

Client Alert

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CPSC Seeks to Hold Former CEO Responsible for Buckyballs[®] Recall

By Erin M. Bosman, Julie Y. Park and Ellen N. Adler

Last week the Consumer Product Safety Commission (CPSC) obtained an unprecedented ruling when Administrative Law Judge (ALJ) Dean Metry granted leave to name Craig Zucker in an administrative complaint against Maxfield and Oberton Holdings, LLC, the manufacturer of Buckyballs[®]. *In the Matter of Maxfield & Oberton Holdings, LLC*, CPSC Docket Nos. 12-1, 12-2, 13-2 (May 3, 2013). The complaint seeks an order forcing Zucker, the former CEO of Maxfield and Oberton, to conduct a recall and remedial efforts for Buckyballs[®], the high-powered magnets that have been under stringent CPSC scrutiny since 2011 due to injuries caused by ingestion of the magnets. This order signals a new enforcement tool that the CPSC is willing to use to negotiate recalls and penalties with consumer product manufacturers.

AGAINST THE BACKDROP OF CPSC'S INCREASED ENFORCEMENT EFFORTS

Since the enactment of the Consumer Product Safety Improvement Act (CPSIA) of 2008, the CPSC has been very active in enforcement efforts and product recalls. The CPSIA increased the maximum civil penalties for failure to report from \$8,000 per violation to \$100,000 per violation. 21 U.S.C. § 2069. Maximum total penalties for a series of violations increased from \$1.825 million to \$15 million. *Id.* The CPSIA also increased criminal penalties, with the potential for up to five years in prison for “knowing and willful” violations. 21 U.S.C. § 2070. In the last year alone, the CPSC has announced eight settlements with civil penalties ranging from \$400,000 to \$1.5 million, levied against companies for failure to report.

Increased penalties represent only one “stick” in the CPSC’s enforcement arsenal. As we just [recently reported](#), the CPSC has also implemented extensive compliance program obligations, requiring companies in violation to maintain strict compliance policies and report to the CPSC on their implementation.

ADMINISTRATIVE COMPLAINT AS A LAST RESORT

Though the CPSC can seek penalties for violations, it can also seek injunctive relief in administrative law courts if a company fails to recall a product with a “substantial product hazard.” See 21 U.S.C. § 2064. In the case of Buckyballs[®], the CPSC chose to do just that.

In 2010, Maxfield and Oberton added warnings labels that the magnets were for adult use only, and recalled all Buckyballs[®] that had been sold without the new label. In 2011, the CPSC launched a campaign warning users not to give Buckyballs[®] to children. Finally, in 2012, the CPSC decided warnings were insufficient to deter use by children and resorted to an administrative complaint to force withdrawal of the product from the market.

The CPSC filed its complaint in July 2012 against Maxfield and Oberton. According to the CPSC, it was only the

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second administrative complaint it had filed in 11 years. Subsequently, the CPSC initiated similar proceedings against Zen Magnets, LLC and Star Networks USA, LLC, both of whom had manufactured similar high-powered magnets.

Despite Maxfield and Oberton's aggressive publicity campaign against the CPSC, the CPSC continued to pursue its complaint. Maxfield and Oberton folded and the company dissolved in December 2012, making the complaint moot. In February 2013, the CPSC moved for leave to file a second amended complaint naming the former CEO, Craig Zucker, both individually and as an officer of Maxfield and Oberton. The CPSC requested the same relief against Zucker as it had against Maxfield and Oberton—i.e., recall, refund, and compliance reports.

RESPONSIBLE CORPORATE OFFICER DOCTRINE APPLIES IN CONCERNS OF PUBLIC HEALTH AND SAFETY

Although the CPSA provides for criminal and civil penalties against individuals, what is less clear is the CPSC's authority to compel an individual to carry out a recall. Zucker argued that he could not be liable as he did not personally manufacture, distribute, or sell the product at issue, and that Maxfield and Oberton was the appropriate respondent. The ALJ agreed that, under the language of the CPSA, Maxfield and Oberton was a manufacturer, distributor, or retailer that could be sued under the statutory scheme. In doing so, the ALJ implicitly acknowledged that Zucker was not a manufacturer, distributor, or retailer. However, the ALJ found this did not exclude Zucker as a proper respondent. The proper question was whether under the responsible corporate officer doctrine, Zucker could "be held individually responsible for the alleged CPSA transgressions" of the corporation.

The responsible corporate officer doctrine finds its roots in two Supreme Court opinions, *U.S. v. Dotterweich*, 320 U.S. 277 (1943) and *U.S. v. Park*, 421 U.S. 658 (1975). It permits responsible corporate officers to be held liable for the actions of the corporation, even in the absence of personal guilt on the part of the individual. The relevant inquiry is whether the individual's position within the company gave him the authority and responsibility to prevent the alleged violation.

Dotterweich, *Park*, and their progeny have applied the responsible corporate officer doctrine to statutes dealing with public health and safety. See *United States v. Osborne*, 2012 WL 4483823 (N.D. Ohio 2012) (Clean Water Act); *United States v. USX Corp.*, 68 F.3d 811 (3d Cir. 1995) (Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)). Because the CPSA "relates to the public's health and safety," the ALJ reasoned that *Dotterweich* and *Park* controlled here.

At this stage the ALJ refrained from commenting on the merits of the CPSC's allegations against Zucker, but simply examined the sufficiency of the complaint. The ALJ found the complaint sufficiently alleged liability under the responsible corporate officer doctrine: "Mr. Zucker was responsible for ensuring Maxfield's compliance with applicable statutes and regulations . . . [and] personally controlled the acts and practices of Maxfield, including the importation of Buckyballs and Buckycubes."

IMPLICATIONS FOR EXECUTIVES OF CONSUMER PRODUCT MANUFACTURERS

This decision has sobering implications. The responsible corporate officer doctrine has seen recent resurgence in the pharmaceutical context, with pharmaceutical executives facing imprisonment and criminal fines in the

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absence of criminal intent—or in some cases, in the absence of any knowledge whatsoever. While this opinion raises concerns for CEOs of companies that no longer exist, the reasoning behind the opinion is not limited to those situations. Extension of this doctrine to the consumer products arena could add another powerful tool to the CPSC’s enforcement toolbox, allowing the CPSC to leverage the threat of personal liability against corporate officers.

In practice, we do not anticipate broad application of the responsible corporate officer doctrine in the consumer product context for two reasons. First, the CPSC files a limited number of administrative complaints—though that could change at any time. Second, from a practical standpoint the CPSC has little to gain from individual liability where the corporation has the means to conduct a full recall and carry out a corrective action plan. Nonetheless, the potential for individual liability could influence and bear pressure on small companies that believe they cannot afford a recall. We expect consumer product manufacturers and industry groups will watch these proceedings closely to see whether the CPSC can force an individual to conduct a recall and engage in other remedial efforts.

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