

● B L L I S P



Manufacturers market booster seats to parents whose children are too young to safely travel in one, increasing the risk of serious injury. Here are some issues you may face in these difficult but vital cases—and how to get around them.

Before children are large enough to be placed in booster seats, they typically are buckled into forward-facing restraint systems, also referred to as “harness seats.”¹ Nearly all harness seats incorporate a five-point harness with straps that secure at the shoulders, across the upper thighs, and between the child’s legs. Most children then graduate to booster seats, which elevate a child so that a vehicle’s integrated lap and shoulder belt will fit safely and appropriately.²

Many booster seat companies market their products as equally safe and appropriate as harness seats for children weighing as little as 30 pounds and as young as three. But this directly contradicts the recommendations of the National Highway Traffic Safety Administration (NHTSA) and the American Academy of Pediatrics (AAP)³: Both state that children between three and seven should ride in a harness seat until they reach the top height or weight limit allowed by the manufacturer and outgrow the harness seat.⁴

NOTS IN BOOSTER SEATS

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Harness seats provide additional protection that booster seats do not.⁵ By using shoulder and crotch straps rather than a seat belt to secure the child, harness seats reduce injury by spreading crash forces over a wider area of the child's body.⁶ They also remove the risk that the seat belt will move to a dangerous position—such as across the child's neck or behind the shoulders—at or prior to impact. Unlike booster seats, harness seats' crotch straps help keep a child from sliding under the lap belt during an incident, particularly younger children whose pelvic bones are still developing the bony ridges that help anchor them to their seat.⁷

As booster seat companies continue to market their products in contravention of these recommendations, young children are being moved prematurely into booster seats—heightening their risk for increased injuries in a crash. When bringing a design defect or failure-to-warn products liability claim against a booster seat company, it is crucial to understand how these seats are—and are not—tested for safety, as well as common defenses these companies hide behind.

INADEQUATE SAFETY TESTING

Before reaching the market, a booster seat is tested for compliance with Federal Motor Vehicle Safety Standard

213 (FMVSS 213), the standard for all child restraint systems. However, compliance with FMVSS 213 does not preclude a claim for damages if a child passenger is injured because it merely provides the minimum safety a manufacturer must achieve.⁸ First codified in 1971 and intended for harness seats—not booster seats—FMVSS 213 is an imperfect standard. Booster seats were added to the standard in 1994, but they are tested for compliance with largely unchanged dynamic safety testing standards for harness seats from 1981.⁹ This is problematic as booster seats and harness seats restrain children in very different ways.¹⁰

Even worse, no specific standard in FMVSS 213 tests the design intent of a booster seat to, for example, ensure that a vehicle’s lap and shoulder belt is in the correct position.¹¹ And no booster seat company has developed its own testing standards to ensure its seats are safe.

The testing dummy. FMVSS 213 mandates that booster seats cannot be marketed to children who weigh less than 30 pounds but otherwise leaves it up to each individual manufacturer to determine the minimum weight

deemed appropriate for booster seats.¹² Manufacturers perform FMVSS 213 testing with a Hybrid III three-year-old dummy,¹³ which weighs over 30 pounds.¹⁴ But booster seat companies simply market and sell their boosters with a 30-pound minimum requirement, using their FMVSS 213 compliance testing with a dummy that can weigh up to 36 pounds as justification. Parents are unaware that the companies do not test—and do not know—the safety performance of these seats for

children who weigh 30 to 35 pounds.

Side-impact marketing. Many booster seat companies now advertise their seats as “side-impact tested,” but many parents are unaware that these companies are only using private, confidential criteria to test their seats. In 2014, NHTSA proposed its first side-impact test standards for car seats. Under the proposal, Hybrid III 3-year-old dummies would be tested in “T-bone” crashes with impacts upward of 30 mph.¹⁵ But that proposal never passed, and today, FMVSS

SAFETY FIRST

Rachel Weintraub is the legislative director and general counsel for the Consumer Federation of America (CFA) in Washington, D.C. Trial spoke to Weintraub about the most hazardous products and toys for children—and what happens when these products and technology collide.

Interview by Diane M. Zhang

What is the CFA—and what is its mission?

The CFA is an association of more than 250 nonprofit consumer groups that advance consumers’ interests through research, advocacy, and education.

What are some of the dangerous products and toys affecting children today?

It’s difficult to state what the most dangerous children’s products are, so a key lens to look through is pervasive hazards. For example,

choking is a leading type of toy injury—
toys for children six and under often include small parts, and we see children getting toys that are too

small for them, despite the warning label.

Fidget spinners also pose choking risks to children when parts fall out. Consumer advocates think that fidget spinners should be considered toys, as does the toy industry, but the U.S. Consumer Product Safety Commission (CPSC) has issued a guidance indicating that not all fidget spinners are toys or children’s products.¹ This means that not all fidget spinners would need to be tested to meet toy safety and other mandatory standards, and they are not required to have a choke hazard warning label.

Riding toys that are either ridden on the street or in a driveway where vehicles can’t see them are another hazard. Off-highway vehicles, such as all-terrain vehicles (ATVs), pose serious threats too. In 2015, ATVs killed at least 58 children under 16, accounting for 17 percent of all ATV fatalities that year.²

Then there are rare-earth magnets, such as Buckyballs. After thousands of incidents of children swallowing these very strong magnets, the CPSC banned them with the promulgation of a mandatory rule, but the Tenth Circuit overruled

the decision in 2016—and we’re already seeing them back on the market.³ What is so problematic about these products is that they pose an entirely hidden hazard—parents have no idea that the magnets are strong enough to rip through the esophagus or small intestine if a child swallows more than one. There’s also a risk for older children who put them in their nose or on their lips to mimic a piercing and then accidentally swallow them. Unfortunately, because they’ve been off the market, consumers are in the dark about the serious hazard they pose now that they are being reintroduced.

How has the landscape of children’s products safety changed in the past 10 or 20 years?

New technology presents risks that are not adequately addressed before the products are put on the market. For example, hoverboards are not considered toys, but children obviously interact with them. The traditional hoverboard hazard is the fall hazard, but the battery packs are more cause for concern—

they’re new technology that poses a fire risk. And the FBI just issued a warning about internet-connected toys and the privacy risks they pose to children.⁴



213 does not contain a side-impact car seat standard. Booster seat companies' test results are also not made public or scrutinized.

State laws. Up until the early 2000s, the vast majority of harness seats were not manufactured to accommodate a child who weighed more than 40 pounds. But since the emergence of the harness seat latch tether system, referred to as the LATCH system, children can now safely stay in a harness seat much longer, with some seats appropriate for children

weighing as heavy as 65 pounds.¹⁶

Recently, some states enacted laws that codified AAP's and NHTSA's recommendations. For instance, Alabama, Connecticut, New Jersey, Ohio, and Oregon mandate that harness seats be used for children under 40 pounds and make it illegal to put kids who weigh less than 40 pounds in booster seats.¹⁷ In those states, it will be important that the jury hear that the booster seat companies are selling seats in defiance of their state's law.

OVERCOMING COMMON DEFENSES

Typically, companies argue that their booster seats are just as safe as harness seats, pointing to their FMVSS 213 compliance testing as the basis for their defense. But as outlined above, that argument rings hollow after close scrutiny of what that compliance testing consists of. Here are some other defenses to be aware of:

Head excursion. Booster seat companies might argue that a child's head excursion—how far a child's head moves



What should people keep an eye out for when purchasing children's products?

Age grading is not based on a child's intelligence but on how children interact with products at specific stages of development. So it's important to think about how a product is age-graded, the age of a child, and whether younger children are in the home—especially for toys that present choking hazards. How individual children play with toys is another consideration—if an older child puts a lot of things in his or her mouth, then parents need to be careful to avoid toys that pose a choking hazard.

What's an example of a type of injury that has dramatically decreased through legislation or litigation?

After Massachusetts passed a law that restricted ATV use by children under 14

and regulated use by children up to 18, injuries decreased up to 50 percent for some age groups.⁵ And a study based in a Toronto hospital looked at rare-earth magnet injuries before and after they were essentially banned and found dramatic decreases in incidents seen at the hospital after the product was banned.⁶ Unfortunately in the United States, this risk exists again, thanks to the Tenth Circuit's decision.

How can we improve the safety of children's products and toys?

We need strong safety standards and testing that address issues before toys are put on the market. But we also need to ensure that the recall process is infused with better technology and more effective mechanisms, so parents know when a product they own has been recalled and can get it out of their children's hands. Manufacturers must communicate with their customers, whether through social media, texting, loyalty cards, or partnering with other entities to get the word out.

A few weeks ago, I received a phone call from Giant Foods about a frozen vegetable bag recall. I received the information I needed to determine whether the bag I purchased was included in the recall. That's how recalls should be conducted. 



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NOTES

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past a fixed point in a crash—is sometimes lower in a booster seat than it would be in an improperly installed harness seat. The companies, by assuming that most parents improperly install the harness seat, claim that this means booster seats are safer because it is less likely that a child’s head will strike the seat back located in front of the child during a crash.

To combat that defense, your child seat, seat belt, and biomechanical experts must measure the linear distance between the child’s seat back and the back of the seat in front of the child. This measurement helps your experts calculate whether the minimal increase in head excursion associated with an improperly installed harness seat would have moved the child’s head far enough forward to impact the seat back. If the distance between the two seats is so large that impact would have been impossible, the defendants will not be able to argue that the booster seat was the safer option in that specific crash.

Also, fight back against the assumption that, had the parents purchased a harness seat, they would have used it improperly. Booster seat companies will argue that the misuse rate for harness seats is high—about 61 percent—making it likely that a child’s parents would have improperly installed a harness seat.¹⁸ But unless the defendants can prove that the parents had a pattern or practice of improperly using a harness seat, argue to the trial judge that such testimony or insinuation is mere speculation and should be excluded.¹⁹

Improper installation. Finally, booster seat companies will argue that parents did not follow the booster seat’s instructions—or that they are primarily at fault for the underlying motor vehicle crash. For instance, companies may claim that the child put the seat belt

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behind his or her back before impact or that the parents improperly buckled their child into the booster seat—for example, by not ensuring that the belt is snug on the child’s shoulder or by using only the vehicle’s lap belt.

To show proper placement, make sure that the parents take pictures of the child’s injuries as soon as practicable after a crash. Often, the child will have abrasions or bruising that show seat belt placement at impact. Absent photos, the child’s hospital and firefighter or emergency medical technician records should note these injuries. These marks will help your experts confirm the seat belt’s placement—as well as whether or how it moved during the crash.

Depose first responders, particularly firefighters and emergency medical technicians, to confirm the child’s body position and seat belt position at the time they first arrived on the scene. This testimony, in corroboration with medical records or photographs of the child’s injuries, can help put to rest any defense claims that the seat belt was improperly positioned.

CASE INTAKE AND EVALUATION

When evaluating a potential products liability booster seat claim, consider

several factors. Make sure the vehicles in the crash and the booster seat itself are preserved. Many vehicles have event data recorders that will tell you their velocity, acceleration, and braking prior to impact. Those numbers are important for your biomechanical expert to determine the mechanism of the child’s injuries and whether the injuries would have been different had the child been in a harness seat. They are also important to help your accident reconstruction expert calculate the forces involved in the crash. Your child seat expert will also need to examine the booster seat to evaluate whether any manufacturing defects or design defects played a role in causing the child’s injuries.

Be aware that these cases can be expensive—typically, you will need to hire a biomechanical expert, child safety seat expert, seat belt expert, warnings expert, and an accident reconstruction expert, in addition to any medical expert, life care planner, or economist. Depending on the child’s injuries, litigation costs could very well exceed the expected recovery.

Finally, speak to the parents about the “who, what, where, when, why, and how” of the selection, purchase, and use of the seat. Remember—booster seat companies improperly market their seats as equally safe as harness seats for younger, lighter children. It is important to know how the booster seat company’s marketing, product instructions, and product labeling influenced the parents’ decisions.

Booster seat cases are difficult—but they are incredibly important. Booster seat manufacturers are needlessly putting children at risk, but we can help end this practice by holding these companies accountable. ▣



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