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CPSC's Case Against Craig Zucker: A Tip Of An Iceberg?

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Law360, New York (March 11, 2014, 12:39 PM ET) -- Things do not seem to be getting any easier for Craig Zucker, the former CEO of bankrupt Maxfield & Oberton Holdings LLC.

In case you have not been following his saga, since 2012, Zucker has been defending a case filed by the Consumer Product Safety Commission seeking to hold him personally responsible for the cost to recall Buckyballs and Buckycubes magnet sets.

The CPSC initially filed an administrative complaint against Maxfield alone, alleging that the once popular desk toys cause a substantial ingestion hazard to children and seeking to require Maxfield to recall all of the products and refund customers. But, when Maxfield went bankrupt, the CPSC staff convinced the administrative law judge to allow the commission to amend its administrative complaint to name Zucker in his personally capacity. Zucker thereby became the first individual that CPSC has ever sued to obtain a product recall under the Consumer Product Safety Act.

Much has been written about the case, and we do not seek to repeat what has been said. Instead, we provide some thoughts below on the practical implications of this case for consumer product companies regulated by CPSC.

A Recap of the Staff's Pursuit of Mr. Zucker

At the staff's urging, the administrative law judge allowed the CPSC to name Zucker in his individual capacity by applying the so-called "responsible corporate officer" doctrine articulated in the 1975 U.S. Supreme Court case United States v. Park, in which a CEO of a food retailer was held criminally liable for violating the Food, Drug and Cosmetic Act for rodent infestation at company warehouses.

That doctrine has never been extended to product recall cases brought under Section 15 of the CPSA. The staff evidently pursued the theory against Zucker without a vote of the CPSC's commissioners, even though the CPSA requires such a vote before the commission can bring an administrative complaint in the first instance.

Although the administrative law judge permitted the staff to proceed against Zucker, whether the maneuver can withstand further judicial scrutiny remains to be seen. As one example, as Zucker has emphasized, the operative language of the FDCA applied in Park, which authorized the government to seek criminal penalties against "any person" that failed to comply with the applicable regulatory regime, is different from the language in Section 15 of the CPSA.

Section 15 authorizes the issuance of recall orders against a “manufacturer, ... distributor or retailer.” Whether this language also extends to individuals in their personal capacities and trumps ordinary principles of corporate law shielding officers from the obligations of the corporation are hotly contested issues, especially absent any allegation that the corporate veil should be pierced.

The administrative law judge denied Zucker’s motion to file an interlocutory appeal of the order permitting the staff to add him as a party. In response, in November 2013 Zucker filed suit against the CPSC in federal court seeking to enjoin the administrative action. But unless that federal court suit is successful, Zucker will need to defend the administrative case to its conclusion before he can challenge the administrative law judge's decision on appeal.

In the meantime, the staff is pursuing discovery aggressively and on personal terms. In recent weeks the staff has asked the administrative law judge to require Zucker to produce his own financial records, arguing that it needs access to those records to fashion an effective and appropriate recall remedy for Zucker to undertake personally.

Implications For Consumer Product Companies

After hearing all of this, some consumer product companies and their executives might think: Wouldn’t a rational company be better off if it avoids interacting with the CPSC whenever possible? And, with the threat of a suit against corporate officers in their individual capacities, how can a company ever push back against a product recall demanded by the CPSC that the company believes is not warranted?

Steering Clear From CPSC Is Not The Answer

In our view, Zucker’s case commands attention because it shows the staff’s willingness to pursue officers in their individual capacity when the staff concludes that the circumstances warrant doing so. Unless and until another judge or reviewing body rejects the application of the responsible corporate officer doctrine in this context, the staff’s threat of such an action remains credible.

It would be understandable for an executive — particularly of a small business that might lack the resources to fight against the staff or to withstand a recall — to be concerned about whether she might face the same fate as Zucker. However, we also believe that companies should not overthink the case’s significance in deciding whether and how to interact with the CPSC. The risks of doing so are just too great.

The staff might view Zucker’s situation as a unique situation — given that he is the first and only individual that the staff has ever pursued for a recall in his personal capacity — and not treat the corporate responsible officer doctrine as a tool to wield regularly in the future. Indeed, the staff might point to a number of facts suggesting Zucker’s predicament is atypical:

- The CPSC has warned of the dangers of high-powered magnets for years, and recently instituted a rulemaking to develop a new federal standard for small, high-powered magnet sets, including those labeled not for use by children.

- CPSC filed administrative complaints against Maxfield — and several other companies that sold similar products — to force a recall of the products. They were the first such complaints filed by the CPSC since 2001. According to the administrative complaint against Maxfield:

Buckyballs were initially advertised and marketed to appeal to children as an "amazing magnetic toy" similar to erector sets, hula hoops and silly putty; numerous children were permanently injured after ingestion of Buckyballs; changes to marketing and labeling were not effective in preventing ingestions; the magnets are "intensely appealing to children due to their tactile features"; and the magnets do not remain on adults' desks out of the reach of children.

- Maxfield was a single-product company that went bankrupt, evidently unable to cover the costs of the recall.

Regardless of whether any of this would or should provide comfort to other companies or executives, a far more common risk that companies face is a CPSC civil penalty investigation for late reporting under Section 15(b) of the CPSA.

Section 15(b) requires that companies notify the CPSC immediately upon obtaining information which "reasonably supports the conclusion" that a product contains a defect which could create a "substantial product hazard," or creates an "unreasonable risk of serious injury or death."

For knowing violations occurring after August 2009, the statute provides a maximum civil penalty of $100,000 per violation and $15.15 million for a related series of violations. Mitigating this risk typically requires more frequent and earlier contact with the CPSC, not less and later.

If A Recall Is Not Warranted, Marshall Evidence and Prove It

Given the substantial risk of penalties for not timely notifying the CPSC when required under Section 15, companies should not react to Zucker's case by trying to avoid dealing with the commission whenever possible. Further, companies still have meaningful opportunities to present evidence-based arguments against the need for a recall under particular facts.

Prior to issuing a “preliminary determination” that a recall is warranted, the staff will request that a company submit a full report and the staff will conduct an investigation to assess the hazard and need for a corrective action. During this phase, and ideally at the earliest opportunity, a consumer product company can marshal its evidence, including through testing and reports from outside experts if warranted. In the rare case that the staff and company are unable to resolve disagreements on the need to conduct a recall, the staff may seek a vote of the commissioners to initiate an administrative proceeding under Section 15 to force a recall. The company then will be able to present its evidence in the proceeding itself, and preserve arguments for further review.

This is not to suggest that opposing a staff request for a recall is anything other than an uphill climb. And leaving aside the unique aspects of Zucker’s case, the mere fact that his company disagreed with the staff’s recall request is far from unusual.

However, rather than viewing Zucker’s predicament as reason to avoid the CPSC, we suggest that companies who believe a potential safety concern does not warrant a recall will be better served by taking the argument to the staff. We hold this view regardless of how the responsible corporate officer doctrine is resolved in Zucker’s case.

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