



U.S. CONSUMER PRODUCT SAFETY COMMISSION

4330 EAST WEST HIGHWAY
BETHESDA, MARYLAND 20814-4408

COMMISSIONER JOSEPH P. MOHOROVIC'S REMARKS TO THE DRI CHILDREN'S PRODUCTS PANEL COUNSEL

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Like every agency, the Consumer Product Safety Commission is filled with good people trying to do good work. We dedicate our lives to making the world safer one toy, one tool, one sofa at a time. But sometimes, our ideas have a few holes in them.

Literally.

CPSC's Broken Bucket List

In the mid-1990s,¹ the CPSC was rightly troubled by reports of young children leaning over five-gallon plastic buckets with water in them, falling in, and drowning because they couldn't extricate themselves or tip the buckets. It's a horrific tale, to be sure, and the agency – its heart ever in the right place – wanted to do something. Working with the relevant ASTM group, CPSC came up with six ideas . . . and I promise I'm not making these up.

- 1) *Easily tipped-over buckets.* Imagine consumers' frustration if they had to refill a bucket a dozen times just to mop a floor because it kept falling over.
- 2) *Restrict child access to the interior of the container.* This would be accomplished by way of "a post projecting upward from the bottom of the bucket."² Think bucket meets Bundt pan.
- 3) *Containers that would not hold water.* You could buy dry goods in a bucket, but holes would keep you from putting liquid in it.

¹ Plastic Buckets; Advance Notice of Proposed Rulemaking; Request for Comments and Information, 59 Fed. Reg. 35058 (July 8, 1994).

² *Id.* at 35059.

- 4) *Photodegradable material*. Vampire buckets that “degraded quickly from ultraviolet radiation from the sun,” though we realized that “buckets kept indoors might not degrade quickly enough to prevent substantial consumer use.”³
- 5) *Containers that could not be cleaned adequately*. One-time use buckets, hardly a green solution.
- 6) *Containers that would be recycled in a closed-loop system*. Think of bottle deposit systems, only more restrictive, “so that [buckets] would not come into consumers’ hands.”⁴

Some of these ideas seem like jokes – can you imagine going through five buckets just to wash your car because they kept disintegrating in the sun? – but what would not have been a joke was how far the agency would have stepped beyond the bounds Congress set for it. Fortunately, the Commission withdrew its proposal,⁵ but the saga reflects a reach-for-regulation impulse that lingers to this day.

Reasonable Limits

To be sure, protecting consumers is the core of our mission, but responsible pursuit of that objective has limits and nuance. As laudable as our ends are, there are means they cannot justify. First, we don't have the authority to go after any and every risk, only unreasonable ones. I don't know whether or not the risk plastic buckets present for young children is reasonable, but I do know it's a discussion we have to have before we take any regulatory action. Too often, we leave that important predicate question unanswered, never explaining why one risk is worthy of intervention but another is not.

Even if a risk is unreasonable, there are limits to how we can address it. By statute, each of our rules *must* consider “the probable effect of [the] rule upon the cost, or availability”⁶ of the products they regulate. Clearly, the bucket rule would have been a disaster on that front. Buckets are relatively inexpensive products, in part because they're paradigmatically simple. The engineering changes we were suggesting – like making them from vampire plastic – might well have priced buckets out of any real viability in the market.

We also can only issue a rule if we expressly find that it “imposes the least burdensome requirement which prevents or adequately reduces the risk of injury.”⁷ According to the House committee that authored our original statute, the Consumer Product Safety Act (CPSA), for a risk to even be considered unreasonable, it must be “one which can be prevented without affecting the product's utility, cost[,] or availability,” or one for which the public benefit outweighs any

³ *Id.*

⁴ *Id.*

⁵ Plastic Buckets; Withdrawal of Advance Notice of Proposed Rulemaking, 60 Fed. Reg. 29518, 29520 (June 5, 1995).

⁶ 15 U.S.C. § 2058(f)(1)(C).

⁷ 15 U.S.C. § 2058(f)(3)(F).

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such effects.⁸ I'm not an engineer, but I don't think you can put holes in buckets without affecting their utility for most purposes.

There are also informal limits to how much a government agency can accomplish by regulation. In a recent New York Times poll, 54% said they thought the nation's economy was facing too much regulation, compared with just 38% who thought there was too little regulation.⁹ In a climate in which Americans¹⁰ already feel regulation is excessive, an agency that moves too far or too quickly may find itself the scapegoat for all of that discontent.

That's especially true for an agency whose mission isn't *just* to regulate. As I mentioned, protecting consumers against unreasonable risks is only part of our charge. We're also directed to "assist consumers in evaluating the comparative safety of consumer products,"¹¹ "develop uniform safety standards for consumer products and to minimize conflicting State and local regulations,"¹² and "promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries."¹³ We can't always regulate our way to safety, but by doing the research to understand a hazard and sharing that knowledge with consumers, we can help them make themselves safer.

Sometimes, consumers choose to use a product they know carries risk. Government needs to be very careful and very sure of itself when it tells those consumers that they're wrong, that whatever benefit they derive from a product is, despite their own judgment, not worth the risk. And this idea has been embedded in the CPSC's mandate as long as the agency has existed. One of the first courts to look at a CPSC rule reasoned that, "If consumers have accurate information, and still choose to incur the risk, then *their judgment may well be reasonable*."¹⁴ Even if

⁸ H.R. REP. NO. 92-1153, at 33 (1972).

⁹ Andrew Sorkin & Megan Thee-Brenan, *Many Feel the American Dream Is Out of Reach, Poll Shows*, N.Y. TIMES, Dec. 10, 2014, available at http://dealbook.nytimes.com/2014/12/10/many-feel-the-american-dream-is-out-of-reach-poll-shows/?_r=0. In a similar Gallup poll, 49% of respondents felt businesses were overregulated, while barely one-in-five thought more regulations were necessary. Frank Newport, *Few Americans Want More Gov't Regulation of Business*, GALLUP, Sept. 15, 2014, available at <http://www.gallup.com/poll/176015/few-americans-gov-regulation-business.aspx>.

¹⁰ Interestingly, the United Kingdom has had great success in taking such perceptions seriously and addressing the facts that underlie them. BETTER REGULATION EXECUTIVE, U.K. DEPT. FOR BUSINESS INNOVATION & SKILLS, THE NINTH STATEMENT OF NEW REGULATION (2014). The UK has embarked on two ambitious regulatory reform initiatives. "One In, Two Out" requires that an agency remove two pounds of cost it imposes on business for each pound it adds, *id.* at 13, while the "Red Tape Challenge" invites the public "to challenge the Government to get rid of burdensome regulations." *Id.* at 21. These initiatives have helped the UK reduce its economic regulatory burden by nearly £2.2 billion. *Id.* at 5. This shift has not gone unnoticed, as the proportion of British businesses that believe "Government regulation [is] fair and proportionate" has risen from under 40% in 2007 to over 60% in 2014. *Id.* at 11.

¹¹ 15 U.S.C. § 2051(b)(2).

¹² 15 U.S.C. § 2051(b)(3).

¹³ 15 U.S.C. § 2051(b)(4).

¹⁴ *Aqua Slide 'N' Dive Corp. v. U.S. Consumer Prod. Safety Comm'n*, 569 F.2d 831, 839 (5th Cir. 1978) (emphasis added).

consumers are taking a risk we might not agree with, that doesn't make the risk inherently unreasonable.

Latent v. Patent Hazards

So, one of the first things I look at is how obvious the hazard is. For me, a latent hazard – a risk whose nature or severity consumers are not likely to appreciate – is always more compelling than a patent hazard – one an ordinary, reasonable consumer should anticipate and understand.

My focus on latency comes in part from my belief in personal responsibility and my belief that government cannot and should not replace that responsibility. It also comes from the value I place on personal choice. We all make dozens or hundreds of choices every day based on any number of factors, and safety is routinely one of those. Where should I cross the street? How much should I brake to make that turn? And yes, is this product or this behavior safe?

Admittedly, consumers do not always have all of the accurate information, which is why part of our mission is information-sharing.¹⁵ When we develop information that suggests consumers are being harmed in a way that may result from their own decisions rather than any inherent product hazard, it may be that the proper role for us is to share the information and allow consumers – the free market – to address whether or not the harm is reasonable by either changing or continuing that behavior.

A properly informed body of consumers provides its own regulatory forces, rejecting products that present risks those consumers feel are unreasonable, and that silent regulation can adapt more quickly than the centralized planning that is the CPSC.¹⁶ Each consumer-regulator also possesses at least one piece of information we don't: Her own risk-tolerance. Wherever possible, I prefer to see us help that consumer do her own regulating by turning latent hazards into patent ones through robust warning and information efforts. To give you some examples of the distinction between hazards for regulation and hazards for education, we recently proposed a set of radical mandates for recreational off-highway vehicles (ROVs). To me, ROV use – especially in the pure recreation setting – is an inherently risky activity, but it's up to consumers to decide if it's too risky for them. It's their choice, not mine.

Further, a substantial majority of the injuries and deaths related to ROVs come from another choice: the choice not to wear a seatbelt. Given how successful public education and local law enforcement campaigns have been about the value of seatbelts in cars, I believe consumers are well aware of the risk of not using one in that context. It's a patent hazard, and given that the most effective solution is a consumer choice to mitigate the hazard by buckling up, I'm not convinced it's a problem that needs a federally mandated solution.

¹⁵ 15 U.S.C. § 2051(b)(2).

¹⁶ See generally Friedrich A. Hayek, *The Use of Knowledge in Society*, 4 AMER. ECON. REV. 519 (1945).

To the extent that consumers do not appreciate that unbelted ROV use presents lethal risk, the agency may have a role to play – alongside state and local governments, user groups, and the industry – in correcting any misperceptions. If consumers continue to make an informed choice to ride without seatbelts, then they have made a decision that the risks are not unreasonable, and I see no reason to overrule their personal choices.

A recent example of a latent hazard is our vote to regulate small, powerful magnets. These products actually present both a patent and a latent hazard. The patent hazard is the risk of choking that any object this small – small enough to fit in the test cylinder described in our small parts regulation¹⁷ – presents for children. But what consumers may not realize is that, even if the magnets make it through a child's throat with no problems, their magnetic interaction can cause serious damage in the airway or the intestines. The ordinary, reasonable consumer probably would not anticipate or appreciate that risk, so I felt it was an appropriate area for CPSC intervention in the form of a performance standard.

Consumers Are Regulators, Too

Consumer choice doesn't just show up in which products people use, but also in how they use them. Sometimes, people use products in ways the manufacturer didn't intend. When that misuse is foreseeable – when the manufacturer can reasonably anticipate how people will misuse the product – we may have a role to play in trying to guard against a resulting hazard by regulation. Addressing foreseeable misuse is implicit in our statutes, but it's also something we can take much too far. If consumers are misusing a product in a way they know could expose them to harm, that is ultimately their choice to make, and it may be reasonable.

Ultimately, whether they're misusing a product or not, consumers not only have a role to play in their own safety, but, when they're properly informed, they're in the *best* position to keep themselves safe. No rule we can pass is as effective as consumers choosing not to buy a product because they feel it presents too much risk.

Sometimes, we try to circumvent consumer choice. In our pending rulemaking on window blinds, for example, the hazard we're trying to address is that exposed cords used to raise, lower, or adjust the blinds can be a tempting plaything for children, who then wind up strangled or otherwise entrapped in the cords. One solution is for consumers to use cleats sold with the blinds to secure the cords out of the reach of children, rather than leaving them hanging.

Instead of that, some people want a passive solution, something that mitigates the hazard completely without any user input. The problem is that the passive solution would be substantially more expensive, impractical for some situations, and perhaps make blinds unusable for some consumers, especially the elderly and people with disabilities – and the “vertically challenged.”

¹⁷ 16 C.F.R. § 1501.4.

Cordless window coverings take a variety of forms, ranging from expensive remote-operated versions to less pricy roll-up shades. Some are ideal for one application while being inappropriate for the next, but they are all more expensive than the ordinary corded blinds that are so ubiquitous. Moreover, aside from the motorized units that “are more than \$100 higher than the prices of corded window coverings,”¹⁸ most require more strength, flexibility, or dexterity than corded blinds. At a minimum, they require that the user be able to reach both the very bottom and the very top of the unit. A cord is, essentially, a limited-range remote control, and without that option many consumers will find the shelves stocked only with products they cannot use.

By contrast, cord cleats are an effective solution. In its analysis, our staff expresses valid concerns that some consumers may not consistently use cleats, but does not suggest properly used cleats will not substantially mitigate the risk. Where there is a viable, less burdensome solution to a hazard, embracing that solution is not just good government, it’s required under our statute.¹⁹ The fact that such a solution relies on consumer behavior is not going to be enough to deter me from supporting it.

Perhaps the concern is that consumers don’t always choose the safer path or perform the action that keeps a product safe. People don’t always buckle their seatbelts or tie down their window blind cords. One of my goals is to look for opportunities to resolve that problem not by designing the consumer out, but by informing the consumer. People may make risky choices they don’t know are risky. It’s our job – in fact one of our statutory missions – to help consumers understand the risks they take.

Nudging Safety

We may find that information is a way of “[altering] people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.”²⁰ That’s an approach to regulation recommended in a book called *Nudge*, by Richard Thaler and Cass Sunstein, former head of the Office of Information and Regulatory Affairs under President Obama. The concept is that, rather than trying to mandate what government considers to be sound choices, we provide consumers with concise information to nudge them into sound choices on their own.

A great example is the EnergyGuide label, which estimates how much an appliance will cost to operate. Presumably, all other things equal, consumers will choose the cheaper, more energy efficient appliance. As a result, government achieves energy use and environmental quality gains without taking consumers’ choices away. It’s what the book describes as “libertarian

¹⁸ Corded Window Coverings; Request for Comments and Information, 80 Fed. Reg. 2327, 2332 (Jan. 16, 2015).

¹⁹ 15 U.S.C. § 2058(f)(3)(F).

²⁰ Richard H. Thaler & Cass R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, 6 (2008).

paternalism,²¹ in stark contrast to the nanny-state paternalism that is too often associated with health and safety agencies. Not only does CPSC have the opportunity to apply such an informed-choice model, we have a mandate “to assist consumers in evaluating the comparative safety of consumer products.”²²

My first instinct is to preserve consumers' liberty, so, generally, I prefer promoting the exchange of information over mandating product design or performance. Sometimes, however, more direct CPSC action is appropriate, such as in our children's product testing rule.

Required under the Consumer Product Safety Improvement Act of 2008 (CPSIA), third-party testing for children's products is designed to realize consumers' assumption that a product on the shelves has been checked against all applicable rules.²³ While we have allowed manufacturers to rely on the testing of component parts, they still have to do so in a manner that gives retailers, the Commission, and consumers confidence.²⁴

Establishing this trust is all the more important in the realm of children's products, as the person making the buying decision is handing the product off to a vulnerable and invaluable end user. Children are “involuntary risk takers,”²⁵ and we owe it to them and their care-givers to work to minimize the risks they take.

A Soft Touch

In imposing these mandates, however, we should still adhere to the CPSA's underlying requirement that we look for the least burdensome means. In the context of the testing rule, that means we need to look for any opportunities to reduce the number, complexity, and costs of tests a product must pass before it can be sold.

Our Fiscal Year 2015 Operating Plan lists seven categories of burdens we may be able to lift, and CPSC Chairman Elliot Kaye and I sent a letter to Senate Commerce, Science, and Transportation Committee Chairman John Thune that discusses three potentially major areas of relief we can provide. I believe these are a good start, but we have to keep looking for opportunities to make sure consumers aren't buying their confidence in products at too high a price.

²¹ *Id.*

²² 15 U.S.C. § 2051(b)(2).

²³ The rule requires that children's products be tested sufficiently to give a “high degree of assurance that the finished product complies with the applicable children's product safety rules.” 16 C.F.R. § 1107.20(b).

²⁴ The rule requires that a finished product certifier “exercise due care in order to rely” on certificates or tests by another party. 16 C.F.R. § 1109.5(i).

²⁵ *The Views of the Independent Agencies on Regulatory Reform: Hearing Before the Subcomm. On Oversight and Investigations of the H. Comm. On Energy and Commerce*, 112th Cong. 11 (statement of Robert S. Adler, Comm'r, U.S. Consumer Prod. Safety Comm'n).

A Precautionary Tale

Hazard latency and a preference for informing and empowering consumers are two principles that motivate my decisions, but I'd also like to talk about one that doesn't: The Precautionary Principle. Those of you who have dealt with chemicals regulation in Europe are familiar with this principle, which holds that a product should be presumed to be harmful until it's proven to be benign.²⁶ The Precautionary Principle is the core of the European Union's REACH²⁷ – the Regulation on Registration, Evaluation, Authorisation, and Restriction of Chemicals – and it is distinct from the traditional American approach that deems products safe until there is evidence to the contrary.

In our recent hearing²⁸ over issuing an NPR to permanently ban several phthalates from children's products, some of my colleagues expressly endorsed the ideas behind the Precautionary Principle. They said that there is “too much onus on the government to prove a product is dangerous as opposed to those who are profiting by it to demonstrate that their product is safe,” and that not applying the Principle is “totally irrational” and a “flat-out public policy failure.” They advocated that, at least in the area of chemicals – and perhaps elsewhere – CPSC have pre-market approval authority. I can't imagine the level of market disruption that would cause.

My concerns aren't speculative; they've already come to pass in some areas. For example, the Food and Drug Administration (FDA) does have pre-market approval authority, and scholars have suggested the scenario presented in the Oscar-winning film *Dallas Buyers Club* – one of excessively risk-averse bureaucracy standing between sick people and medicines that could save or at least improve their lives – is all too real. When uncertainty about the safety and efficacy of using a beta blocker to prevent second heart attacks resulted in a “seven-year delay” of the drug, that delay may have cost “some 45,000 to 70,000 lives, greater than all the casualties resulting from thalidomide and other major new drug disasters.”

Even though it can come with a cost, pre-market approval makes sense in FDA's environment, where the products at issue are ingested and, by design, have powerful effects on the fundamental operation of the human body.²⁹ In CPSC's realm, pre-market approval – particularly

²⁶ See, e.g., Frank B. Cross, *Paradoxical Perils of the Precautionary Principle*, 53 WASH. & LEE L. REV. 851 (1996).

²⁷ Corrigendum to Regulation (EC) No. 1907/2006, Concerning the Registration, Evaluation, Authorisation, and Restriction of Chemicals (REACH), 2007 O.J. (L 136) 18 (“This Regulation is based on the principle that it is for manufacturers, importers[,] and downstream users to ensure that they manufacture, place on the market[,] or use such substances that do not adversely affect human health or the environment. Its provisions are underpinned by the precautionary principle.”).

²⁸ See generally, *Commission Meeting: Decisional Matter – Phthalates – Notice of Proposed Rulemaking*, U.S. Consumer Prod. Safety Comm'n (Dec. 17, 2014), available at <http://www.cpsc.gov/en/Newsroom/Multimedia/?vid=71311>.

²⁹ FDA has also made great strides in honing their review processes to accelerate approvals while still holding would-be new drugs to exacting standards for safety and efficacy.

if it is governed by the ultra-conservative spirit of the Precautionary Principle – promises far more in costs than it does in benefits.³⁰

“Minimize conflicting State and local regulations”

Chemicals regulation is in fact a burgeoning category of market disruption, particularly below the federal level. States, counties, and even cities are creating laws and rules to govern the use of chemicals in consumer products sold in their jurisdictions. The most familiar, of course, are the California Green Chemistry Initiative³¹ and Washington's Children's Safe Products Act,³² namely its list of 66 “chemicals that are of high concern for children,”³³ but fully half of the states have one or more laws regarding chemicals.³⁴ Worse, there is very little CPSC can do to untangle this web. Even though part of our mandate is to develop uniform standards and minimize conflicting laws and we have preemptive authority to make that happen, our preemption only extends to safety standards. Many of these state laws are reporting requirements, where our preemption authority is limited.³⁵

The best hope for standardizing chemical regulation may be reform of the Toxic Substances Control Act of 1976 (TSCA). An effort has been underway in Congress for years, and an overhaul bill came close to passage last year. There are some remaining issues – such as balancing preemption and how much new authority to give agencies like the EPA – but the committee leaders say they're confident they'll be able to pass some kind of reform this year.

Even with TSCA reform, chemicals and chronic hazards will continue to play a significant role in consumer product policy at all levels. For example, in December, New York City Consumer Affairs Commissioner Julie Menin – with the support of a letter from Senator Kirsten Gillibrand (D-NY) – petitioned CPSC to initiate rulemaking regarding the “Washington 66.”³⁶ She wants us to review the use of – and potentially ban – all those chemicals in children's products. By law, we're required to take some action on the petition – so the issue is certain to be a topic of debate.

Getting Personal: Who's Responsible for Recalls?

Another hot topic of debate from the CPSC – and another emerging principle I have serious reservations about – is our decision to use the Responsible Corporate Officer (RCO) doctrine to

³⁰ This is particularly true for any risk to consumers caused by a manufacturing defect in a product, which pre-market approval would do little if anything to prevent.

³¹ Assem.B. 1879, 2007-2008 Sess., ch. 559, Statutes of 2008; S.B. 509, 2007-2008 Sess., ch. 560, Statutes of 2008.

³² Wash. Rev. Code § 70.240 *et seq* (2008).

³³ Wash. Rev. Code § 70.240.030 (2008). *See also* Wash. Admin. Code § 173-334-130 (2009).

³⁴ Melanie Condon, *Toxic Substances Control Act Reform*, NATIONAL CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/environment-and-natural-resources/state-chemical-statutes.aspx> (May 19, 2014).

³⁵ *See, e.g.*, Chem. Specialties Mfrs. Ass'n, Inc. v. Allenby, 958 F.2d 941, 949-50 (9th Cir. 1992) (holding California chemicals reporting statute not preempted by Federal Hazardous Substances Act, administered by CPSC).

³⁶ Press Release, New York City Department of Consumer Affairs, NYC Department of Consumer Affairs (DCA) Commissioner Julie Menin Urges Federal Government to Investigate Toxic Chemicals in Children's Products (Dec. 15, 2014), *available at* http://www.nyc.gov/html/dca/html/pr2014/pr_121514.shtml.

pursue penalties against Craig Zucker when his company, the company behind Buckyballs, went bankrupt and couldn't fund a recall. There may be circumstances where we should invoke RCO, and indeed we've done it before, when we went to federal court to accuse a fireworks company of importing banned products.³⁷ Those facts were not present in Mr. Zucker's case.

The proceeding against Buckyballs (and ultimately Mr. Zucker) was an administrative hearing³⁸ in which we asked an Administrative Law Judge to determine that the product presented a "substantial product hazard [SPH]."³⁹ Once something is deemed to present an SPH, we can "order the manufacturer or any distributor or retailer" to stop sale and take any of several remedial actions,⁴⁰ and selling an SPH product we have ordered removed from the market is a prohibited act⁴¹ that carries potential civil⁴² and criminal penalties.⁴³

At the time we invoked the RCO doctrine, we were at the beginning of the SPH process, not the end. The ALJ had not ruled on whether or not Buckyballs presented a substantial product hazard, they were not subject to a regulatory ban or standard with which they failed to comply, and, as our General Counsel acknowledged, "it [was] not a violation of any law administered by the CPSC for any retailer to continue to sell Buckyballs"⁴⁴ at that point.

Even if we had prevailed before the ALJ (and any further levels of appeal) and Buckyballs had been ruled to present an SPH, no sales prior to that point would have been illegal, and no fines⁴⁵ or prison time could have resulted. Most of the time, we do not have to use this process, as our recalls are conducted voluntarily. Companies either agree a product presents an SPH or do not wish to spend the time and money necessary to fight us in the hearing process.

The voluntary route, however, is voluntary, and companies are entitled to due process and their day in court. That was what Mr. Zucker wanted, the right our statute affords him to make the case for his company's product before a neutral arbiter. In the minds of many, we sought to punish him for exercising that right as vocally as he did.⁴⁶

³⁷ *Shelton v. U.S. Consumer Prod. Safety Comm'n*, 277 F.3d 998 (8th Cir. 2002).

³⁸ 15 U.S.C. § 2064(f).

³⁹ 15 U.S.C. § 2064(a)(2) ("a product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public").

⁴⁰ 15 U.S.C. § 2064(c). *See also* 15 U.S.C. § 2064(d), (e).

⁴¹ 15 U.S.C. § 2068.

⁴² 15 U.S.C. § 2069.

⁴³ 15 U.S.C. § 2070.

⁴⁴ Letter from Cheryl Falvey, General Counsel, U.S. Consumer Prod. Safety Comm'n, to Alan H. Schoem, Esq. (July 20, 2012), *available at* <http://www.cpsc.gov/en/Recalls/Recall-Lawsuits/Adjudicative-Proceedings/> (item 36, "Exhibit D").

⁴⁵ Seeking to force a company to bear the costs of a recall, as we did in this case, is not the same as a penalty and is available in an SPH hearing. 15 U.S.C. § 2064(e).

⁴⁶ There certainly was a factual argument for exploring the RCO option in this instance, as Zucker's company had filed for bankruptcy and dissolved, leaving no one to pay for the recall but the CPSC and, ultimately, the taxpayers.

Ultimately, the agency settled its complaint against Mr. Zucker, so there will be no court ruling on whether or not our decision was legally appropriate. The public might infer from the terms of the deal – a settlement of less than \$400,000 against a perceived demand of \$57,000,000⁴⁷ – that we might have lacked some confidence in our legal position, the facts of the case, or both. That leaves lots of questions unanswered for the regulated community, from the circumstances under which CPSC might employ the RCO strategy again to the propriety of making an astronomical monetary demand when the agency is willing to settle for less than one percent of that amount.

Moreover, the circumstances of the Zucker complaint raise fundamental institutional issues. I believe the decision to invoke the doctrine – while it may ultimately be appropriate in rare cases – should only be a Commission decision. There are serious legal and policy implications, and those are the prerogatives of the Commission. In the case of Buckyballs, while the Commission did vote to issue the original complaint against the company, the decision to pursue Mr. Zucker was not made at the Commission level. That troubles me, and I hope we don't see a repeat.

As a Commissioner, I'm not sure I could ever endorse personally prosecuting an executive whose sole "offense" was demanding the government make its case as envisioned by our statutes before he would accept that his product was a substantial hazard. I certainly cannot endorse that decision being made at the staff level.

Relating to "Relating to"

Whether or not we should be going after executives for company behavior that we allege was unsafe but not illegal is not the only tough legal question surrounding the agency recently. We also took a bad courtroom loss, relating to our consumer product database. In fact, "relating to" was precisely the issue.

As you know, the CPSIA required us to create a publicly available database to catalog and disseminate reports of harm "relating to" the use of consumer products. We sought to publish a tragic report about an infant who died while in a particular carrier even though an autopsy indicated the child had choked on a foreign object and there was no reasonable suggestion the carrier played any role in his death. The manufacturer sued to stop the publication, and the court ruled that the phrase "relating to" means a report demonstrating some kind of connection or association between an incident and a product, not just a report "about" a product.⁴⁸ Whatever your thoughts on the parsing of the phrase, it's clear the agency needs to be more thoughtful in its decisions; what we do has a real effect on real people's lives and livelihoods, and we cannot take that responsibility lightly or be glib in the way we treat the companies we regulate.

⁴⁷ To be clear, the \$57 million figure was a claim against the liquidation trust that Mr. Zucker would not have had to pay himself, but it was the figure that caught observers' attention.

⁴⁸ "[T]he Commission predicates its decision to publish the report on the coincidence that the baby was present in the carrier [but this decision] bears no rational relationship to the public safety purposes the CPSIA purports to promote." *Ergobaby v. Tenenbaum*, No. 8:11-cv-02958-DKC, 43 (D. Md. July 31, 2012).

Conclusion

And that really is the core of my regulatory philosophy: Taking a serious job seriously and looking out for *all* of our constituents. Whether we do it by taking a product off the market or putting more information into it, our job – the mission Congress gave us – is to protect consumers with the slightest disruption to the market necessary to achieve that end. We have, by design, a mission of balance.

Balancing always involves difficult choices. We have to look carefully and thoughtfully at what it is we may want to do and seek to understand how it will affect everyone we serve. It's not always possible to get it right, but it is our responsibility to make the effort, not simply mandate by impulse and let other people sort out the details. When we want to put holes in buckets, we have a responsibility to stop and ask if that's a good idea. Thankfully, in the 1990s, we did stop and think, and the world was spared vampire buckets. It was a tough choice – but the right one – to pull the rule back in the face of tragedy, but the burden of making tough choices is what you're getting into when you take that oath. I hope we will continue to make the choice to do what *is* right, not what just *feels* right.