

## Decades-Old Law Hides Dangerous Products and Impedes Recalls

The provision has endangered children and kept parents in the dark about the Fisher-Price Rock 'n Play Sleeper and other products

By Rachel Rabkin Peachman  
April 30, 2019

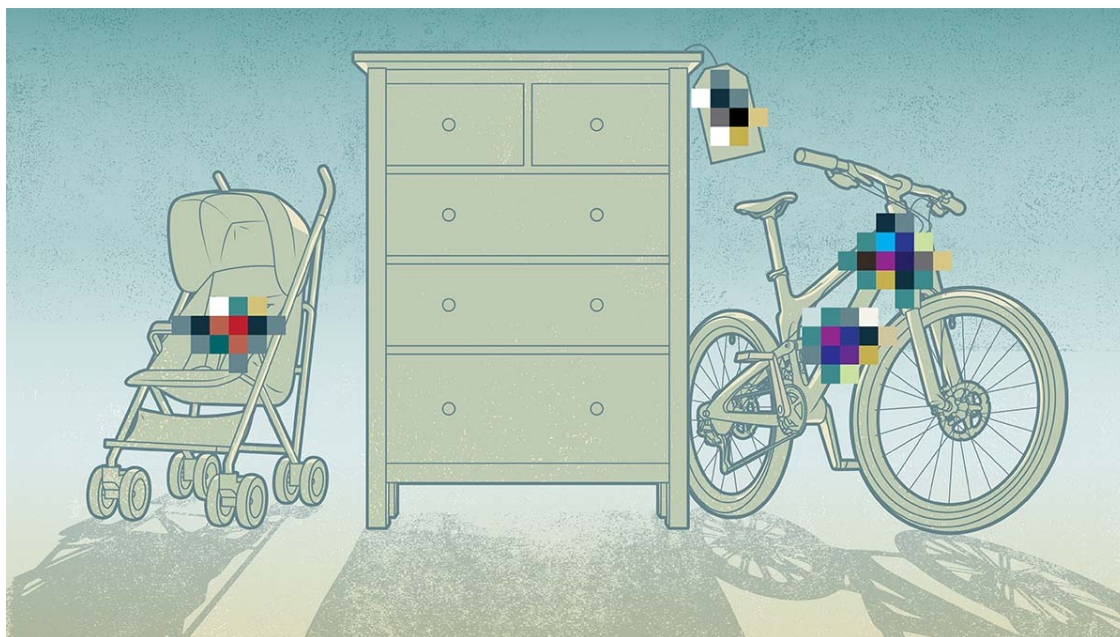


ILLUSTRATION: CHRIS PHILPOT

The deaths were alarming—and hard to miss: 19 infant fatalities, right there in the government data, all linked to the Fisher-Price Rock 'n Play Sleeper and similar products made by the company Kids II.

Consumer Reports' safety experts saw the information only because of an error on the part of the federal government agency that collected the data and sent it to CR. Typically, the agency—the Consumer Product Safety Commission (CPSC)—redacts company and product names in the reports they share. But in this case, those details stood out in stark black and white.

Some pediatricians and consumer advocates had worried about the Rock 'n Play Sleeper for years, noting that babies should be put to sleep flat on their backs, not on an incline, and free from restraints and soft bedding. But without definitive public information tying fatalities to the products, the sleepers remained on the market.

### MORE ON DANGEROUS PRODUCTS

**Fisher-Price Rock 'n Play Sleeper Should Be Recalled, Consumer Reports Says**

**What Parents Need to Know About the Fisher-Price Rock 'n Play and Safe Sleep**

**Ikea Still Sells a Hemnes Dresser Linked to a Child's Death**

**Furniture Tip-Overs: A Hidden Hazard in Your Home**

When CR received the unredacted CPSC data, we investigated the incidents by tracking down related lawsuits and talking with experts about the product's risks. Ultimately, CR identified more than a dozen additional deaths and confirmed with Fisher-Price that the company knew of at least 32 fatalities tied to the Rock 'n Play Sleeper.

We published our findings on April 8. Four days later, Fisher-Price recalled all 4.7 million of the sleepers, though it continued to stand by the safety of its product. Two weeks later, Kids II recalled nearly 700,000 of its rocking sleepers, including the Ingenuity Moonlight Rocking Sleepers and Bright Starts Playtime to Bedtime Sleepers.

"I know why they didn't want to recall" the Rock 'n Play Sleeper, says Sara Thompson of Reading, Pa., whose 3-month-old son William Alexander died in one on Sept. 23, 2011. "But years and years ago [Fisher-Price] should have fixed it." And now that the product's safety record has been made public, Thompson is angry that the sleeper stayed on the market while "other babies died."

The chain of events reveals not just the seriousness of the risks posed by those specific products but also the potential harm of a controversial law, unique to the CPSC, that critics say protects manufacturers at the expense of consumer safety.

The law—known as Section 6(b) of the Consumer Product Safety Act—requires the agency, in most cases, to get permission from manufacturers before releasing their names or any information that could reveal their identities, even when a product is linked to injuries and deaths. And when the CPSC does announce an alert or recall, companies often can restrict the information that's released and negotiate the language used.

Those measures took shape during the Reagan administration. According to Nancy Nord, who was the CPSC's acting chairman from 2006 to 2009, they were in response to complaints that a company's reputation could suffer unfairly if the

CPSC didn't give it a chance to review the agency's safety concerns before they were made public. She thinks 6(b) is reasonable, satisfying both consumer and industry needs.

But some other members of the CPSC, including current ones, disagree. "We need the anti-consumer safety and anti-transparency requirements of Section 6(b) . . . to be eliminated," said Elliot Kaye, the CPSC commissioner and former chairman, in early April at a subcommittee hearing of the House Energy and Commerce Committee. "People die because of Section 6(b). It is that simple."

Other federal agencies don't have the same restrictions.

The Food and Drug Administration, for instance, doesn't have to get permission from companies before publicly disclosing their names in connection with alerts or recalls. "There is a process that we go through with the company to ensure that the recall is effective," says Peter Cassell, an FDA press officer. "There are cases where the company information is insufficient, so we add our own notices."

"The gag that 6(b) places on the CPSC is a dangerous anomaly among federal safety agencies," says David Friedman, CR's vice president of advocacy and the former acting administrator of the National Highway Traffic Safety Administration, which oversees vehicle safety. "At NHTSA, we were able to call for the recall of millions of deadly Takata airbags because we had the freedom to share what we knew. But the CPSC can't do that."

## The Power of Naming Names

Negotiations between the CPSC and manufacturers often take a lot of time, which delays getting crucial information to consumers, says Pamela Gilbert, who served as executive director of the CPSC from 1995 to 2001. During that delay, Gilbert says, "the commission knows a secret it can't tell the public, which is . . . that this product could injure or kill you or your family member."

In the case of the Rock 'n Play Sleeper, CR's investigation found that the CPSC knew that the product was linked to fatalities several years before the agency or Fisher-Price issued a recall—and that happened only after CR alerted the public that the sleeper was clearly linked to infant deaths.

Initially, the agency and company only issued a joint alert late on the afternoon of Friday, April 5, stating that the Rock 'n Play Sleeper was a risk to infants. But that alert didn't address all of the deaths or dangers linked to the product. Only after CR revealed the 32 deaths and the American Academy of Pediatrics also urged a recall did the company finally pull the Rock 'n Play Sleeper from the market.

## Recalled Too Late

Families harmed by incidents involving the Rock 'n Play Sleeper say the recall was too little, too late. Evan and Keenan Overton of Virginia wish they'd known about the product's history before they put their 5-month-old son Ezra to bed in one in December 2017.

"We assumed the product was safe because it was marketed for all-night sleeping, and we trusted that Fisher-Price was a reputable company," Evan says. But a few days before Christmas 2017, Ezra died of asphyxia (an inability to breathe) while sleeping in a Rock 'n Play Sleeper.

Jonathan A. Sorkowitz, who filed a class-action complaint against Fisher-Price on April 18, alleges that Fisher-Price knew of the risk of the Rock 'n Play Sleeper for years but sold the product anyway. He is representing Samantha Drover-Mundy and Zachary Mundy of Selbyville, Del., alleging that the couple's 12-week-old daughter died after being placed in a Rock 'n Play Sleeper in September 2018.

"Had our clients known of the risk that the Rock 'n Play's design [posed], they never would have let her sleep in it," Sorkowitz says. There were "many warning signs prior to the recall, but the manufacturers and retailers who sell this product nevertheless waited years to take action. The recall earlier this month came too late to prevent a number of injuries and fatalities related to the product, including our clients' daughter."

## The Making of an Anti-Transparency Law

Section 6(b) as it exists today was born out of a compromise in the early 1980s between members of Congress who felt the CPSC was overreaching its authority and those who felt the agency's power should be strengthened.

The Reagan administration "wanted to abolish the Consumer Product Safety Commission, and there was a backlash to that," Gilbert says. So, she says, critics of the agency weakened it "with a number of amendments, most of which we live with today. 6(b) was one of those."

And the battle over the provision continues.

"I do scratch my head over all the wails I hear about how awful 6(b) is," says Nord, the former CPSC commissioner. "This notion that somehow companies control what the agency is saying is just not correct. It's not my experience, and it's not what the statute requires."

In limited circumstances, the CPSC can release manufacturer-specific information without a company's permission, says William Wallace, manager of home and products policy for CR. But the agency rarely takes that path, he says, in part because it makes it more likely that a company will sue the CPSC. And the more the agency needs to defend itself in court, the fewer resources it has to focus on its safety mission, Wallace says.

Gilbert, the former CPSC executive director, said the fear of lawsuits is "a very strong deterrent to CPSC to release information."

Rachel Weintraub, legislative director and general counsel of the Consumer Federation of America, says the law harms consumers in other ways, too. "The shadow of the provision is much larger than the law itself," she says. As an example, she points to how the CPSC handled the deaths tied to the Rock 'n Play Sleeper before CR began investigating.

In May 2018, the agency issued an alert about "infant deaths associated with inclined sleep products." But the alert didn't name the Rock 'n Play Sleeper or other specific products, or explain that the AAP warned against ever putting babies to sleep on an incline. As a result, there was little public reaction, and business proceeded as usual.

"When the government's hands are tied and they are thwarted from communicating the full story, naming names, it very much limits the utility of that information," Weintraub says.

Section 6(b) even restricts the information the CPSC can release through Freedom of Information Act (FOIA) requests. Before the agency provides any records in response to those requests, it typically first contacts any manufacturers whose identity could be revealed to get their permission. "That not only shields companies from accountability but it also delays the release of vital information. Communications between the agency and industry can go on for months or longer," Wallace says.

He notes that CR filed a FOIA request in January 2018 for information about deaths involving liquid laundry packets, but the CPSC has yet to release those records and has repeatedly failed to meet timelines prescribed by federal regulations.

## How Many Deaths?

The Rock 'n Play Sleeper recall also raises the question of how quickly the CPSC should act.

Nord believes the agency should be deliberate, and says that investigations can sometimes require significant time. "It's so easy after the fact to go back and say, 'You should've known. You should have done it quicker,'" she says. "I've got to tell you, when it's in real time, sometimes those decisions aren't quite as easily made as people think they should have been."

But Gilbert says that if the agency determines that the reasonable use of a product could be life-threatening, it should be recalled. "Consumer products should not be killing people," she says. "One of the most important goals of product recall is prevention—to prevent the next death. You're not always successful, which is heartbreaking, but . . . what happened to that overwhelming desire to prevent the next death and to act as quickly as you can?"

Other recent recalls and announcements from the CPSC underscore how deaths and injuries continue to occur while the agency investigates potentially dangerous products.

For example, Ikea recalled millions of dressers in 2016 but only after dressers from the company had been tied to seven deaths and dozens of injuries dating back to 1989. And while jogging strollers by Britax-owned BOB Gear have been linked to at least 97 injuries to children and adults since January 2012, it took seven years for Britax, pressured by the CPSC, to offer consumers a potential fix to the problem. The company still hasn't recalled the strollers.

The danger posed by 6(b) to public health and safety has also attracted the attention of lawmakers.

"For too long, Section 6(b) has acted like a gag order—depriving the CPSC from carrying out its critical mission, and its ability to quickly and properly inform consumers about specific product dangers," Sen. Richard Blumenthal, D-Conn., told CR recently. "Jettisoning this anti-consumer provision is necessary to bring more transparency to the commission and make sure consumers have the specific information they need to protect themselves and their families."