

## Products Liability Law Daily Wrap Up, TOP STORY—PRELIMINARY INJUNCTION—D. Colo.: Zen Magnets enjoined from selling recalled high-powered magnets, (May 15, 2015)

By Pamela C. Maloney, J.D.

The federal district court in Colorado ordered Zen Magnets, LLC and its owner, Shihan Qu, to stop selling the high-powered magnets that had been the subject of a product recall by their manufacturer pursuant to an agreement with the Consumer Product Safety Commission (CPSC). The court determined that the company and its owner likely were violating the Consumer Product Safety Act and likely would continue to violate the CPSA by selling magnets that had been purchased from the manufacturer shortly before the magnets were recalled. The court also ordered Zen to permit CPSC staff to monitor compliance with the injunction through unannounced field investigator verification visits to Zen's places of business (*United States of America v. Zen Magnets, LLC*, May 14, 2015, Arguello, C.).

**Background.** Zen Magnets had purchased approximately 917,000 magnets from Star in July 2014. The purchase agreement included magnet cubes sold by Star under the brand name Magnicube Magnet Cubes and magnet spheres sold under the brand name Magnicube Magnet Balls. About a week after the sale, Star entered into a Consent Agreement with the Consumer Product Safety Agreement to settle an administrative complaint that Star's Magnicube Spheres and Magnicube Cubes created a substantial product hazard. According to CPSC staff, when more than one of these high-powered magnets is swallowed by a child or an adult, the magnets rapidly clamp together and can cause serious internal damage. The Consent Agreement required Star to implement a voluntary corrective action plan in which the company would recall the magnets, issue refunds to consumers who returned the magnets, and to destroy the magnets still in the company's possession.

**Allegations of wrongdoing.** In its May 5th complaint, the DOJ charged that Zen Magnets had placed the Star magnet cubes and magnet balls in different packaging, had comingled them with similar magnets obtained independently of Star, and had sold them on its website under the brand names "NewbCubes" and "Neoballs." The complaint also stated that Zen Magnets continues to offer these products for sale on its website despite CPSC written warnings that selling the recalled magnets purchased from Star is unlawful.

**Preliminary injunction.** In determining that the government had met the first part of the two-prong test used for determining whether a preliminary injunction should be issued, the court turned aside Zen's argument that the "raw" Star Magnets themselves—absent the "Magnicube" packaging and branding—were "fungible commodities," and that the company's efforts in rebranding and repackaging them, including using different warning labels, meant that they no longer constituted "subject products" governed by the Consent Agreement. According to the court, the Star Magnets, even when repackaged with Zen's new warning label, are used by Zen's consumers in precisely the same way they were used by Star's consumers. Therefore, Zen's consumers faced precisely the same dangers that Star's consumers faced—dangers which prompted the CPSC to bring a complaint against Star in the first instance. Despite this fact, Zen inter-mixed the Star magnets with its own and continued to sell them in violation of the CPSA. This evidence clearly proved that Zen had violated federal law.

As to the second prong of the test, which required proof of recurrent violations, the court noted that the facts of the case demonstrated a significant "cognizable danger" that Zen would continue to violate the CPSA absent an injunction. Although Zen knew that there was a risk it could be found in violation of CPSA for selling the Star Magnets, Zen inter-mixed the Star Magnets with its own inventory and claimed that there was no way to identify which are Star Magnets and which are not. Furthermore, Zen has refused repeatedly to stop selling Star Magnets despite receipt of multiple notices of noncompliance issued by CPSC and has turned "its pledge to continue to defy the CPSC into a marketing campaign." Because Zen has vowed openly that they will not stop selling the Star Magnets absent an injunction, the court pledged to take the company at its word and issue a preliminary injunction.

**Tenth Circuit litigation.** Zen Magnets is separately challenging the CPSC magnet safety standard that went into effect April 1, but was temporarily stayed until April 20 (see Products Liability Law Daily's April 6, 2015 analysis). The rule requires magnets or magnet sets to be large enough so that they cannot be swallowed or

weak enough so they are unlikely to clamp together if ingested. In issuing that rule, the CPSC noted the risk of injury that the rule addresses. When a person ingests more than one magnet from a magnet set, there is potential for damage to intestinal tissue. The magnets are attracted to each other in the digestive system, damaging the tissue that becomes trapped between the magnets. In several incidents, surgery was required to remove magnets that children had swallowed.

The case is Civil Action No. 15-cv-00955.

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Companies: Zen Magnets, LLC

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