

CPSC Can Add CEO To Buckyballs Lawsuit

By **Greg Ryan**

Law360, New York (May 07, 2013, 6:34 PM ET) -- An administrative law judge on Friday allowed the U.S. Consumer Product Safety Commission to seek to hold the former CEO of Buckyballs maker Maxfield and Oberton Holdings LLC personally liable for alleged defects in the magnet sets.

The CPSC sued Maxfield in July over its refusal to stop selling the magnetic toys, which the agency claims can cause severe injury if they are accidentally swallowed. The suit was the first administrative complaint filed by the CPSC in more than a decade.

Maxfield stopped doing business in December, and at least eight major retailers have recalled the products, but the CPSC has continued to pursue the lawsuit before Administrative Law Judge Dean Metry. In February, it filed a motion to add former Maxfield CEO Craig Zucker, in both his individual capacity and his capacity as an executive, as a respondent to the complaint.

Judge Metry ruled that at this point in the litigation, the allegations against Zucker were sufficient to add him to the suit.

"If, at the conclusion of the commission's case, Mr. Zucker feels as though CPSC has failed to demonstrate that his responsibility or actions were significant enough to render him liable under the [Consumer Product Safety Act], nothing precludes Mr. Zucker from presenting a legal argument regarding the same at that juncture," the judge said.

Judge Metry pointed to two U.S. Supreme Court decisions, *U.S. v. Dotterweich* and *U.S. v. Park*, as case law that backed his decision. Both rulings — which were handed down in 1943 and 1975, respectively — held that corporate officers can be held individually accountable for company violations under the Food, Drug and Cosmetic Act.

The language in the CPSA does not specify whether an individual such as Zucker can be targeted under the law, according to Judge Metry. But since *Dotterweich* and *Park*, other courts have found that corporate officers can be held individually liable under public health and safety laws, and the CPSA falls into that category, the judge said.

Zucker argued that *Dotterweich* and *Park* are "extraordinary exceptions" to principles of corporate law, but Judge Metry found that the so-called responsible corporate officer doctrine has been applied in circuit courts across the country.

Erika Jones of Mayer Brown LLP and John Fleder of Hyman Phelps & McNamara PC, the attorneys for Zucker, said in a statement that Judge Metry had erred. The responsible corporate officer doctrine "has no applicability to this case for a variety of reasons, including that it applies only when an underlying statute authorizes its application, something absent in this case," they said.

"We also believe that the CPSC is selectively treating Mr. Zucker as a manufacturer for certain purposes but not for others," they said. "This inconsistent treatment demonstrates the fatal flaws in the CPSC's argument."

A CPSC spokesman did not immediately return requests for comment on the ruling.

The complaint against Maxfield and Zucker seeks to force them to refund customers for the purchase price of Buckyballs sets and to reimburse retailers, among other measures.

Judge Metry also ruled Friday that the CPSC could amend a complaint filed against another magnet set maker, Zen Magnets LLC, to include a new line of magnets.

Zucker is represented by Erika Jones of Mayer Brown LLP and John Fleder of Hyman Phelps & McNamara PC.

The case is In the matter of Maxfield and Oberton Holdings LLC, Zen Magnets LLC and Star Networks USA LLC; case numbers 12-1, 12-2 and 13-2; before the U.S. Consumer Product Safety Commission.

--Editing by Eydie Cubarrubia.

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