

# Client Alert

May 30, 2014

## The Epic Buckyballs® Saga Settles

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May 2014 brought an ordinary end to a series of extraordinary events, with the Consumer Product Safety Commission (CPSC) settling an unprecedented proceeding against Craig Zucker, the former CEO of Buckyballs® manufacturer Maxfield and Oberton Holdings, LLC (“Maxfield and Oberton”). The CPSC had sought 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). Zucker responded by suing the CPSC for injunctive relief and a declaration that the CPSC’s actions violated his First and Fifth Amendment rights.

### SOUND AND FURY, SIGNIFYING NOTHING?

Despite estimating the cost of recall to be \$57 million, the CPSC settled with Zucker for \$375,000—less than one percent of the estimated cost. Pursuant to the settlement, Zucker initiated a voluntary recall that offers a refund to consumers.<sup>1</sup> Of the \$375,000 settlement amount, \$75,000 is to be used to publicize the recall and conduct a notice campaign pursuant to Section 15 of the Consumer Product Safety Act. The rest of the settlement will fund the consumer refunds. Zucker did not admit that Buckyballs® were defective, a substantial product hazard, or children’s toys; or that the CPSC had jurisdiction over him as an individual.<sup>2</sup> The settlement is only in Zucker’s capacity as a responsible corporate officer, and not on behalf of Maxfield and Oberton.

Although the cases are now over, the underlying question of whether the CPSC could assert jurisdiction over Zucker and hold him responsible for the recall remains unanswered. In a public statement, CPSC Commissioner Ann Marie Buerkle noted that she was concerned “about how this case unfolded.”<sup>3</sup> Commissioner Buerkle wrote that she “believe[s] the case against Mr. Zucker should never have gotten started without an affirmative Commission vote approving the issuance of a complaint against him” because the CPSC “never approved the issuance of a complaint against Mr. Zucker” as required by 16 C.F.R. §§ 1025.11(a), 1025.11(b)(2), 1025.11(b)(3), and 1025.13. Despite her concerns, she supported the settlement because Zucker had stipulated to the CPSC’s jurisdiction over him for purposes of the settlement. The commissioner did not address whether or not an individual could be held personally liable for a recall.

Commissioner Buerkle’s comments may further fuel Cause of Action, Inc., Zucker’s attorneys, who are not done with their fight against the CPSC. They plan to continue their FOIA litigation against the CPSC to determine what led to its action against Zucker in his individual capacity in their ongoing campaign against government

<sup>1</sup> *In the Matter of Maxfield & Oberton Holdings, LLC*, CPSC Docket No. 12-1, Consent Agreement (May 9, 2014), available at [http://cdn.shopify.com/s/files/1/0282/4712/files/Consent\\_Agreement\\_Order\\_050914.pdf?1155](http://cdn.shopify.com/s/files/1/0282/4712/files/Consent_Agreement_Order_050914.pdf?1155).

<sup>2</sup> *Id.* at ¶ 29.

<sup>3</sup> Statement of Commissioner Buerkle on the Zucker Settlement Agreement, available at <http://www.cpsc.gov/About-CPSC/Commissioners/Ann-Marie-Buerkle/Ann-Marie-Buerkle-Statements/Statement-of-Commissioner-Buerkle-on-the-Zucker-Settlement-Agreement/>.

# Client Alert

overreach.<sup>4</sup> Cause of Action has long alleged that Zucker was targeted by the CPSC for speaking out against what Zucker dubbed “CPSC bullying.” Zucker was also 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.”

## SIGNIFYING . . . SOMETHING

Any message the CPSC intended to send with its pursuit of Zucker has been muddied by the settlement and Commissioner Buerkle’s statement. Should individuals view administrative proceedings brought by the CPSC as an ordinary enforcement mechanism in the CPSC’s toolbox, or was this case a result of Zucker’s repeated intransigence and taking up arms against the CPSC? The answer is unclear. At least Commissioner Buerkle’s statement provides comfort that naming an individual in an administrative proceeding cannot be as simple as filing an amended complaint. But the ultimate question—“when, if ever, an individual officer or director of a corporation can properly be made a Respondent in a contested recall case”—remains open.

## THE SAGA BEGAN WHEN ZUCKER WAS NAMED BY THE CPSC

In its May 2013 filing, the CPSC sought to force Zucker, the former CEO of Maxfield and Oberton, to personally conduct recall and remedial efforts for Buckyballs®, the high-powered magnets that the CPSC ordered off the market due to injuries caused by ingestion of the magnets.<sup>5</sup> Maxfield and Oberton dissolved in 2012. Despite 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. This was the first time the CPSC attempted to hold an individual personally responsible for a company’s recall.

## 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). On June 19, 2013, the Administrative Law Judge (ALJ) denied Zucker’s motion, finding that the underlying substance of the litigation—whether or not Buckyballs® constitute a substantial product hazard under the CPSA—did not hinge on Zucker’s inclusion as a respondent.

## ZUCKER FOUGHT BACK

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.<sup>6</sup> Zucker alleged that “[h]aving obliterated [Maxfield and Oberton], and having salted the earth by undermining the [liquidating trust’s] ability to satisfy whatever claims that [Maxfield and Oberton] might have left, CPSC turned its sights on Mr. Zucker.” Zucker sought declaratory and injunctive relief enjoining

<sup>4</sup> Cause of Action statement concerning Craig Zucker and the Consumer Product Safety Commission, *available at* <http://causeofaction.org/cause-action-statement-concerning-craig-zucker-consumer-product-safety-commission/>.

<sup>5</sup> 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>.

<sup>6</sup> For further analysis of Zucker’s complaint, please see our previous Client Alert, “Buckyballs® Strike Back: Former CEO Sues CPSC,” *available at* <http://media.mofo.com/files/Uploads/Images/131118-Buckyballs-Strike-Back.pdf>.

## Client Alert

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the CPSC from asserting adjudicative authority over him, and declaring that the CPSC acted arbitrarily and capriciously and that its actions violated the First and Fifth Amendments.

### LOOKING AHEAD

Though the events leading to the Buckyballs® settlement raise more questions than they answer, few individuals are likely to find themselves in a situation where these questions arise. Most product manufacturers, even those that end up in adversarial negotiations with the CPSC as to whether a product should be recalled, can reach a resolution before the CPSC resorts to an administrative proceeding against the company, let alone against the individuals. In the unlikely event individuals find themselves in a similar situation, they can at least point to the Buckyballs® saga as setting a low bar for settlement.

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