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The Hidden Dangers of Infant Sleep Products: Tips to Win Your Case and Save Lives

While it may seem unthinkable that a trusted manufacturer of infant products would sell a baby sleeper with little, if any, regard for pediatric sleep safety, that scenario has repeatedly played out across multiple name brands and popular products that have been linked to infant deaths throughout the United States.

By Alan M. Feldman, Daniel J. Mann, Edward S. Goldis and Bethany R. Nikitenko

While it may seem unthinkable that a trusted manufacturer of infant products would sell a baby sleeper with little, if any, regard for pediatric sleep safety, that scenario has repeatedly played out across multiple name brands and popular products that have been linked to infant deaths throughout the United States.

Indeed, consumers often operate under the false assumption that infant sleep products are safe and designed by professionals with relevant expertise. The reality, however, is that these products are created to maximize corporate profits and often disregard the guidelines issued by the American Academy of Pediatrics (AAP), which instruct that infants should be put to sleep on their backs, on a separate, flat and firm sleep surface without any bumpers, loose bedding or stuffed toys.

Our firm currently represents in excess of 10 families who lost infants when they asphyxiated



(L-R):Alan Feldman, Daniel Mann, Edward Goldis, and Bethany Nikitenko of Feldman Sheperd Wohlgelernter Tanner Weinstock Dodig.

Courtesy photos

while using inclined sleepers. In contravention of AAP guidelines, inclined sleepers (often referred to as rockers, nappers or loungers) place babies at angles of up to 30 degrees, which allow them to adopt unsafe sleep positions that cause asphyxia. In 2009, Fisher-Price brought to market the first inclined sleeper, the Rock 'n Play, without clinical research as to whether it was safe. When the Rock 'n Play was a hit, other companies entered the market with similarly designed products.

The tragic outcome was predictable. In October 2019, the Consumer Product Safety Commission (CPSC) warned consumers to stop using infant inclined sleep products, citing reports of 73 deaths and 1,108 incidents from January 2005 to

June 2019. The warning was issued after an independent study commissioned by the CPSC of 14 inclined infant sleep products found that none of them were safe for infant sleep. Astoundingly, Fisher-Price executives admitted in June 2021 in testimony before the U.S. House of Representatives Committee on Oversight and Reform, which was investigating infant deaths in inclined sleepers, and specifically the Rock 'n Play, that the company had received 97 reports of infant deaths occurring in its product. More recently, three Boppy infant lounger products were recalled after eight reports of infant deaths came to light.

The problem is not limited to inclined sleep products. The CPSC is aware of 254 incidents,

including 21 fatalities, related to infant sleep products (inclined and flat), occurring between January 2019 and December 2020, according to a June 2021 press release. In addition to inclined sleepers, other products tied to infant deaths include in-bed sleepers (meant for parents to co-sleep with their baby, which the AAP advises against), baby boxes (cardboard boxes with a fitted mattress), sleep hammocks, and travel and compact bassinets. The CPSC has also identified 113 fatal incidents from January 1990 to March 2019 and 113 nonfatal incidents from January 2008 to March 2019 associated with crib bumpers, which the AAP also recommends that parents not use.

How can so many unsafe infant sleep products enter, and remain in, the marketplace and people's homes? The short answer is a perfect storm of statutory and regulatory shortcomings.

First, the CPSC lacks sufficient authority to effectively regulate the baby product industry, or any industry for that matter. Under Section 6(b) of the Consumer Product Safety Act, when the CPSC wants to notify the public about a hazardous product, it usually must get the company's permission first. If the company objects, which is usually the case, the CPSC may be forced to litigate the issue. Section 6(b) also allows companies to negotiate the language the agency uses in the event of a safety alert or product recall. Moreover, the CPSC is powerless to force a recall and must engage in protracted litigation or administrative proceedings if a

company does not voluntarily agree to withdraw its product. Likewise, reports of incidents and deaths involving infant products are not readily available to the public.

Notably, Fisher-Price and other manufacturers agreed to recall more than 5 million inclined sleepers in 2019 only after the CPSC accidentally disclosed, in violation of the laws protecting manufacturers, unredacted data to *Consumer Reports* about infant deaths associated with these products, and *Consumer Reports* indicated its intent to publish the information. By that time, the Rock 'n Play sleeper had been on the market for 10 years and had generated at least \$200 million in revenue for Fisher-Price, according to the staff report from the Committee on Oversight and Reform's investigation, titled "Infant Deaths in Inclined Sleepers: Fisher-Price's Rock 'n Play Reveals Dangerous Flaws in U.S. Product Safety." The report concluded that the Rock 'n Play might still be on the market today if not for the data leak.

While infant sleep cases often pose difficult and unique challenges, multiple claims, verdicts and settlements, can, over time, provide strong incentives for manufacturers to adopt safer product designs and recall unsafe sleepers. Below are strategies for screening, preparing and successfully resolving these cases, which may resonate beyond your client and help to keep other infants safe.

Initial Steps

When a family contacts you about a potential infant sleeper case, your

first step is to gather some key information.

- Get all available information about the sleep product, including the model, instruction manual, where it was purchased and the receipt.
- Determine whether there are any warnings in the manual, on the sleeper itself or on the box in which it was sold, if still available.
- Take possession of the sleeper and any related products sold with the sleeper and store them in a secure facility, in the condition acquired.
- Conduct an in-depth interview with the parents or caregivers about the events leading up to the incident and how they learned of it.
- Check the CPSC website to ascertain whether the sleeper has been subject to a recall and obtain all available CPSC data, including prior incidents.
- Report the incident to the CPSC. If the CPSC desires an interview with your client, make certain that you are with your client (in person or virtually) when the interview is conducted to prevent any unfair or inappropriate questions.

Litigation Tips

- Collect exemplars of the product. They will disappear from store shelves and websites if the product is recalled.
- Download all available information, including marketing claims and product manuals.
- Retain experts. Experts to consider include product design

and human factors experts, a causation/airway specialist, and a forensic pathologist.

- Request key documents from the manufacturer. These may include a history of internal testing; warnings and instructions supplied with the product and other sleepers sold by the manufacturer; reports of all other incidents involving the sleeper which resulted in either injury or death; and memoranda arising from participation in relevant ASTM International committee meetings, where voluntary safety standards are developed.
- Depose the designers of the products, those responsible for marketing it, the executive responsible for recall decisions, and the company CEO if possible.
- Ascertain what hazard testing was done.

Legal Claims

Possible legal claims include:

- Unsafe design, meaning that the sleep product is not safe for its intended or expected use. These claims can be asserted under negligence or product liability theories. In Pennsylvania, *Tincher v. Omega Flex*, 104 A.3d 328 (Pa. 2014), provides two tests to apply to product defects: risk utility and consumer expectations. Under a risk-utility test, a product is defective if a “reasonable person” would conclude that the probability and seriousness of harm caused by the

product outweigh the burden or costs of taking precautions. A consumer expectations test defines a defective condition as one that, upon normal use, is dangerous beyond a reasonable consumer’s contemplation. A negligence claim may be appropriate in circumstances where the manufacturer failed to perform hazard testing before releasing its product into the marketplace. Our firm has handled multiple cases in which infants died in products under circumstances where no hazard testing was performed.

- Failure to warn, which is based upon the absence of clear instructions and adequate warnings about the safe use of the product, pursuant to Section 402A of the Restatement (Second) of Torts.
- Whether a post-sale duty to warn exists in Pennsylvania for products like inclined sleepers is problematic under current law, but in our view warrants a fresh look, given the state of industry knowledge of significant risks and the law of other jurisdictions permitting these types of claims.

Punitive damages may be possible when there is evidence that a manufacturer recklessly failed to consult with medical specialists in designing the sleeper, or received notice or was otherwise aware of injuries or deaths occurring in its product, and did little or nothing to investigate such incidents.

Settlements That Save Lives

As trial lawyers we know that the impetus for product safety arises not only from regulations and standards, but also from creative and impactful lawyering. In our experience, most parents who lose a child to a dangerous product want to spare other families from similar tragedies and will consent to utilizing their case to accomplish this objective.

When settling cases involving unsafe baby sleep products, be mindful that you can achieve a fair financial result for your clients, while also negotiating terms that promote recalls, public awareness and design practices that will help keep other infants safe.

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