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## CPSC's Rare 10th Circ. Loss Gives Boost To Magnet Industry

By **Emily Field**

Law360, New York (November 28, 2016, 9:30 PM EST) -- The Tenth Circuit's recent split decision to vacate the Consumer Product Safety Commission's rule on small, high-powered magnets marks a rare victory in a challenge to one of the agency's rules and the latest turn in the agency's saga with the novelty toy, attorneys said Monday.

The panel's 2-1 decision last week to send back the rule — which extended the size and magnet strength restrictions for children's toys to magnets marketed to or used by adults — to the CPSC for further proceedings is unusual, given the rarity of successful court challenges to the agency's rules, according to experts. However, it's still unclear what the commission will opt to do regarding the ruling, attorneys noted.

The majority of the panel in **its Nov. 22 ruling** raised several issues with the cost-benefit analysis the CPSC conducted to back its rule, including its failure to account for a drop in injuries associated with the magnets after it began looking at the toys.

One possible byproduct of the decision is that it could leave agency staffers doubting their ability to put into effect valid standards for consumer products on the grounds that it's just too difficult to do so under the Consumer Product Safety Act, Charles Samuels of Mintz Levin Cohn Ferris Glovsky and Popeo PC noted.

That could create an incentive for the agency to use compliance actions, such as a recall, as a sort of back-door rulemaking, Samuels said.

"I do believe that the CPSC staff can ... undertake rulemakings that are justified," Samuels said. "I don't want the lesson to be that rulemaking is too hard."

A CPSC spokesman said Monday that the commission is assessing the ruling and what the best next steps are, while stressing that the agency's perspective on the risks magnets pose to children hasn't changed in light of the decision.

The magnet toys first garnered the CPSC's attention in 2011 following reports of children becoming injured by swallowing them. Finding that the magnets in the sets were often 10 times as strong than those allowed to be marketed to children, the commission revved up its enforcement efforts to halt their sales.

The magnets can cause severe injuries if swallowed by connecting together inside a child's intestines and causing intestinal obstructions, perforations and sepsis, according to the CPSC. While the balls appeal to young children — who are often prone to swallowing things — teenagers also use them to mimic body and facial piercings, the spokesman said.

Zen Magnets LLC — which brought the challenge to the rule — is the only company left standing in that market, after other companies agreed to stop selling the magnet toys.

"It's really difficult to fight a government agency like the CPSC. You've got to go through a lengthy process and court battle," said James Weller of Nixon Peabody.

In an email last week, Zen Magnet's CEO Shihan Qu said that his company had been "financially battered" and that the ruling couldn't have come any later for the company.

"This is certainly an outcome that many experts and lawyers told me not to realistically expect when I decided to fight," Qu wrote. "Within the week, we will begin selling pre-orders for manufacturing actual Zen Magnets again: our beloved shiny magnets that we passionately built our business on and fought for."

Zen Magnets **had notched another win** this past spring against the CPSC, when an administrative law judge found that the magnet balls it sold aren't inherently unsafe since they only pose a danger when the balls are separated and swallowed, which isn't an intended use of the product.

The judge also found that from at least 2012, Zen had provided adequate — if somewhat colorful — warnings about the toys' risk of ingestion and injury.

One such warning, highlighted in the judge's opinion, read "OMFG README: This is serious! The grumpy CPSC is about to BAN magnet spheres in the US because they are an ingestion hazard. They don't trust that you are capable of understanding and following warnings. Prove them wrong, or we all can't have nice magnets. Zen Magnets LLC, the producer of Neoballs, has had no record of ingestion and we'd like to keep it that way."

In the Tenth Circuit's ruling, the panel took issue with the CPSC's reliance on data from January 2009 to June 2012 in its cost-benefit analysis behind its rule.

The commission looked at a nationwide sampling of emergency room injury reports and estimated that the final rule would prevent approximately 900 magnet ingestion injuries annually, for a savings of \$28.6 million.

But that data set didn't show the significant market changes started by the commission's compliance activities in May 2012. Two months later, most of the largest magnet distributors agreed to recall them and subsequently, injury rates dropped.

In the 18 months after June 2012, the estimated number of emergency room visits declined by about 100 incidents a year, according to the panel majority.

"Reading between the lines, [the majority believed] the CPSC already got to a decision before they did an analysis," Weller said. "Going forward, attorneys said it remains to be seen how and if the commission will choose to undertake its analysis behind its rulemaking."

The panel majority also took issue with how the CPSC identified magnet-related injury reports in a sample of emergency room reports, saying that the vast majority of the reports the commission relied on only "possibly" involved the magnets sets, the panel majority said.

The ruling could spur the CPSC to be more rigorous in its safety and hazard assessment of consumer products, attorneys said.

"From a safety standpoint, we think it's disappointing, but we're confident the commission will heed advice," said Jonathan Shub of Kohn Swift & Graf, P.C.

He noted, however, the panel's issues with the CPSC's analysis possibly highlights a lack of agency resources to adequately research and come to conclusions about safety issues.

--Editing by Philip Shea and Jill Coffey.