

The Continuing Saga Surrounding Magnet Sets: Proof of the CPSC's Determination to Eradicate Hazards to Children

Insight

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By Michelle Corrigan

The Consumer Product Safety Commission (CPSC) has made it very clear over the last several years that it takes hazards associated with rare earth magnet sets very seriously, primarily because the hazards affect children. Rare earth magnet sets consist of tiny, high-powered magnetic balls that adhere to each other and can be molded into various shapes. While such magnets have industrial uses in engines, turbines and even spacecraft, they have also been marketed by some companies to consumers as desk accessories, puzzles, jewelry and games. Although not specifically marketed for use by children, the consumer versions of these magnet sets are dangerously attractive to children. Not only do they pose a choking hazard for children, but when swallowed, these small and powerful magnets can cut through intestinal walls and become trapped within the digestive system, often necessitating surgical removal and sometimes leading to death.

The CPSC Litigation and Rulemaking Regarding Small Rare Earth Magnet Sets

Because of the severe hazards these magnet sets pose to children, the CPSC unanimously voted to impose very strict standards on the sale of magnet sets in the U.S. These standards, which went into effect on April 1, 2015, require that each magnet within a set sold for consumer use that is small enough to be ingested must have a magnetic force (flux index) of 50 kG² mm² or less. 16 CFR § 1240¹. The flux index of a particular magnet in the set must be determined by a test procedure mandated by federal law. *See*, [16 CFR ¶ 1240.4](#).

In addition to promulgating rules that mandate standards for consumer products like the magnet sets regulated by 16 CFR § 1240, the CPSC also has the authority under the Consumer Product Safety Act (CPSA) to bring administrative actions against companies selling defective products that constitute a substantial hazard and pose a significant risk of injury to consumers. Prior to the imposition of the current federal rule on magnet sets, the CPSC engaged in such

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administrative proceedings against multiple rare earth magnet sellers in the U.S. who refused to voluntarily recall magnetic novelty toys that the CPSC deemed to be defective. One of those magnet sellers named in the CPSC's administrative litigation was Zen Magnets LLC (Zen) of Boulder, Colorado. While many of the magnet set sellers named in the administrative proceedings ultimately settled the CPSC's claims against them, Zen did not. In fact, not only did Zen not settle with the CPSC, it purchased (at a substantial discount) the magnets that another seller, Star Magnets USA LLC, recalled pursuant to its settlement with the CPSC of the administrative claims against it. Zen then combined the recalled magnets purchased from Star with Zen's own stock of magnets, and began selling these comingled, repackaged products under its own brand names in 2014.

Because the CPSA prohibits the re-sale of recalled products, the CPSC brought a second, separate proceeding² against Zen in federal court in March 2015, seeking to enjoin Zen from selling its newly repackaged magnet sets. After a preliminary injunction was granted in May 2015, the Colorado District Court entered a permanent injunction March 22, 2016, prohibiting Zen from selling any products containing the recalled magnets purchased from Star³. In her [opinion](#), Judge Christine M. Arguello found that Zen had "knowingly" violated the CPSA in continuing to sell its repackaged magnet sets. This punitive finding allowed the CPSC to recommend that a civil penalty be imposed on Zen. The CPSC filed its *Recommendation for Civil Penalties* against Zen in federal court on April 5, 2016. While the CPSC stopped short of recommending a specific civil penalty that should be imposed on Zen, it recommended that a "substantial" civil penalty be levied up to the maximum allowable amount of \$15,150,000 under 76 FR 71554-02.

Interestingly, on March 25, 2016, just three days after Judge Arguello issued her opinion in the injunction proceeding against Zen, Administrative Law Judge Dean C. Metry issued his decision in the administrative proceeding brought by the CPSC against Zen in 2012. In a thorough turning of the tables, Judge Metry found that the CPSC did not meet its burden in proving that the magnet sets sold by Zen are defective, or that they constitute a substantial product hazard under Section 15 of the CPSA. Although Judge Metry found that the magnets are dangerous when ingested, he stated that there is no risk of ingestion during the normal and intended use of Zen's product, and the warnings affixed to the product that identify the danger of ingestion are not defective. Importantly, he found that Zen's magnet sets are not marketed for use by children under the age of 14⁴ who may not appreciate their dangers. As such, Judge Metry concluded that the magnet sets are not product hazards when sold with appropriate warnings that include proper age recommendations. Judge Metry did, however, find that Zen should recall a small number of magnet sets it sold before May 2010 that were marketed for use by consumers 12 years of age and older (as opposed to 14 years of age and older).

What Happens Next?

With respect to the federal action against Zen, we await the court's ruling on whether a civil penalty should be imposed on Zen, and if so, for how much. Zen will have the opportunity to

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respond to the CPSC's *Recommendation for Civil Penalties*, and the court will likely render its decision in the penalty phase of that matter shortly thereafter. Further, Zen filed a Motion for Reconsideration of the court's order enjoining it from selling the products containing the recalled magnets purchased from Star. That motion is also currently pending before the court.

The future of the administrative action against Zen is a bit more complicated. The CPSC filed a Notice of Intent to Appeal Judge Metry's March 25, 2016 ruling four days after it was rendered. What is interesting about an appeal under these circumstances is that it is handled not by a court of law, but by the CPSC. In other words, the CPSC has appealed to itself. Essentially, the CPSC now has the power to review the record, in whole or in part, and decide whether it will adopt, modify or set aside Judge Metry's findings and conclusions. *See*, [16 CFR § 1025.55](#). As such, the CPSC can effectively overrule Judge Metry's decision, and disregard all of his findings of fact and conclusions of law as it sees fit.

In some cases, the anticipated result of this type of appeal may not be so obvious. However, the result of the appeal of Judge Metry's decision in the administrative matter against Zen seems fairly certain. As stated above, the Commissioners of the current CPSC have already unanimously voted to effectively ban the sale of small powerful magnets like those sold by Zen that do not meet the strict threshold limits set forth in 16 CFR § 1240. The CPSC has pursued (and won) a permanent injunction against Zen in federal court prohibiting the sale of its products that contain previously recalled magnets. And the CPSC has quite zealously prosecuted its claims against Zen in the administrative proceeding that is now before it on appeal. If the CPSC sets aside Judge Metry's decision, Zen can appeal to the federal court of appeals. Although it is anyone's guess as to how the federal court appeal may turn out, it is certain to be a rather lengthy and expensive process. As Zen stated on its website, "Right now, our biggest obstacle seems to be money to fund the battle."

Important Takeaways for Consumer Product Manufacturers and Distributors

If the Zen magnets saga has taught us anything, it is that any product that poses a substantial risk of injury to children will come under intense scrutiny by the CPSC, regardless of whether the product is intended for or marketed to children. No one disputes that the rare earth magnet sets sold by Zen are not "children's products" as defined by [16 CFR § 1200.25](#). However, the CPSC has initiated its relentless pursuit of the recall of Zen's magnet sets because of the danger they pose to children. As CPSC [Chairman Elliot F. Kaye stated](#) following the permanent injunction ordered by the Colorado federal court against Zen: "The Court's order to stop the ongoing sale of these recalled high-powered magnets is a big victory for the safety of children. Along with the U.S. Department of Justice, we will continue to move aggressively to enforce the law and protect consumers from the sale of recalled products, especially those that put children at risk."

Consumer product manufacturers, suppliers, marketers and sellers should be aware that if any product they sell is hazardous to children 14 years of age or younger, even if the product is not

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designed, marketed or sold for that class of consumers, the CPSC will likely take strong action against them. The health and safety of children in particular is clearly an especially prominent goal with the current CPSC. Any company in the supply chain of a product that is at odds with that goal may find themselves on the wrong end of litigation filed by the CPSC, or facing extremely large penalties. Companies in the consumer products industry should be very mindful of any risk their products pose to children, even if children are not their targeted customers. A thorough and frequent review of consumer reports, test data, and product injury claims associated with all products in a company's line is crucial to avoid the ire of the CPSC.

For more information about the continuing saga surrounding magnets sets and its potential impact on the children's products industry, please contact [Michelle Corrigan](#) or the Stinson Leonard Street attorney with whom you regularly work. For additional literature and insights from the Stinson Leonard Street [Children's Products Group](#), please visit the webpage and subscribe to receive future content.

¹For more information regarding the federal standards for magnet sets, please see "[Children's Products: Safety Regulations Governing Rattles and Magnet Sets](#)," Michelle Corrigan and Jenna Hueneger, Stinson Leonard Street (March 23, 2016).

²In addition to giving the CPSC authority to bring administrative lawsuits against sellers of defective products that pose a substantial hazard, the CPSA also gives federal district courts jurisdiction to enjoin product sellers from engaging in conduct that violates the CPSA and other federal statutes.

³For more information regarding the permanent injunction against Zen, please see "[Federal Judge Prohibits Novelty Toy Seller From Selling Products Containing Recalled Magnets](#)," Michelle Corrigan, Stinson Leonard Street (March 30, 2016).

⁴ASTM F963-11 sets forth certain specific safety standards for toys intended or designed for children under the age of 14. The Consumer Product Safety Improvement Act (CPSIA), section 106, adopted ASTM F963-11 into federal law.

⁵For more information on the factors considered in determining whether a product is a children's product or a general use product, please see "[What is a Children's Product?](#)", Kim Steuterman, Stinson Leonard Street (January 19, 2016).

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