

Client Alert

November 18, 2013

Buckyballs® Strike Back: Former CEO Sues CPSC

By Erin M. Bosman, Julie Y. Park and Jeffrey M. David

In May 2013, the Consumer Product Safety Commission (CPSC) took the unprecedented step of naming Craig Zucker in an administrative complaint against Maxfield and Oberton Holdings, LLC, the manufacturer of Buckyballs®, in order to hold Zucker personally liable for a product recall. *In the Matter of Maxfield & Oberton Holdings, LLC*, CPSC Docket Nos. 12-1, 12-2, 1302 (May 3, 2013). Now Zucker has taken an equally unprecedented step: he has sued the CPSC for injunctive relief and a declaration that the CPSC's actions violate his First and Fifth Amendment rights.

ZUCKER IS NAMED BY THE CPSC

In its May 2013 filing, the CPSC sought to force Zucker, the former CEO of Maxfield & Oberton ("M&O"), to personally conduct recall and remedial efforts for Buckyballs®, the high-powered magnets that the CPSC has ordered off the market due to injuries caused by ingestion of the magnets.¹ If the CPSC prevails, Zucker would not only have to personally fund the recall efforts, but he would also be financially responsible for refunding customers the purchase price of the Buckyballs®.

The Consumer Product Safety Act (CPSA) states that manufacturers, distributors and retailers are responsible for recalls—not individuals. Individuals may be liable for criminal and civil penalties. Despite the apparent statutory limitations on the CPSC's enforcement authority, the CPSC was allowed to name Zucker under the responsible corporate officer doctrine as a proper respondent for the recall. As alleged by Zucker, "[a]fter driving M&O out of business CPSC has thrown its full weight against Mr. Zucker." This is the first time the CPSC has attempted to hold an individual personally responsible for a company's recall.

Understandably, Zucker has made significant efforts in the last six months to extricate himself from the CPSC's administrative proceedings. First, he sought leave for an interlocutory appeal. Having failed, he has now sued the CPSC in the District Court of Maryland seeking declaratory and injunctive relief.

INTERLOCUTORY APPEAL

On May 16, 2013, Zucker filed a "Motion for Determination that the Order Adding Craig Zucker as a Respondent Can be Immediately Appealed." Zucker argued that the order adding him to the complaint involved a controlling question of law or policy for which there is substantial ground for differences of opinion, and that an interlocutory appeal would materially advance the ultimate determination of the litigation (the standard under 16 C.F.R. § 1025.24(b)(4)(i) for such a motion). Specifically, Zucker argued that the expansion of the responsible corporate officer doctrine from criminal proceedings to a civil proceeding was a novel legal issue presenting a controlling question of both law and policy.

¹ For further analysis of the CPSC administrative proceeding, please see our previous Client Alert, "CPSC Seeks to Hold Former CEO Responsible for Buckyballs® Recall," available at <http://www.mofo.com/files/Uploads/Images/130509-CPSC-Buckyballs.pdf>.

Client Alert

On, June 19, 2013, the Administrative Law Judge (ALJ) denied Zucker's motion. The ALJ found that the underlying substance of the litigation—whether or not Buckyballs® constitute a substantial product hazard under the CPSA—does not hinge on Zucker's inclusion as a respondent. Having found that an interlocutory appeal would not materially advance the litigation, the ALJ declined to address whether or not the motion addressed a controlling question of law or policy for which there is substantial ground for differences of opinion.

THE MARYLAND DISTRICT COURT ACTION

On November 12, 2013, Zucker took the unprecedented step of suing the CPSC in the U.S. Federal District Court for the District of Maryland. Zucker alleges that “[h]aving obliterated M&O, and having salted the earth by undermining the [liquidating trust's] ability to satisfy whatever claims that M&O might have left, CPSC turned its sights on Mr. Zucker.” Zucker seeks declaratory and injunctive relief enjoining the CPSC from asserting adjudicative authority over him, and declaring that the CPSC has acted arbitrarily and capriciously and that its actions violate the First and Fifth Amendments.

Zucker argues that the CPSC has targeted him for selective administrative adjudication to punish him and deter him from exercising his First Amendment rights. Zucker's argument is based on the list of his infractions as provided by the CPSC, which includes communications with government personnel and statements in interviews and print that he believes the CPSC is wrong. As explained by Zucker, he “has been a thorn in CPSC's side and so CPSC has targeted him for retribution.” He alleges that the chilling effect of the CPSC's actions are meant to also deny him due process under the Fifth Amendment.

BROADER CAMPAIGN AGAINST GOVERNMENT OVER-REGULATION

In his latest efforts, Zucker is represented by Cause of Action, Inc., a watchdog group founded in 2011 by former congressional staffer Dan Epstein. Cause of Action bills itself as “Advocates for Government Accountability” and “uses investigative, legal, and communications tools” to fight government overreach.²

Zucker's actions have been supported by former CPSC Chair Nancy Nord, who wrote an op-ed in *The Wall Street Journal* on November 12, 2013, titled “The Irrational Federal War on Buckyballs.” She elaborated on the op-ed with a statement on her own website the following day expressing disappointment in the CPSC's actions: “To now say that senior management's involvement, so essential to help protect consumers, could result in mind-blowing penalties imposed personally can only result in destroying the cooperative relationship the agency needs to do its job effectively.”³ Similar sentiments have been expressed by *Forbes*, which called the CPSC's action “ludicrous” and a “clear overreach.”⁴

WAITING FOR THE NEXT INSTALLMENT

The saga between Zucker and the CPSC will no doubt continue to mesmerize consumer product manufacturers and attorneys. Which side will take the next unprecedented action? Whatever that action is, consumer product

² <http://causeofaction.org/about>.

³ <http://nancynord.net/2013/11/13/the-saga-of-buckyballs-how-not-to-regulate>.

⁴ Michael Fertik, “Buckyball Busting is Bad for Business,” *Forbes* (November 13, 2013, 11:32 AM), <http://www.forbes.com/sites/michaelfertik/2013/11/13/buckyball-busting-is-bad-for-business-3/>.

Client Alert

manufacturers will want to watch closely to learn whether or not the CPSC can force an individual to conduct a recall, and what options an individual might have in fighting the CPSC's efforts.

* * *

Morrison & Foerster's Product Liability Group defends and provides counsel to product manufacturers and suppliers of all types of products. We serve as trial and national coordinating counsel in product liability and toxic tort cases, including class actions, multiparty serial tort litigation, mass tort litigation, and multidistrict litigation proceedings. We bring to every case a wealth of experience, a keen understanding of the multifaceted issues confronted by manufacturers, and the skills and knowledge to communicate scientific and medical defenses to juries. To learn more about our product liability practice, [click here](#).

Contact:

Erin M. Bosman

(858) 720-5778

ebosman@mofo.com

About Morrison & Foerster:

We are Morrison & Foerster—a global firm of exceptional credentials. Our clients include some of the largest financial institutions, investment banks, Fortune 100, technology and life science companies. We've been included on *The American Lawyer's* A-List for 10 straight years, and *Fortune* named us one of the "100 Best Companies to Work For." Our lawyers are committed to achieving innovative and business-minded results for our clients, while preserving the differences that make us stronger. This is MoFo. Visit us at www.mofo.com.

Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.