

CLIENT ALERT

CPSC Hears Rare Oral Argument in Zen Magnets Recall Litigation

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On June 7, the U.S. Consumer Product Safety Commission provided administrative law followers a fascinating case study. For the first time in two decades, the CPSC's five Commissioners heard an appeal put on by CPSC staff in administrative litigation. In its appeal, the staff seeks to overturn an administrative law judge's opinion finding that Zen Magnets' controversial high powered, small rare earth magnets (SREMs) are not defective and are not a substantial product hazard when sold with appropriate warnings. Novel already, what made this argument all the more interesting was an additional wrinkle: four of the five Commissioners who heard the appeal had voted previously to approve a final safety standard that has the practical effect of banning such magnets outright.

How Did We Get Here?

In 2012, CPSC staff, with the approval of the Commission, filed administrative complaints against distributors of certain SREMs, Zen included. Zen had refused to voluntarily recall its magnetic products deemed to be defective by staff. The other magnet companies, including Buckyballs, settled their cases and conducted recalls. Zen opted to fight.

In early 2015, Zen and the CPSC tried their case before an administrative law judge. The CPSC's thrust was that Zen's SREMs presented a substantial product hazard because of a design defect that creates a serious risk of injury, namely, ingestion of loose, separated magnets by young children. Zen countered that the magnets, with proper packaging, warnings, and instructions, do not pose a danger to consumers, and are not toys, so they are not covered by toy specific regulations, including the ASTM F-963 safety standard.

A (Temporary) Win for Zen

On March 25, 2016, in a well-reasoned, thirty-eight page opinion, ALJ Dean Metry found that CPSC staff did not prove that Zen's SREMs are defective under the factors set forth in 16 C.F.R. §1115.4 or constituted a substantial product hazard when sold with appropriate warnings. Judge Metry also found that the CPSC did not prove the warnings on the product were deficient when they describe the potential risk of injury and contain proper age recommendations. Judge Metry concluded that because the magnets are not designed, manufactured, or marketed for play to children, Zen's SREMs are not hazardous when properly used and kept away from children.

But Wait

In September 2014, during pendency of the administrative cases, the Commission enacted a safety standard setting a minimum level of safety for SREMs—the very products sought to be recalled through the litigation. The Commission took this action saying it believed “high powered magnet sets are hazardous to young children.” The practical effect of the standard was to prohibit the sale of SREMs (though the rule was ultimately vacated by a federal appellate court). Commissioners Kaye, Adler, Robinson, and

Mohorovic voted in favor of the rule. Then-Commissioner Buerkle (now Acting Chairman) abstained, citing a potential conflict of interest with the litigation.

Now back to the litigation.

The Appeal

CPSC staff appealed Judge Metry’s opinion finding for Zen to the full Commission—the same body that voted to approve the initial filing of the complaint *and* to promulgate the 2014 safety standard functionally banning these magnets.

Per CPSC regulations for such proceedings, “the Commission shall consider the record as a whole or such parts of the record as are cited or as may be necessary to resolve the issues presented and, in addition, shall to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the Initial Decision.” The regulations go on to authorize the Commission to “adopt, modify, or set aside” the ALJ’s findings, conclusions, and order. No deference is due to the ALJ’s ruling.

The June 7 Hearing

At the June 7 hearing, the parties presented their arguments to an engaged bench of Commissioners for approximately two hours. Each Commissioner had five minutes of questioning after each presentation and the opportunity to ask the parties to address additional questions or topics in their closing remarks. The questioning showed some partisan tilt, though not as much as some had anticipated.

CPSC counsel argued that the ALJ erroneously concluded that the SREMs did not pose a defect. According to counsel, the products are defective—“ticking time bombs,” he called them—because children risk injury from reasonably foreseeable use and misuse; their warnings are inadequate to mitigate the risk; and weighing of the factors (prescribed by regulation) that the Commission and staff evaluate to determine defect shows them to be defective.

Zen, as it did at trial, argued to the contrary that the products are not defective and do not pose a substantial product hazard when appropriate warnings are included with the product—that is, that Judge Metry got it right. Zen repeated its mantra, “magnets should be respected not feared.”

Zen allotted almost half its oral argument time to a video highlighting the artistic and educational value of the magnets. The utility of the products, one of several factors considered by the Commission in making a decision on whether a product is defective, was discussed at length by the ALJ in his decision. In his opinion, Judge Metry critiqued the CPSC’s expert claiming that he “did not fairly assess” the utility of the product, highlighting defense witnesses who testified as to their educational value in teaching science and geometry. In closing, Zen’s counsel emphasized that there is a way to market these magnets in a manner that reduces risk of oral ingestion and educates the public on their appropriate use and value.

What’s Next?

While litigation outcomes are rarely certain, this one seems preordained. The Commission seems all but certain to overturn the ALJ’s opinion and return Zen to the proverbial penalty box. Right or wrong, the losing party will then have the opportunity to appeal to the federal courts, presumably the federal district court in Maryland for further consideration.

Given the dearth of CPSC case law, both at the administrative level and from Article III courts, the arguments made by the parties involved, and the judicial decisions reached at the various levels of litigation, are instructive for product safety stakeholders. This case will continue to provide meaning to the term “defect” and the various factors that guide “defect” determinations pursuant to 16 C.F.R. §1115.4, such as a product’s utility, operation and use, and the importance and adequacy of warnings and instructions.

Stay tuned. This battle remains magnetizing, and is far from over.

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