



U.S. CONSUMER PRODUCT SAFETY COMMISSION
WASHINGTON, DC 20207

STATEMENT OF CHAIRMAN HAL STRATTON REGARDING THE *CPSC V. DAISY
MANUFACTURING CO.*, CPSC DOCKET No. 02-02.

I. Introduction

This matter now comes before the U.S. Consumer Product Safety Commission (“Commission”) on a revised settlement offer made by Daisy Manufacturing Co. (“Daisy”) to the Commission on November 5, 2003. An original settlement offer was transmitted to the Commission via the administrative law judge (“ALJ”) on May 14, 2003, which was denied by the Commission by a vote of two to one.

Upon receipt of the original settlement offer from the ALJ on May 14, 2003, I found, as a Commissioner who was not present prior to sending this case to the ALJ for adjudication, that I had very little access to the facts and evidence of the case necessary to make an informed decision as to the settlement offer.¹ I then requested that the parties waive the *ex parte* prohibition preventing Commissioners from discussing the case with either Daisy or complaint counsel.² This request was rejected by Daisy.³ Under those circumstances, I voted not to accept the original settlement offer on September 15, 2003, as I did not feel I had, nor could I legally obtain, the requisite knowledge necessary to make an informed decision as to the settlement offer made by Daisy.⁴

Subsequently on October 14, 2003, Daisy submitted a motion to reconsider the previous settlement offer based primarily on Daisy’s financial condition and their reported inability to obtain liability insurance at any reasonable price. Daisy alleges their “precarious financial condition” is a direct result of this action.⁵ Upon receipt of this request, I once again asked the parties to waive the *ex parte* prohibition and allow the Commissioners to learn the facts and evidence of the case necessary to make an informed decision regarding the settlement offer. This time, both parties agreed to the *ex parte* waiver request.

My staff and I then met independently with Daisy and complaint counsel to learn the details of the case. We asked each side to give us their best evidence and to objectively evaluate

¹ The case was initiated on October 30, 2001 by a 2-1 vote of the Commission. The ALJ was appointed in this case on February 7, 2002.

² The Commission is prohibited from contacting either party after the matter has been referred to the ALJ by certain provisions of the Administrative Procedures Act, 5 U.S.C. §§ 554, 557, and CPSC regulations, 16 CFR § 1025.68, as the Commission would eventually hear any appeal of the ALJ’s decision in the case.

³ It is my belief that had Daisy agreed to the request, this matter could have been resolved some time ago.

⁴ As it turns out, there was apparently another earlier settlement offer made by Daisy which the ALJ did not see fit to transmit to the Commission.

⁵ October 14, 2003, motion by Daisy counsel for reconsideration of proposed settlement offer, page two.

the case for us. We assume the parties complied with this request in our meetings. We have had additional conversations with each party to clarify certain points and have had the opportunity to review all the supporting documentation in the case.

Although I consider this administrative legal proceeding to be burdensome and inefficient, it was my original intent to let the matter proceed through the process and deal with the case if it came back to the Commission on appeal. However, the settlement offer and party's eventual agreement to present the evidence on both sides to the Commission, caused me to fully review the facts and evidence of the case. Since I am now familiar with all the relevant facts and evidence in the case--evidence that would be adduced at the administrative hearing in the matter-- it seems unnecessary and particularly inefficient to allow this case to go through what would be years of costly litigation from which we will learn nothing new. Under the circumstances, I have decided to accept the latest, revised settlement offer proffered by Daisy. I have made this decision based on the following reasons:

1. Based upon the evidence adduced in the case, I am not at all sure the CPSC complaint counsel would prevail on the merits of the case. Should the complaint counsel fail in their efforts to prove their case, consumers would obtain no benefit from a long and costly legal proceeding. The settlement, on the other hand, affords consumers a number of benefits that are enumerated therein and will be put in place immediately.⁶

2. I am concerned about the animosity on the part of all the parties in this case which I consider to be particularly rancorous. I would add that this rancor seems to go even to the attitude of the ALJ.⁷ This type of attitude, although now all too common in litigation, causes the process to be much more expensive than necessary and particularly inefficient. It also causes the parties to be excessively adversarial to the point that litigation decisions could potentially be made for reasons other than trying to reach a just and amicable resolution of the case. As it stands now, if Daisy would remain solvent, this litigation could go on for years. Since all of the Commissioners now have access to and now know all of the relevant facts and evidence in the case, it would seem particularly imprudent to let the parties and the ALJ go on fighting for years in a case that would develop no further evidence or facts. A settlement not only resolves the litigation but also results in immediate benefits to consumers. In addition, the CPSC can better use its limited resources in making the market a safer place for consumers by amicably resolving this case now.

3. Although I don't consider it determinative in itself, I have also taken Daisy's financial condition into consideration. From a review of the extensive financial documentation that we requested and received from Daisy, it is clear that Daisy is in a "precarious financial" condition as alleged. It is less clear to me the role this proceeding has played in Daisy's financial condition. I believe the CPSC action may now be a factor in Daisy's financial condition, but I do not believe it is the only factor. Nevertheless, when considered with the other reasons to settle this matter, a settlement would provide certain immediate benefits to consumers, which they would not receive if Daisy becomes insolvent or this litigation drags on for years.

It is for these reasons, as more fully developed below, that I have voted to accept the revised settlement offer.

⁶ Appendix "A" is attached hereto which includes the major points of the settlement agreement.

⁷ See letter of ALJ transmitting offer of settlement dated May 12, 2003.

II. Background

This case involves two models of multi pump,⁸ gravity feed⁹ air guns produced by Daisy – the Model 880 and Model 856.¹⁰ Complaint counsel alleges that the air guns represent a substantial product hazard in violation of § 15 of the Consumer Product Safety Act (CPSA), 15 U.S.C. §2064 and a substantial risk to children under §17 of the Federal Hazardous Substances Act (FHSA) 15 U.S.C. § 2274.

A. Prior CPSC Actions Concerning BB Guns

Before this case was filed, CPSC dealt with air rifles on numerous occasions, through petitions and investigations. On four separate occasions, the Commission has been asked to regulate air guns.¹¹ Throughout its 30-year history, the Commission consistently found that regulating this product would not enhance safety.¹² Rather, the Commission has continuously made the determination to work with voluntary standards organizations to improve the safety standards of these products.¹³

Prior to the investigation that led to the filing of this case, the Commission investigated air guns seven separate times, utilizing a variety of disciplines, including engineering and human factors. With the exception of the investigation leading to this case, none of the investigations resulted in a preliminary determination that the product represented a substantial product hazard. In addition, these investigations showed that the air guns met existing voluntary standards.¹⁴ The Commission has never found that air rifles, or any model of air rifle, constitute a substantial product hazard.

⁸ A multi pump air gun uses air to propel a BB. The speed at which the BB is propelled increases when the gun is pumped more than one time.

⁹ A gravity feed air gun uses gravity to position BBs into firing position when the air gun is loaded.

¹⁰ As originally designed, the two air guns fired BBs and pellets at speeds up to about 650 fps, depending upon the amount of times the air gun was pumped. (The 856 was later redesigned, and is now a pellet only air gun.) Approximately 9 million of the air guns have been sold since 1972. The air guns are marketed, along with other high velocity air guns, under the description, “Powerline.” Daisy’s web site notes that the air guns are intended for users who are age 16 and older. Lower powered air guns (guns that shoot BBs at 350 fps or less), as marketed as under the description “Youthline”.

¹¹ “Petition from the Western Massachusetts Public Interest Research”, HP-74-5 (Dec. 17, 1973); “Petition from Kenneth J. Jacoby” HP 75-21 (May 23, 1975); Petition of The Children’s Memorial Hospital, October 31, 1984; and Petition of the Education Fund, April 24, 1989.

¹² See, e.g., Letter, Sade E. Dunn to Stephen Rider, November 16, 1981 and minutes of Commission meeting, September 24, 1981.

¹³ The most significant voluntary standards relating to air rifles are published by the American Society for Testing and Materials (ASTM), a voluntary organization of over 30,000 individuals from over 100 countries. ASTM produces standards for a wide variety of products, which standards serve as guidance for government, industry, and consumer advocacy groups. The relevant ASTM standards for air guns are F 589-92, “Standard Consumer Safety Specification for Non-Powder Guns”, and F590-92, “Standard Consumer Safety Specification for Non-Powder Gun Projectiles and Propellants”.

¹⁴ These standards included ASTM Standard F 589 9.1.4.5-5 which provides that an air gun should be able to fire 100 projectiles without an accidental firing or failure to fire.

B. Analysis of Facts

Over the course of considering Daisy's settlement offer, and after the *ex parte* waiver, my office has had the opportunity to be briefed by both complaint counsel and Daisy on the issues involved in this case, and to examine documents including depositions, experts' reports, and summaries of the evidence prepared by the parties. In the light of the information presented during reconsideration, several facts have become apparent:

1. The failure of air guns, particularly gravity fed air guns, to properly load, feed, and fire a BB may happen for a variety of reasons, and may not be limited to the particular models involved in this litigation.
2. Loading, feeding, and firing problems may not be best addressed by singling out a particular air gun or air guns for a corrective action, but by submitting these issues to the appropriate ASTM Subcommittee for the development of voluntary standards.¹⁵
3. Even though BB lodging may occur, the link between lodging and injuries is not at all clear. Complaint counsel has identified eight injuries, and one fatality, which are alleged to be due to BBs lodging in the Model 856. These injuries occurred over the course of 20 years of production and the sale of over 2 million units. Similar injury rates exist for the Model 880, which has been in production for 32 years with sales of 7 million units. It is apparent that if BB lodging injuries occur, they are relatively rare,¹⁶ which goes to the issue of whether the defects alleged in the complaint, as a legal matter, constitute a substantial product hazard.
4. All of the injuries that can be attributed to the guns at issue in this case were preventable. They all involved either someone pointing the gun at someone and pulling the trigger or playing with the gun in an inappropriate manner—all in violation of widely known and accepted safety rules for the use of guns.

III. Revised Settlement Offer

In my view, Daisy's revised settlement offer provides a framework to adequately address these concerns. Daisy has agreed to add warnings related to the hazards associated with these air guns, including misfeeding and failure to load BBs as part of its \$1.5 million safety campaign. All BBs manufactured by Daisy will contain a label or insert on the package, which will be apparent to all users accessing BBs. The label or insert will warn consumers:

¹⁵ ASTM Subcommittee F15-06 deals with non-powder guns, and is the appropriate ASTM subcommittee in this situation.

¹⁶ An examination of the types of injuries is also revealing. Eight of the injuries involved some form of eye trauma. This is a type of injury that may occur regardless of the model of BB gun used, though the severity of the injury might be less if a lower velocity air gun were involved.

WARNING: 1) Always point the gun in a safe direction; (2) Always treat every gun as if it were loaded; (3) Any gun may fail to load, feed or fire a BB for a variety of reasons. Even if the gun fails to fire a BB one or more times, do not assume it is unloaded; (4) A BB can seriously injure or kill you or other humans if it is fired in an unsafe direction; (5) Shoot safely.

In addition, the revised settlement offer will submit performance issues to the appropriate ASTM committee for the purpose of developing standards related to the propensity of air guns to fail to load, feed or fire BBs. I believe this is a particularly important aspect of the settlement agreement as it submits the alleged problem to experts who can deliberately review the situation and, if necessary, adopt a safety standard to resolve it. Finally, the revised settlement offer will submit the issue of age appropriateness for air guns that fire projectiles in excess of 350 feet per second to the appropriate ASTM standards committee.

This litigation has been particularly contentious in my opinion. Given the deeply held feelings on both sides, it is probable that this case would stretch out for years assuming Daisy's solvency. I do not believe that continuing such litigation is in the public interest, particularly where a settlement has been offered that provides an immediate improvement in public safety for all air rifle users, not just the users of two specific models.

Given the numerous issues contested in the case, the litigation risks, and the benefit to the public resulting from Daisy's notice campaign and the submission of certain issues to the appropriate voluntary standards committee, I believe that the settlement agreement is in the best interests of consumers.