Safety Commission*, 619 F. 2d 499 (5th Cir. 1980), at 513.
[15] To point to another example, when the Congress amended the Federal Hazardous Substances Act by enacting the Child Protection and Toy Safety Act of 1969, it specifically extended the application of the Act to include "reasonably foreseeable *abuse*" with respect to children's articles presenting electrical, mechanical, or thermal hazards.

predictable and foreseeable – and Congress wanted a safety agency to protect consumers even where misuse occurs.

All of this is to confirm that Congress incorporated into the product safety laws the fundamental notion that it is easier to re-design products than it is to re-design consumers.