CPSC vs Zen Magnets: Not Knowing When To Quit

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Form CPSC Commissioner Nancy Nord

Recently I had the great honor of being appointed a fellow at the University of Pennsylvania Law School. As part of those responsibilities, last month I spoke to the administrative law class on how regulators balance competing priorities, using the CPSC's actions on Zen Magnets[1] as one example.

The Zen Magnets case is especially relevant since it dramatically illustrates how regulators, acting in the first instance with the best of intentions, can pursue their regulatory and enforcement goals with such fervor as to distort and pervert the consumer safety objectives central to the agency's mission. I have written extensively (see here and here) about the procedural and due process issues that the agency threw to the winds in pursuing Zen Magnets.[2] As a result of the agency's zealousness, expansive reading of the statute, and lack of care, it lost the administrative recall case, with the Administrative Law Judge finding, in part, that Zen's warnings were sufficient and that the agency did not prove that a defect existed. When the related regulation banning all small powerful magnets was challenged, the 10th Circuit Court of Appeals found that the administrative record showing injury from the product and considering benefits of the product was deficient.

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>
> *Nancy Nord*

Nevertheless, the battle rages on. In a move that surprised no one, a majority of the commissioners recently voted to overturn the ALJ's findings that SREMs are not defective and ordered Zen to immediately stop sale of the product. The parties agreed to delay the effective date of that stop sale order to allow for an appeal to be filed.

What is especially interesting about the majority's opinion overturning the ALJ's decision is its breadth in determining that consumer misuse of the product, standing alone, can form the basis for a product defect determination. However, the regulations do not support this conclusion as clearly as the majority contends. The regulations discuss consumer

misuse in two contexts. First, the regulations present an example of a defect when product instructions or safety warnings are inadequate and this inadequacy contributes to the misuse of the product. (See 16 USC §1115.4 (d)) Obviously, this is not the situation with Zen Magnets. Second, the foreseeability of consumer misuse is listed as one factor to be considered and balanced with other appropriate factors in determining whether the risk of injury rises to the level of making the product defective. (See 16 USC §1115.4)

However, it is a stretch to say that injuries occurring solely from consumer misuse of a product makes a product defective, especially in the presence of strong package warnings. One need not look very far to find examples of products where the commission has come out the other way. For example, small button batteries present a similar ingestion hazard to magnets but with even more severe injuries, many more incidents and a number of child deaths. Yet the commission has determined that package warnings and consumer education adequately address this more significant risk. Choking hazards from small parts in toys are well-established risks. Every year children choke on small parts in toys found in the family toy chest. Yet the commission has determined that package warnings are sufficient for toys designed for children older than three, even knowing that many households have children of varying age groups and that the toy with the small part may be accessible to younger children.

Finally, the commission opinion provides no boundaries that can be applied beyond this case between foreseeable consumer misuse and obviously risky behavior. The take-away is that if a child is injured, even though the injury occurs because an adult negligently misuses the product or disregards warnings and instructions, then the product may well be deemed defective. The regulations do not necessarily lead to that conclusion but the current commission's reading of them suggests that.

From a safety standpoint, the problem is that all this has led to a perverse result where safety considerations take a second chair to winning the case. The CPSC has devoted a significant amount of public resource to forcing Zen Magnets off the market. So far Zen's record in court is much better than is that of the agency. With all its guns trained on Zen, the agency has allowed magnets without warnings to enter the country and be sold freely.

Zen has approached the agency to find a solution that would allow magnets to be sold but with aggressive restrictions on packaging, warnings, age restrictions and sales channels. In fact, Zen recently petitioned the CPSC to issue such a regulation. With little fanfare (and without even notifying the petitioner), the agency has requested comment on the petition and the deadline for comments expires next week. It almost seems like the agency does not want to hear what the public thinks of this idea. Yet such a rule may provide the agency with a mechanism for policing the marketplace while still allowing the product to be sold with a strong safety message.

The Zen case is an example of the agency, in its zeal to address a real safety concern, losing sight of the ultimate safety goal. In terms of regulatory priorities, the agency is putting winning above safety—since on its current course, it may put out of business a company trying to address the safety of its products while it ignores the many other magnet products that are being sold with no warnings or safety information. In this case, if the agency wins, consumers lose. It's time to quit.

[1] Zen is a very small Colorado based company that sells small rare earth magnets (SREMs) primarily on the internet. Its packaging is difficult to open and the product has multiple warnings of ingestion hazards.
[2] See footnote 2 in original article: https://nancynord.net/2017/11/28/not-knowing-when-to-quit/

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