



Office of the Secretary
Consumer Product Safety Commission
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Docket No. 02-2

**Comments of Consumers Union of the U.S. Inc.,
to the
Consumer Product Safety Commission
In Response to the Notice of
Proposed Rulemaking for Baby Bath Seats
(68 Fed. Reg. 74878)**

Introduction

These comments are submitted by Consumers Union¹ (CU), non-profit publisher of *Consumer Reports* magazine. They are in response to the Consumer Product Safety Commission's ("CPSC" or "Commission") request for comment on a Notice of Proposed Rulemaking ("NPR") to ban bath seats that do not meet certain requirements under the authority of the Federal Hazardous Substances Act ("FHSA"), 15 U.S.C. 1261 et seq.

¹ Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, *ConsumerReports.Org*, its other publications and from noncommercial contributions, grants and fees. *Consumer Reports* has four million paid circulation; total readership is approximately 16 million, and www.ConsumerReports.org has more than one million paid subscribers. In addition to reports on Consumers Union's own product testing, these resources regularly carry articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare.

Background

In October of 2001, CU submitted comments in response to the Advanced Notice of Proposed Rulemaking ("ANPR") relating to baby bath seats and rings (66 Fed. Reg. 39692, August 1, 2001). CU recommended to the CPSC that it issue a rule declaring baby bath seats to be "banned hazardous substances" under the FHSA.

CU stated in its October 2001 comments that:

[u]sing baby bath seats and rings encourages caregivers to leave children alone in the bathtub - a 'misuse' of the product. . . Parents and caregivers using these products develop a false sense of security because the products appear to be able to hold a child upright, and in place. In addition, these products pose a hazard even when used in a manner consistent with their purpose as a bath aid - evidence collected by the CPSC reveals three deaths have been reported where a caregiver was present in the bathroom. In addition, 41 non-fatal incidents have been reported with the products while the caregiver was present.

In our comments filed in October 2001 (excerpted above), we agreed with the Commission's findings contained in its August 2001 ANPR on baby bath seats: "The Commission has reason to believe that baby bath seats and rings, as currently designed, may present an unreasonable risk of injury." At the time, the Commission noted that it was "aware of 78 deaths and 110 non-fatal incidents and complaints from January 1983 through May 2001 involving baby bath seats and rings. Forty-one of these non-fatal incidents complaints occurred when a caregiver was present."

On July 28, 2003, CU filed "Consumers Union Comments to Consumer Product Safety Commission on Staff Briefing Package Recommendations on Baby Bath Seats," in which we commented on the CPSC Staff's recommendations and options for Commission action. In our comments, we commended the staff for its careful review of the options. However, we renewed our request for a ban, and raised concerns that

based upon past experience with these products, any other approach besides a ban would be inappropriate. We stated, however, that in the absence of a total ban, we supported the CPSC's effort to propose a mandatory rule.

After review of the current NPR, CU continues to believe that, based upon the history of these products, the most prudent approach would be to ban all bath seats. There is some evidence, based upon the research of Dr. Kimberly Thompson, that the use of bath seats may, on balance, result in fewer deaths among children aged 6 to 9 months.² However, this study's conclusions are based upon many unproven assumptions which render them unpersuasive.

In the study, Dr. Thompson attempts to quantify the relative risks of unintentional infant drowning deaths in bathtubs with and without bath seats. Dr. Thompson focused on infants ages 6-10 months, and assumes that 45% of the "19,455,025 infants ages 6-10 months in the 1994 through 1998 time period used bath seats, and the remainder did not."³ She states that the data suggests that the "population of infants that died while using bath seats appeared to be similar to the population that died while not using bath seats." She concludes that "the existing data are not consistent with the hypothesis that bath seats increase the risks of infant bathtub drowning overall or the assumption that without a bath seat the caretaker will be in constant attendance."⁴ However, she bases this conclusion on the assumption that consumers who own bath seats use them to bathe their children. She highlights this as a limitation of the study, because if, in fact, a portion of consumers own, but do not use bath seats, this would change the

² Thompson, KM, "The Role of Bath Seats in Unintentional Infant Bathtub Drowning Death. Medscape General Medicine, March 26, 2003, <http://www.medscape.com/viewarticle/450989>.

³ Id.

⁴ Id.

estimated number of bath seats in use -- and indicate a smaller number of bath seats in use -- and a corresponding higher risk of drowning when a bath seat is present.

Dr. Thompson also assumes that children not bathed with a bath seat are bathed in the bathtub. However, caregivers who do not use a bath seat may be bathing the child in a sink, or in some type of infant bathtub. If this is true, then of all children bathed in bathtubs, the risk of a child drowning in a bathtub may be greater in the presence of a bath seat.

Finally, Dr. Thompson was unable to address the question of why parents leave a child unattended, and whether parents might leave children unattended because they are lulled into a false belief that a bath seat will keep a child safe when left unattended in a bathtub. However, the possibility that caregivers may develop a false sense of security when they use bath seats is a factor that cannot be discounted or ignored. Professor Clay Mann, of the Intermountain Injury Control Research Center at the University of Utah Medical school, studied drownings with bath seats and drownings in bathtubs. Dr. Mann found two significant differences between the groups: 1) caregivers filled the bathtub higher when they used a bath seat, and 2) they were more likely to make a *willful* decision to leave a child unattended in a tub when a bath seat was being used.⁵

The false sense of security manifested in caregivers that the product will aid in a child's safety, coupled with the higher bath water level observed by Dr. Mann represent serious observable risks associated with the use of these products that are difficult to control. Safe use of the product is highly dependent on caregivers reading and

⁵ NC. Mann, R. Rauchschalbe, L. Olson, NZ., "Infant Seat Bathtub Drownings: Who's to Blame?" presented at the National Congress on Childhood Emergencies meeting, Baltimore, MD, March 27, 2000.

adhering to instructions on the warning label. The recommended age range is very short, and if a caregiver uses the product with a child who can pull to standing, the child faces a higher risk of drowning.

Another factor that seems to play a role in increased drowning risk is the presence of a sibling in the bathtub. This risk factor is not addressed by the proposed standard. Even if the CPSC issues a mandatory standard for baby bath seats, the existence of these other risk factors makes continued sales of the product unreasonable. Therefore, because of the dangerous history pertaining to these products, and in the absence of conclusive evidence that there is an overall benefit in all age groups from the use of the product, we continue to urge that the Commission issue a ban of all bath seats.

In the event that the Commission proceeds with issuing a mandatory standard instead of a complete ban, below is our analysis of the proposal, including suggested improvements to the proposed mandatory standard.

CU Analysis of Proposed Rule

On December 23, 2003, the Commission proposed this NPR. In it the Commission informed that, as of the date of publication, the use of bath seats has been associated with 106 infant and child deaths, and 163 non-fatal incidents since 1983 (68 Fed. Reg. 74878). For the period from 1994 through 2003 an annual average of 8.8 deaths and 12.5 serious, but non-fatal incidents were recorded. In an effort to reduce these deaths, the Commission proposes to continue to allow the sale of bath seats, but to permit sales only of those products that meet its requirements for stability, leg openings, and labeling. Bath seats not meeting requirements will be considered to be

"banned hazardous substances." While we commend the Commission for this effort to mandate the creation and sale of a safer bath seat, we are concerned that the new standard will not be sufficient to address risky behaviors that occur during the use of bath seats. We believe that the risk will be reduced, but not enough to warrant the continued use of bath seats.

Stability Requirements

In the absence of a complete ban, we support requiring, as part of the mandatory standard, that bath seats pass tests on a slip-resistant surface (See 68 Fed. Reg. 74888). We believe that this is a significant improvement over the testing requirements under the voluntary ASTM standard (ASTM 1967-03). This standard currently requires testing on a smooth (non-slip resistant) surface, but on a slip-resistant surface only if a bath seat is labeled to include its use on such a surface. Since a large number of household bathtubs have a slip-resistant surface and child bath seats on the market are not designed for such a surface, these bath seats represent a risk to children bathed in them.

We do, however, caution that the proposed test is to be conducted in a laboratory setting, on a clean surface, and may not appropriately reproduce the conditions in a consumer's household bathtub in terms of the presence of soapy water, grime and residual soap scum, and varying water level during use.

Recommended Improvements to Proposed Rule:

Static Load Requirement

We recommend that the Commission make mandatory certain requirements found in ASTM F 1967 - 03. The current ASTM standard requires static load testing of a bath seat with a 30-lb load. We recommend the inclusion of such a test, but we believe the CPSC should require the test to be conducted with a 100-lb load, in order to offset any force that might be exerted on the product if a caregiver partially leans on the bath seat.

Suction Cup Degradation Performance

We are concerned that if a product is stored for an extended period of time (such as between infants born into a household) the suction cups may degrade, and later fail to adhere to a bathtub surface. We therefore recommend that the Commission include a requirement -- for any product that has suction cups -- for the testing of suction cups for resistance to degradation over time. Such a test should ensure that a bath seat stored in an area of changing environmental conditions (e.g. temperature or humidity), would still provide effective adherence to slip-resistant bathtub surfaces.

Suction Cup Attachment Performance

We recommend that the Commission make mandatory -- for any product that has suction cups -- the testing requirements found in ASTM F 1967 - 03 for suction cup attachment performance of the seat to the product, and of the product to the bathtub surface. The test includes application of a 25-lb tensile vertical force on each suction cup, a cycling test of installing/uninstalling each seat (2000 cycles), and a subsequent

vertical 25-lb. tensile force on the bath seat to check the attachment of the product to the bathtub surface.

Leg Openings

In the absence of a complete ban, we support the Commission's proposal to narrow the leg openings, to prevent submarining of smaller and/or younger children.

Warning Label

We support the Commission's efforts to strengthen the wording on the warning label, and urge the Commission to require the warning to appear in both English and Spanish. However, we are concerned that the warnings on the label will be insufficient to deter caregivers from leaving an infant alone in the bathtub because, based on the history of these products, bath seats appear to allow caregivers to develop a false sense of security. Despite the fact that the device is not intended to be a safety device, caregivers seem to feel that the device will help keep the child safe in the tub, and will be more likely to leave the child unattended, or fill the tub to a higher water level. This is not conjecture, but rather the tragic truth that threads its way through the history of these products.

Permanency Requirement for Warning Labels:

We support requirements that the bath seat, and the front and back of its packaging contain the safety alert language and symbol in proposed 16 C.F.R. §1514.5. Because the potential hazards relating to bath seats will not diminish over time, we strongly urge the Commission also to add a permanency and readability requirement for

the warning label. The proposed standard lacks any permanency requirement. The current ASTM standard only requires that the label withstand immersion for 20 minutes.

In informal tests conducted by CU on products that claimed to comply with the ASTM standard, our testers observed that the labels on two models floated free after submersion in water for far less than 20 minutes. This occurred the first time the products were submerged in water. We consider this to be a considerable deficiency, especially since the proposed standard relies heavily on the caregiver following those instructions.

We strongly believe that because, as we observed, certain models purporting to comply with the voluntary ASTM standard do not, in fact, meet the standard, it is even more important that the Commission issue a mandatory standard in this area. We urge the Commission to strengthen the testing requirements to include permanence and legibility requirement to ensure the important warning will be available and decipherable to all caregivers. Otherwise, whatever benefit the labels might provide will be fleeting.

Labeling -- Compliance with CPSC Standard

We support the Commission requirements in proposed 16 C.F.R. § 1514.4(d), that "Each bath seat and its packaging shall display a label stating the bath seat complies with U.S. CPSC Requirements for bath seats." There remains, of course, the attendant concern that consumers will continue to view the product as a safety device.

The proposed warning reads (graphic omitted):

WARNING

Children have drowned while using bath seats.
ALWAYS keep baby within arm's reach.
This bathing aid is NOT a safety device.
Stop using when a child is able to pull to a standing position.
(68 Fed. Reg. 74881).

In addition, in order to clarify for consumers the approximate age at which a child is able to pull to a standing position, we recommend that the end of the last line of the warning label contain the parenthetical "(9 months)."

Recommended Improvements to Proposed Rule

We recommend that the Commission require a disclosure of the manufacture date on each bath seat. In addition, as is required for cribs, we urge the Commission to mandate that only identical products may carry the same identifying number. We recommend that the Commission adopt the following requirement that is in effect for cribs, *i.e.*, the creation by all manufacturers of:

A model number, stock number, catalog number, item number, or other symbol expressed numerically, in code or otherwise, such that only [products] of identical construction, composition, and dimensions shall bear identical markings. (See 16 C.F.R. §§1508.9(b)(2) and 1509.11(a)(2)).

Additional Recommended Improvements to Proposed Standard

Reduce age range recommendation

Because the staff review of drowning data summarized in the NPR (68 Fed. Reg. at 74886) indicates that children younger than 8 months are more likely to drown in the presence of a bath seat, we urge that the recommended age for use of the bath seats be limited to between 6 and 9 months of age.

Recall of All Non-Complying Bath Seats

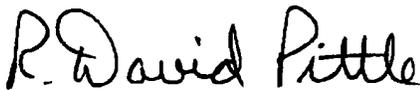
By proposing a ban of all bath seats that do not comply with the Commission's Proposed Rule as "banned hazardous substances," the Commission acknowledges the acute hazards associated with products that do not meet the standard. CU shares this concern, and urges the Commission to work closely with industry and other stakeholders to find ways to remove products that do not comply with any future mandatory standard from consumers' homes.

Conclusion

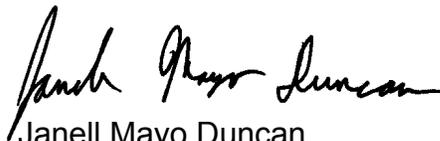
For the reasons stated herein, CU renews its request that the Commission ban baby bath seats as "banned hazardous substances." In the absence of such a ban, CU supports the CPSC's efforts to issue a mandatory rule banning bath seats that do not meet the requirements set forth under this NPR. CU requests, however, that the Commission include in its final rule the recommendations set forth in these comments.

March 15, 2004

Respectfully submitted,



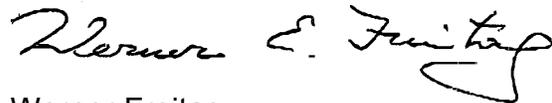
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