



**U.S. CONSUMER PRODUCT SAFETY COMMISSION
4330 EAST WEST HIGHWAY
BETHESDA, MD 20814**

**STATEMENT OF COMMISSIONER ROBERT ADLER REGARDING
THE CIVIL PENALTY SETTLEMENT AGREEMENT WITH AQUA-LEISURE INDUSTRIES, INC.**

October 18, 2012

On October 12, 2012, I voted along with my fellow Commissioners to provisionally accept a settlement agreement with Aqua-Leisure Industries, Inc. to pay a civil penalty of \$650,000 to resolve CPSC staff allegations that the company knowingly failed to report the existence of a defect in its inflatable baby boat seats. The defect was the sudden and unexpected tearing of the seats, sometimes plunging an infant into water deep enough to submerge the child completely. In such a case, only the immediate intervention of the child's caregiver could save the child's life.

I cast my vote reluctantly not because I disagree with the amount of civil penalty that this small business will have to pay, but because I believe that the company's wrongdoing is extremely serious. Were it within my power to take more drastic action against this company, I would unhesitatingly have done so.

Background

Aqua-Leisure is a repeat offender. In 2001, the company undertook a recall of its inflatable baby boats because the seats could suddenly and unexpectedly tear, thereby permitting the complete submerging of an infant into a pool or other body of water. At least four children reportedly suffered this fate before being rescued by their caregivers. Miraculously, good fortune prevailed and, to the best of my knowledge, no one drowned. But the strong potential obviously existed.

After this recall, CPSC staff monitored the company's Corrective Action Plan for two years. On July 14, 2003, staff closed the case, but notified the company that it had a

“continuing obligation to inform the Commission of defects associated with this product....”

Unfortunately, over the next three years, Aqua-Leisure became aware of at least 17 incidents in which its post-recall inflatable baby boat seats “fell out,” “ripped,” “failed,” “tore,” “split” and/or “separated,” including four incidents in which the boat’s seat ripped sufficiently to cause children to fall into the water unexpectedly. More ominously, the company obtained information that the leg straps of the baby boats were not being produced in accordance with the width and thickness specifications of the replacement product that had been evaluated by CPSC staff as part of the 2001 recall, arguably a violation of its Corrective Action Plan. Notwithstanding this information, the company failed to issue a warning to the public, undertook no recall, and did not report to the CPSC.

As the reports of seat failure continued, Aqua-Leisure’s senior executives in August 2008 raised concerns internally about a “potential problem” with its baby boat seats, prompting their own investigation of the products and consideration of filing a report to the CPSC. Given the company’s previous history with this product and with the agency, it seems hard to imagine the company was unaware of its legal obligations. Again, the company failed to issue a warning to the public, undertook no recall, and did not report to the CPSC.

Later that year, CPSC staff notified Aqua-Leisure of an incident in which a 6-month old girl became completely submerged in a pool when the bottom of her inflatable baby boat seat “broke completely.” In fact, the company had already received notice of this incident. Notwithstanding these reports, the company failed to issue a warning to the public, undertook no recall, and did not report to the CPSC. By this time, the company had received at least 24 consumer complaints regarding the tearing of the boat seats in its post-recall products, including nine reports in which children fell completely through the seats and were totally submerged underwater.

On March 12, 2009, just hours before the publication of a news story by a Boston news team about problems with Aqua-Leisure’s products and its failure to report to the Commission, the company finally reported to the CPSC. To make matters worse, the company’s initial report dramatically understated the scope and severity of the hazard. Its report identified only four incidents and only one model of boat when, in fact, it had

28 complaints spanning 18 different models. The company waited two more months before it disclosed the full extent of the information in its files.

Finally, on July 2, 2009, the company announced a recall of its inflatable infant boats. Too little, too late, in my judgment.

Discussion

Drowning is among the leading causes of unintentional deaths for young children in the United States. Every year, almost 500 children ages 4 and under die this way. Given the catastrophic and unexpected way that Aqua-Leisure's baby boat seats failed, one can only sigh with relief at the tremendous good fortune of the families whose children – without mishap – ended up plunging without warning into water completely over their heads. Obviously, this good fortune extended to the company as well because it is only through the greatest of luck that no child lost its life in these defective baby boats.

Luck, however, should not be a mitigating factor when examining a company's behavior. In this case, several things disturb me about the company's actions and justifications. First, the company's response to the staff's allegations is to point out that "like all inflatable pool toys, the Subject Products degrade over time." I see no indication in the public record that product degradation played a significant role in this case (or in the 2001 recall). Moreover, I fail to see anything in the extensive warnings issued by the company that alerts consumers to the hazard of degradation or provides any advice about how to check for – or guard against – such a hazard.

I am equally troubled by the company's attitude towards the reported failure rate of its products. The company points to the small number of consumer reports about the potential hazard of its products given the large number sold and notes that the number of "substantiated injuries is zero." I am unimpressed. To imagine that the number of consumer complaints reported represents the actual number of failures of the product's design is naïve. No one knows the ratio of actual incidents to reported incidents for a product like this, but I imagine the relief of many parents that their child did not drown might overwhelm any thought of reporting the incident to the company, especially in light of the low cost of the product.

And the idea that no "substantiated injuries" occurred gives me no reassurance whatsoever. Unfortunately, that confuses luck with skill – a deadly thought indeed. Congress did not direct the CPSC to wait for a body count before acting – and the

companies that make consumer products should not justify their failure to report on the random chance that an unreasonably dangerous product has not yet caused injuries or deaths.

Moreover, as modern production methods with a special emphasis on quality control have taken hold in America and the world, failure rates even this low are simply unacceptable. I say this particularly where a failure presents such a severe risk of death.

Finally, I find myself offended by the company's argument that its baby boats contained no defect because they included warnings to parents not to leave children in the boats unattended.¹ To say that this argument misses the point is a massive exercise in understatement. Warnings cannot substitute for poor design or shoddy manufacturing. To quote a tired joke that illustrates the point: when the auto mechanic says to his customer, "I couldn't fix your brakes, so I made the horn louder," listeners chuckle because of the absurdity of the idea that a defective product can be made not so simply by alerting people to the defect.²

Conclusion

Given Aqua-Leisure's previous recall history with its inflatable baby boats, based on the information available in the public record, I believe it indisputable that the company knowingly failed to file a report under section 15(b) of the CPSA and, therefore, committed a prohibited act under section 19(a)(4) of the Act. Committing such a prohibited act exposes the company to liability for civil penalties under section 20(a) of the Act. I would, moreover, venture an opinion that the behavior in this case probably extended to a violation of section 21 of the CPSA, which imposes criminal liability for

¹ They point to language in 16 CFR § 1115.4 stating that the Commission should "consider, as appropriate: ... the adequacy of warnings and instructions to mitigate such risk" before it determines that a product is defective.

² And even if I for a moment accepted the notion that a warning could fix the defect with Aqua-Leisure's baby boats, I would insist on an extremely prominent warning that read something like this:

WARNING: THE SEATS ON THESE BABY BOATS MAY UNEXPECTEDLY RIP OR TEAR, SUDDENLY PLUNGING YOUR CHILD INTO WATER SO THAT IT IS COMPLETELY SUBMERGED AND IN IMMINENT DANGER OF DROWNING. STAY WITHIN ARM'S REACH AT ALL TIMES WHEN YOUR CHILD IS SITTING IN THE BABY BOAT.

Needless to say, Aqua-Leisure has no warning anything remotely similar to this. Moreover, I repeat: such a warning would not really solve the problem of its poor design. What the company needed to do was not to make such a dangerous product.

violations made “knowingly and willfully.” I say this because I see no evidence that the company made a serious move to notify the Commission absent the impending disclosure by a Boston news source of the company’s hazardous product. The time to report had long passed. The company knew it and did nothing, intentionally placing thousands, if not millions, of children at a serious risk of death. Luck should neither be a strategy nor a defense.