

DISSENTING OPINION
COMMISSIONER ROBERT S. ADLER AND COMMISSIONER ELLIOT F. KAYE
IN THE MATTER OF BRITAX CHILD SAFETY, INC.
CPSC Docket 18-1
NOVEMBER 9, 2018

CPSC Complaint Counsel and Respondent in the above titled matter have proposed a settlement of the case brought by Complaint Counsel regarding the alleged hazards of single and double occupant strollers sold by Britax under the name, B.O.B. On November 9, 2018, by a vote of 3-2, the Commission voted to accept the proffered settlement. Although we commend the parties for reaching agreement after what appears to be a lengthy and exhaustive negotiation, we respectfully and reluctantly dissent from approving the agreement.

In any negotiation each party must compromise to reach an agreement. We have no problem with appropriate compromises, and we are well aware of the maxim that we should not let the perfect be the enemy of the good. Alas, to us, despite the best efforts of talented counsel on both sides, this agreement falls short of the good.

Background

The B.O.B. strollers in question were introduced into commerce in 1997 and sold by a company known as B.O.B. until December 2011, when Respondent Britax merged with B.O.B. Thereafter, Britax sold numerous models of the strollers under the original B.O.B. name.

On February 16, 2018, Complaint Counsel filed an administrative complaint against Britax, seeking a recall of the subject strollers pursuant to section 15 of the Consumer Product Safety Act (CPSA), 15 U.S.C. § 2064. Complaint Counsel alleged that a Quick Release mechanism on the strollers failed to secure the front wheel to the fork, allowing the front wheel to detach suddenly and unexpectedly during use. Staff further alleged that this defect constituted a Substantial Product Hazard under section 15 of the CPSA, leading to a number of serious injuries both to caregivers pushing the strollers and to children sitting in the strollers.

As of the date of filing the complaint, staff alleged that approximately 200 consumers had reported front wheel detachments while using the strollers, resulting in at least 50 injuries to children and 47 adults. Among the injuries alleged to have occurred to children: a concussion, injuries to the head and face requiring stitches, dental injuries, contusions and abrasions. Among the injuries alleged to have occurred to caregivers: torn labrum, fractured bones, torn ligaments, contusions and abrasions.

The Commission authorized the issuance of the complaint after Britax declined to recall or repair the strollers.

The Agreement

Briefly described, under the terms of the Agreement, Respondent will undertake what is termed a "robust, intensive" information campaign to instruct consumers how to safely and correctly operate the Quick Release on the strollers. One of the main features of the information campaign will be an instructional video for consumers demonstrating and describing how to safely operate the Quick Release. As part of the information campaign, Respondent will email notice of the campaign to all known dealers and retailers of the strollers located in the United States.

In addition to the information campaign, the Agreement, *inter alia*, calls for Respondent to supply free parts, accessories, discounts and incentives to consumers who "self-identify" as having concerns about their ability to safely and correctly operate the Quick Release on strollers manufactured between January 1, 2009 and September 30, 2015. Respondent will do so through one of three options:

1. A new Quick Release mechanism that has a lever that operates only 90 degrees, thereby permitting consumers easily, by visual inspection, to know whether the mechanism is properly fastened;
2. A new "thru-bolt" (with installation tools) which is permanently fastened, thereby precluding any unexpected release of the wheel, but which defeats the Quick Release function of the stroller; or
3. A 20 percent discount off the Manufacturer's Suggested Retail Price (MSRP) of any new BOB Gear stroller, subject to availability of the new strollers.

For strollers manufactured prior to January 1, 2009, the Agreement will offer owners a 20 percent discount off the MSRP, subject to availability of the new strollers. However, Respondent will not offer the mechanical repairs described in paragraphs 1 and 2 above to such owners.

Although we applaud the good faith and spirit of the Agreement, upon careful reflection, we cannot support it for at least two major reasons:

The Misleading Nature of the Agreement: In virtually every Corrective Action Plan the Commission enters into, we insist that it be described to the public as a "recall." The reason is simple. Consumers know that this term signals that a manufacturer has agreed to take some kind of corrective action to fix a safety problem with its product. The media knows that this term will typically command consumers' instant attention and concern without the need for more elaborate explanations. Of course, the fact that consumers' attention is drawn to this news is only a first step in removing or repairing hazardous products, but without such a flag,

the task of protecting consumers is made much harder. Consumers need to know that safety concerns are afoot in order to decide whether to avail themselves of such protections.

By its terms, this Consent Agreement explicitly rejects characterizing this Corrective Action Plan as a recall. Paragraph 20 of the Agreement leaves no doubt on the point:

The parties agree that the actions taken pursuant to this Consent Agreement and Order shall not be construed as a recall pursuant to section 15 of the Consumer Product Safety Act, 15 U.S.C § 2064. (emphasis added)

Underscoring this point is the notice that Respondent intends to send to dealers and retailers, which states as follows:

In February, we notified you that the U.S. Consumer Product Safety Commission had sued Britax to compel a recall of certain BOB strollers manufactured prior to September 2015. *We are pleased to report that we have resolved this litigation without a recall by developing and launching an information campaign to further instruct consumers how to safely and correctly operate the Quick Release on the BOB strollers manufactured prior to September 2015.* Consumers will be offered incentives to participate in the information campaign, which are more fully described in the links below. If any of your customers ask you about this issue, please direct them to [INSERT HYPERLINKS TO CPSC PRESS RELEASE AND INSTRUCTIONAL VIDEO].” (emphasis added)

To say the least, this notice is aggressively misleading. What Respondent is (too) quietly offering goes beyond a mere information campaign; it is a program for corrective action to modify and repair strollers for those consumers dogged enough to pursue a remedy that would actually make their strollers safer. Yet, the notice to the public and to the firm’s distribution chain neglects to point this out in any clear or meaningful fashion. Needless to say, without being fully informed that relief from the hazard extends to repairs, consumers may well ignore an information campaign that is fairly complex to follow and understand.

In making this point, we need to add some further thoughts. As much as we would prefer to use the term “recall,” as a matter of compromise, we would have been cautiously open to a different way of describing the relief offered in this case. A more accurate description of the relief carefully offered and fully explained would have satisfied us. But, describing the Agreement as an information campaign “without a recall” misleadingly directs the public’s attention away from the actual terms agreed to by the parties. It’s not quite analogous to a tree falling in a forest with no one to hear it, but it’s close. Having an agreement that provides relief without anyone being fully alerted to the nature of the relief is pretty much no relief at all.

Compounding the problem is the fact that the parties have provided no explanation why the term "recall" was rejected nor have they explained why this alternative approach would be acceptable. We surmise that rejecting the term "recall" was a point that Respondent insisted upon. If so, they needed to explain why this point was so important to them and, more importantly, to provide some evidence that this revised approach would provide sufficient protection to consumers that it would be acceptable to proceed with it.¹

Limited Scope of Relief: As we stated at the outset, the B.O.B. strollers were first introduced into commerce beginning in 1997. So, the allegedly hazardous strollers were produced over a period of roughly 18 years. Yet, the mechanical fix for the strollers offered by Respondent extends back only to 2009 – a period of just six years. Nowhere in the Agreement is there any explanation why the fix is so limited in time. If the pre-2009 strollers do not contain the alleged defect, the parties should have explained this. If, on the other hand, the parties believe that few, if any, pre-2009 strollers remain in use, we would like to see evidence of this. It's our understanding that there is a substantial secondary market for these strollers and that large numbers of them remain in use. If so, we can see no reason for refusing to extend the offer of a mechanical repair to what constitutes two-thirds of the years of production.

Summarily limiting full remedies to all purchasers of these allegedly hazardous products without explanation constitutes a fatal flaw in this Agreement to us.²

Conclusion

Despite offering a number of very positive features, this Corrective Action Plan falls short of what we believe the Commission should approve. We regret this not only because we believe consumers will come up short in terms of safety, but also because we fear that other respondents will invoke this agreement as a precedent in future recalls, thereby lessening safety for far more consumers than are affected by this agreement.

¹ Additionally, it is unclear what enforcement authorities the parties refer to in the Agreement when they state that "[t]he Commission shall retain jurisdiction to enforce the provisions of the Consent Agreement and Order." Any violation of an order issued under Section 15(c) or (d) would be a prohibited act under Section 19(a)(5) and may subject a violator to civil or criminal penalties, see 15 U.S.C. §§ 2069-70. We are concerned that this language does not specify whether this provision applies to this settlement, and it may be difficult for the Commission to meaningfully enforce the Agreement.

² We also note that the Agreement limits the information campaign to a period of 24 months from its announcement and limits the availability of parts and accessories, discounts, or other incentives to a period of 12 months from the information campaign's announcement. As a general matter, relief to consumers should not have such a short expiration date. There is no explanation for why Respondent should not provide the same safety information and remedy to all consumers who may have concerns about their ability to safely and correctly operate the Quick Release, regardless of when those concerns may arise.