

## [Products Liability Law Daily Wrap Up, DEFENSES TO LIABILITY—HOUSEHOLD PRODUCTS—D. Colo.: Commission bias necessitates new hearing on defectiveness of Zen magnets, \(Jun. 15, 2018\)](#)

Products Liability Law Daily Wrap Up

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By Pamela C. Maloney, J.D.

Although the Consumer Product Safety Commission's final decision and order (FDO) declaring that Zen Magnets and Neoballs rare-earth magnet sets presented a substantial product hazard and that warnings did not mitigate that risk was not arbitrary or capricious, bias exhibited by one of the Commissioners during the adjudication violated the company's due process rights to a fair and impartial tribunal, the federal district court in Colorado ruled in vacating the FDO and remanding the matter to the Commission with directions to provide an impartial tribunal, and in particular, to conduct the review without the participation of the named commissioner ([Zen Magnets, LLC v. U.S. Consumer Product Safety Commission](#), June 11, 2018, Jackson, B.).

Zen Magnets LLC markets and sells high-powered small rare-earth magnets (SREMs), either individually or in sets under the brand names Zen Magnets and Neoballs, for educational and scientific purposes, for stress relief, and as toys for adults. These magnets, which are small, spherical, coated in reflective silver, and highly powerful, can be separated and rearranged in various geometric sets. SREMs have been linked to a number of injuries in children and adolescents who have swallowed them. When two or more magnets are ingested, they rapidly clamp together causing serious internal damage.

**Procedural background.** In 2014, CPSC finalized a [safety standard](#) for magnet sets, setting an industry-wide standard limiting the size and magnetic strength of SREMs. However, the U.S. Court of Appeals for the Tenth Circuit [vacated and remanded](#) the rule because the Commission's prerequisite factual findings were incomplete and inadequately explained. Following the rulemaking, Zen sought dismissal of the CPSC's administrative adjudication against it, arguing that the rulemaking demonstrated that the Commissioners were biased against Zen and had prejudged the facts in the case. Following an administrative hearing, the ALJ [determined](#) that there was insufficient evidence to prove that the magnets were a hazard when accompanied by proper warnings. CPSC appealed the ALJ's decision and Zen moved to stay the appeal and to disqualify the Commission or some of its members for bias. The Commission denied both motions, although Commissioner Buerkle [dissented in part](#), contending that her colleagues should be disqualified from hearing the appeal.

On October 26, 2017, CPSC issued a [final decision and order](#) setting aside the ALJ's decision and holding that SREMs were a substantial product hazard (see *Products Liability Law Daily's* November 3, 2017 [analysis](#)). CPSC ordered a stop sale of these magnets and asked the parties to submit a proposed corrective action plan that included a refund and notice to the public. Zen filed a complaint in the federal district court in Colorado seeking injunctive and declaratory relief on the ground that the Commission had violated its due process rights because its members were biased and had prejudged the matters on appeal. Zen also sought to set aside the FDO under the Administrative Procedure Act as being arbitrary and capricious, contrary to constitutional rights, and/or unsupported by the evidence.

**Administrative Procedure Act claims.** In the FDO, the Commission determined that the magnets contained a defect because they created a risk of injury based on operation or use, including reasonably foreseeable misuse. The Commission also rejected Zen's argument that warnings could mitigate the risk of injury. In reviewing the FDO, the district court found that despite Zen's argument to the contrary, the Commission had considered the dictionary definition of defect in addition to considering the regulatory framework for determining whether SREMs were defective. The fact that the Commission did not use the exact verbiage found in the dictionary definition

did not "trouble" the district court given the context of regulatory references to the dictionary definition along with other facts considered by the Commission.

The court further found that in determining whether SREMs were defective, the Commission was entitled to consider foreseeable misuse. Conceding that ingestion constituted misuse of the magnets, the FDO concluded that the consideration of reasonably foreseeable misuse in determining whether a product was defective had been contemplated in CPSC's regulatory provisions referring to the operation and use of a product; the legislative history of the Consumer Product Safety Act, which includes discussions of misuse; and case law reflecting the Commission's authority to address misuse.

Zen also argued that the FDO's findings that the magnets were defectively designed because they were separable was not supported by substantial evidence. Specifically, Zen argued that the Commission relied only on the testimony of a single human factors expert who was qualified to testify only as to the use of warnings, not with regard to the existence of a design defect. The district court found that the FDO contained a variety of evidence on the issue of the defect posed by the magnets' separability including: (1) incident reports and in-depth investigations about magnet ingestion incidents; (2) Zen's marketing of the products as a manipulative toy requiring separation of the magnets in order to create and reshape them; (3) the fact that Zen sold spare magnets as replacements; and (4) the fact that the magnets could be lost even when used as intended and by experienced users. Furthermore, as an expert in human behavior, the challenged expert could not address whether a warning could mitigate a hazard without also addressing the nature of the hazard.

Finally, the district court rejected Zen's argument that the Commission's finding that the warnings accompanying the magnet sets were defective was arbitrary and capricious because it ignored the National Electronic Injury Surveillance System (NEISS) data and ingestion reports which demonstrated that the very low rate of Zen's involvement in these incidents indicated the effectiveness of the company's warnings. When considered in the context of other evidence and expert testimony about the efficacy of the warnings given, the level of the Commission's assessment and use of NEISS data was sufficient to overcome Zen's challenge.

**Due process challenge.** In support of its due process claim, Zen argued that at the time CPSC issued the magnet safety rule, the Commissioners had prejudged the key questions of fact and law involved in its appeal. As an initial matter, the court noted that the fact that CPSC had issued a rule on the subject did not demonstrate that the Commissioner's minds were "irrevocably closed" on the issue of whether Zen's magnets should be recalled. Federal agencies have the authority to investigate and form opinions on issues that later come before them in an adjudicatory setting without violating the due process rights of the parties involved. In issuing the magnet safety standard and then hearing the appeal of the ALJ's decision, the Commission properly exercised its administrative roles and had afforded full due process to Zen during both proceedings.

Furthermore, contrary to Zen's arguments, the two proceedings did not involve the same core issue, namely, whether SREMs should remain on the market, nor did both seek prospective relief in violation of Zen's due process rights. The rulemaking proceeding concerned industry-wide safety standards for future production, whereas the administrative adjudication involved recalls of specific products already on the market. In addition, the consideration of similar factors or evidence during both proceedings did not demonstrate that the Commissioners had prejudged the issues involved in Zen's case. In fact, Zen was permitted to provide unique evidence and testimony during the administrative adjudication before the ALJ, which gave the company the opportunity to dissuade the Commission from the opinions expressed in the final rule.

However, publicly made statements by the Commissioners about the rulemaking and other related proceedings showed that at least one Commissioner had prejudged the key issues of law and fact at issue in the adjudication and demonstrated an irrevocably closed mind, or at the very least, the reasonable appearance of having prejudged the key issues in Zen's appeal.

During a Commission meeting concerning what would become the final rule, Commissioner Adler stated that "the conclusion I reach is that if these magnet sets remain on the market irrespective of how strong the warnings on the boxes in which they're sold or how narrowly they are marketed to adults, children will continue to be at risk of debilitating harm or death from this product." According to the district court, this statement revealed that

Commissioner Adler's mind was closed to the possibility that any marketing or warning strategy could mitigate the risk of injury from SREMs. Given that the role of warnings and marketing efforts were the central issues in the adjudication and that one of Zen's key arguments was that its warnings, instructions, and marketing could prevent misuse of its product from which injury could arise, Adler's statement indicated that regardless of the particular circumstances or evidence presented by Zen with respect to the efficacy of its warnings or marketing strategy, he would find that the risk of injury could not be mitigated. As such, his statement not only revealed a strong view about the dangers of SREMs, but an inflexible view of the potential to mitigate the risk of injury associated with the magnets. Concluding that Adler's statement indicated his stance on the merits of Zen's case, the district court found that his mind was irrevocably closed on the key question involving the efficacy of Zen's warnings or marketing. Noting that a single decisionmaker's bias rendered an entire adjudication partial and denied Zen an impartial tribunal, the district court invalidated the Commission's FDO, reinstated the ALJ's initial decision, and remanded the case with directions to CPSC to provide an impartial tribunal. The district court also instructed the Commission to conduct the review without Commissioner Adler's participation.

The case is No. [1:17-cv-02645-RBJ](#).

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Companies: Zen Magnets, LLC

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