CPSC 12-2 Respondent's Motion to Dismiss Exhibit 4

Statement on the Final Rule for Magnet Sets

September 29, 2014

On September 24, 2014, the Consumer Product Safety Commission, by a 4-0 vote, approved the publication of a consumer product safety standard for certain high-powered magnet sets. I proudly joined this vote and believe that it goes a long way towards protecting young children – among our most innocent and vulnerable citizens – from the extremely serious internal injuries and death that these magnets, if swallowed, can cause.

I regret the absence of the wisdom and good cheer of my colleague, Commissioner Buerkle, from the deliberations on this issue. I particularly regret the reason she offered for not attending these meetings or casting a vote because, while I respect her thoughtful consideration, I do not agree with her decision to abstain.

The general proposition my colleague advances is that the Commission should have postponed its vote on

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a mandatory standard for high-powered magnets in order to avoid "prejudging" any appeal that might arise in a pending administrative enforcement case brought against several firms that is currently before an Administrative Law Judge.[1] In that case, the Commission staff seeks to have specific high-powered magnets declared a substantial product hazard under section 15 of the Consumer Product Safety Act (CPSA). Whether the postponement my colleague envisions would be for weeks, months, or years is unclear to me since, as a matter of principle and long-standing practice, I do not know the status of the case.

Background: How Enforcement Cases Proceed

As a starting point, I feel it useful to review how administrative proceedings under section 15 of the CPSA begin and how they are litigated. Under section 15, the Commission is authorized, *inter alia*, to seek the recall of a product that is determined to be a "substantial product hazard." A substantial product hazard arises when a product fails to comply with an applicable CPSC rule that creates a substantial risk of injury to the public or contains a defect that creates a substantial risk of injury to the public.[2] In order to declare a product a substantial product hazard, the Commission must file an administrative action pursuant to section 554 of the Administrative Procedure Act (APA), which provides for a hearing before an Administrative Law Judge (ALJ) in a trial-type proceeding.

In order to bring such a proceeding, the Commissioners must authorize the filing of a complaint against a respondent or respondents under the provisions of the agency's rules of procedure.[3] Once a complaint is filed, the case is then tried by CPSC enforcement staff before an ALJ in accordance with the agency's rules and, any appeal from the ALJ's decision will come before the Commission for resolution.[4]

Here, I note a unique feature of federal administrative law, i.e., the Commission is the body that initiates the adjudication and, if an appeal is taken, the Commission is also the entity that decides the appeal. Although observers occasionally express misgivings about an agency head serving both as initiating and appellate body in an administrative action,[5] the Congress has repeatedly enacted this type of administrative structure[6] and the courts have consistently upheld this combining of functions.[7]

Prejudgment Issues: Distinguishing "Unreasonable Risks" From "Substantial Product Hazards"

As I understand it, the objection in the magnet case is not that the Commission, having initiated an administrative proceeding against respondents, may serve as the appellate body in the case. It is that the Commission should not have voted to promulgate a safety standard during the pendency of the adjudicative proceeding lest we prejudge the results of the enforcement case. Although I understand the concern for due process, I strongly disagree that there has been any interference with it.

I remind interested observers what we have done with our vote to promulgate a safety standard. In accordance with sections 7 and 9 of the CPSA,[8] the agency has determined that certain high-powered magnets present an "unreasonable risk of injury" to the public. Having made this determination, the Commission has imposed a set of restrictions on the types of such magnets that may be sold in the United States.[9] This determination has been made after following the due process requirements of the law, including:

- providing notice to the public of the proposed rule,
- permitting any member of the public wishing to do so to file comments and objections to the proposed rule,
- inviting any member of the public wishing to do so to provide oral comments on the proposed rule, and
- addressing and responding to the comments filed with the agency.[10]

These due process rights extend to, and safeguard, all interested parties, including any respondent in the enforcement action against high-powered magnets. In my judgment, the Commission and its staff meticulously followed all procedural requirements called for in the Consumer Product Safety Act in drafting the magnet standard. Accordingly, I find it hard to see any impropriety in the standards setting process. Given this, in accordance with the provisions of the CPSA, the Commission has set an effective date for implementing the standard's requirements. After that date, no one, including any respondent in the ongoing administrative case, will be able to distribute noncomplying magnets in the United States.

At this point, one may ask whether the Commission's determination that high-powered magnets present an "unreasonable risk of injury" somehow means that we have prejudged the issue of whether they also constitute a "substantial product hazard" such that we should be disqualified from hearing an appeal from an ALJ's ruling should one be brought to us.[11] That is, does a Commissioner's vote to promulgate a mandatory standard automatically mean that the Commissioner has prejudged whether a product presents a "substantial product hazard?"[12]

I think not. Speaking as one Commissioner, I fully understand the difference between making a determination that a product presents an unreasonable risk of injury and should not be sold in the future versus a determination that a product currently being distributed presents a substantial product hazard and should be recalled from the market. The two determinations involve different facts, different policies and different law. And, in both cases, the full panoply of due process rights applies to anyone affected by Commission action.

I particularly note the sharp differences in the law between the two findings: An "unreasonable risk" determination involves a careful balancing of the risk against the impact of a proposed rule on the product's

price, utility, and availability. A "substantial product hazard" determination focuses almost exclusively on the risk of a product and imposes a much higher standard of proof than an "unreasonable risk" finding. This is so because a substantial product hazard determination seeks to remove an otherwise legal product from the marketplace due to its particularly hazardous nature whereas a safety standard never touches products currently in inventory or in distribution. Accordingly, it is entirely possible that a product found to present an unreasonable risk of injury might be completely exonerated as a substantial risk of injury.[13] And, I am fully confident that every CPSC Commissioner easily understands the distinction and can vote appropriately.

An Ominous Precedent

To take the position that assessing the risk of injury of a product in a rulemaking vote would prejudice a Commissioner in assessing the product's risk of injury in a subsequent (but quite different) enforcement proceeding sets an ominous precedent for the Commission's safety efforts. Suppose the Commission did postpone its vote on a safety standard for an undetermined period of time – perhaps months or years – until all appeals were exhausted in a section 15 enforcement case. Why would there be any less potential prejudice in the Commission's subsequent decision to set a safety standard?[14] If the issues are inextricably intertwined such that a decision in one matter irretrievably clouds a Commissioner's mind in another, would there not be significant prejudice either way? In fact, given the higher standard of proof in section 15 cases, one might argue that a Commission decision to uphold an ALJ's determination that a product presents a substantial product hazard would make it virtually impossible for the Commission to decide that the product did not present an unreasonable risk of injury.[15]

Having searched far and wide, I have found no statutory restriction, administrative agency, or administrative case law (or any other authority) that would bar the Commission from hearing an appeal in an adjudicated case simply because the Commissioners had voted on a safety standard regarding the product in litigation. To the contrary, where Congress has voiced a policy preference regarding agency action against hazards currently in the marketplace and similar hazards in the future, it has blessed concurrent rulemaking and adjudication.[16]

Moreover, although the pending administrative case involves only one respondent at the moment, one must think of the worrisome precedent of staying action on safety standards more broadly. Assume, for example, enforcement cases involving numerous respondents distributing hundreds of thousands, if not millions, of products in the marketplace during the years of pendency of the cases[17] – and I need remind no one that virtually all administrative adjudications, including the current case, typically stretch out for years. To defer a vote on a safety standard while waiting for the resolution of an enforcement case would unnecessarily expose the public to dangerous products for unacceptably long periods of time – to no useful

end whatsoever.

Conclusion

I find it difficult to believe that Congress would have created the CPSC or any administrative agency with a gaping regulatory hole that bars the agency from providing full protection to the public – in effect, having to choose between protecting consumers now versus those in the future. This would truly be a Hobson's choice of a distressing nature. Accordingly, I stand by the Commission's decision.

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[1] Several of the cases have settled, leaving only one respondent at the moment.

[2] Specifically, section 15(a) states:

(a) For purposes of this section, the term "substantial product hazard" means –

(1) A failure to comply with an applicable consumer product safety rule under this Act or a similar rule, regulation, standard or ban under any other Act enforced by the Commission which creates a substantial risk of injury to the public, or

(2) A product defect which (because of the pattern of defect, the number of defective products distributed in commerce, the severity of the risk, or otherwise) creates a substantial risk of injury to the public.

15 U.S.C. § 2064(a).

[3] See 16 CFR Part 1025, §§1025.1-1025.68.

[4] Section 16 CFR §1025.53 states, in part, that "any party may appeal [an ALJ's] Initial Decision to the Commission."

[5] Joseph Postell, "Administrative Adjudication: Even Worse than it Looks?" http://www.libertylawsite.org/2014/06/12/administrative-adjudication-even-worse-than-it-looks/ (June 12, 2014)(recommending that "an agency head not participate in a matter in which he or she has investigated, prosecuted, etc.").

[6] Bernard Schwartz, *Bias in Webster and Bias in Administrative Law – The Recent Jurisprudence*, 30 Tulsa L.Rev.461, 473 (1995)"(The combination of functions has been an outstanding feature of American administrative agencies since the Federal Trade Commission Act of 1914 …. It is settled that the combination of functions as such is not subject to legal attack.")

[7] See, e.g., Withrow v. Larkin, 421 U.S. 35 (1975), Federal Trade Commission v. Cement Institute, 333 U. S. 683 (1948), and Blinder, Robinson & Co., v. SEC 837 F.2d 1099, 1107 (D.C. Cir.), *cert. denied,* 488 U.S. 869 (1988).

[8] 15 USC §2056 and 15 USC §2058.

[9] Specifically, the standard will bar the distribution in commerce of high-powered magnets with a flux greater than 50 if they will fit into the Commission's small parts test container.

[10] In addition, I note that any aggrieved member of the public may challenge the Commission's standard in court. See 15 USC §2060.

[11] I see no suggestion by my colleague that the ALJ in the ongoing enforcement case is compromised in

any way by our vote to set a mandatory standard, so the sole issue is whether the Commissioners are somehow tainted by our vote.

[12] I have little doubt that any member of an appellate body can act in such an irresponsible manner that he or she should be disqualified from hearing an appeal, but the issue in this case is not individual misconduct. It is whether there is a per se prejudgment solely by virtue of having voted to declare a product an unreasonable risk of injury.

[13] Section 15 could not be clearer on the point. In order to find that a product subject to a safety standard constitutes a "substantial product hazard," the Commission must determine not just that it fails to comply with the standard, we must also conclude that this failure "creates a substantial risk of injury to the public." (Emphasis added).

[14] I recognize that the standard for prejudgment and bias in enforcement matters is significantly more stringent than in rulemaking matters, but the psychological and policy issues are fundamentally the same in both instances.

[15] Not a proposition with which I agree.

[16] In section 12 of the CPSA, which provides authority for the Commission to file an imminent hazard action in federal court, the Act states

(c) Where appropriate, concurrently with the filing of such action or as soon thereafter as may be practicable, the Commission shall initiate a proceeding to promulgate a consumer products safety rule applicable to the consumer product with respect to which such action is filed.

I recognize that a federal judge operates independently of the agency. Nevertheless, as with the Commission in a section 15 case, the judge will know of, and according to this line of thinking, be "prejudiced" by, the agency's regulatory action – and vice-versa.

[17] In fact, one firm alone can distribute millions of hazardous products – as was the case with Buckyballs.

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