IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEROME J. MAHONEY and REBECCA G. MAHONEY, h/w,	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	No. 04-1833
U.S. CONSUMER PRODUCT SAFETY COMMISSION,	:	
Defendant.	:	

MEMORANDUM

ROBERT F. KELLY, Sr. J. **September, 30, 2004**

Presently before this Court is Defendant U.S. Consumer Product Safety Commission's Motion to Dismiss the Amended Complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). For the reasons that follow, the Motion will be granted.

I. BACKGROUND

Plaintiffs, Jerome and Rebecca Mahoney ("Mahoneys"), are the parents of Tucker Mahoney who died at the age of twenty due to complications from a catastrophic brain injury suffered four years prior when he was accidentally shot with a BB from a Daisy model 856 air rifle. The Defendant, U.S. Consumer Product Safety Commission ("the Commission"), is a five member commission and independent agency of the federal government charged with, inter alia, the protection of the public from unreasonable risks of injury associated with consumer products through its enforcement of the Consumer Product Safety Act ("CPSA"). 15 U.S.C. § 2051(b). Daisy Manufacturing Company ("Daisy") is not a party to this case; however, Daisy produces the

air rifles at issue here.

In 1999, the Mahoneys filed a product liability action in the Eastern District of Pennsylvania against Daisy, alleging that the model 856 air rifle was defective and had caused their son's injuries. Tucker Mahoney's injury occurred when his friend, believing the gun to be empty, pointed the weapon at Tucker's head and discharged it. The gun discharged a BB which penetrated Tucker's skull, causing severe injuries. The boys had apparently shaken the gun hearing nothing inside, and then dry fired the weapon eight times before taking aim at Tucker's head. A defect in the gun allowed a BB to become lodged in it in such a manner that the gun would appear unloaded. The lodged BB could then subsequently dislodge and be fired even though the user had not loaded the weapon.

The Mahoneys and Daisy reached a substantial financial settlement before their case went to trial. After their case settled, the Mahoneys provided the Commission with all the information they learned regarding the product defect, and the Commission initiated its own action against Daisy.

On October 30, 2001 the Commission staff issued an administrative complaint, authorized by the Commission, against Daisy, 66 Fed. Reg. 56,082 (Nov. 6, 2001), alleging that certain models of air powered rifles (BB guns) presented a substantial product hazard within the meaning of the Consumer Product Safety Act, 15 U.S.C. § 2064(c) & (d) ("CPSA"), and a substantial risk of injury to children within the meaning of the Federal Hazardous Substances Act, 15 U.S.C. § 1274(c)(1) & (2).

The Commission staff and Daisy litigated the case before an administrative law judge ("ALJ") through the discovery stage without the intervention of a third party. The case

was set for a final hearing on May 19, 2003. On May 14, 2003, Daisy submitted a settlement offer to the ALJ, which was transmitted to the Commission. On September 22, 2003, the Commission issued an order rejecting the settlement offer and remanding the case back to the ALJ.

On October 1, 2003, Daisy filed a motion with the Commission to reconsider the rejected settlement and offered additional information on Daisy's financial condition. The parties agreed to waive restrictions on ex parte meetings with the Commissioners on October 8, 2003, and thereafter, some of the Commissioners met individually with Daisy and Commission staff. Daisy submitted a revised settlement offer to the Commission on November 5, 2003, which was provisionally accepted.

The provisionally accepted consent agreement and order was published by the Commission in the December 10, 2003 issue of the Federal Register for public comment. 68 Fed. Reg. 68,876 (Dec.10, 2003). The Commission received twenty-one timely comments, two criticizing the settlement and nineteen supportive of the settlement and/or critical of the underlying administrative case. The Mahoneys submitted comments to the Commission; however, their comments were excluded because they arrived after the deadline for consideration. On January 30, 2004, the Commission, with one Commissioner dissenting, accepted the provisional settlement as final and issued a final order notifying the parties. In the settlement, Daisy agreed, among other things, to undertake an intensive notice and warning campaign to instruct users in the safe handling and use of its BB guns at its cost and expense. See 68 Fed. Reg. 68,876.

The Mahoneys filed this action on April 28, 2004, asking this Court to set aside

the Commission's settlement with Daisy pursuant to the Administrative Procedure Act, 5 U.S.C. § 706, alleging that the settlement between the Commission and Daisy was ineffective in that it did not contain a corrective action plan requiring replacement, repair, or refund of the air rifle's purchase price. The Mahoneys allege that they own two Daisy air rifles and that if the Commission were to order Daisy to take corrective action, they would be entitled to the economic benefit of that action.

The Commission moved to dismiss on June 28, 2004 after which the Mahoney's amended their complaint. The Commission filed the instant motion on August 13, 2004, arguing that the Mahoney's alleged injury is based upon an incorrect interpretation of the law and does not exist. The Mahoneys would, therefore, lack standing to bring suit. Additionally and in the alternative, the Commission argues that its decision to end its enforcement action and settle with Daisy is an action committed to agency discretion by law and, therefore, not reviewable under the Administrative Procedure Act.

II. STANDARD

The Commission moves for dismissal of the Amended Complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). In evaluating a motion to dismiss under Rule 12(b)(1), the Court must first determine whether the motion attacks the complaint as deficient on its face or whether the motion attacks the existence of subject matter jurisdiction in fact. Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977). Where the defendant's motion facially attacks the complaint, the court must take all allegations in the complaint as true. Id. As the Commission argues that the Mahoneys "allegations remain insufficient for standing," its motion will be treated as a facial attack on the

complaint and the allegations contained therein will be taken as true. (Def.'s Mem. Law Supp. Mot. Summ. J. at 2).

III. DISCUSSION

The Commission has moved for dismissal arguing that the Mahoneys have misinterpreted the applicable law and regulations in bringing this lawsuit, and that the application of the correct law leaves them without standing. Additionally and in the alternative, the Commission argues that its decision to settle its "substantial product hazard" proceeding with Daisy is committed to agency discretion and unreviewable under the Administrative Procedure Act. These issues will be taken in turn, beginning with the applicable law.

A. STANDING

1. Applicable Law

At issue in this case is the amount of discretion afforded to the Commission in its determinations regarding whether to reject or to accept a proposed settlement offer made during the pendency of an adjudicative proceeding that does not include a corrective action plan requiring repair, replacement, or refund of the purchase price of a defective consumer product. The Mahoneys contend that the Commission's Rules of Practice for Adjudicative Proceedings require the Commission to reject any proposed settlement offer that does not include such a remedy. The Commission does not agree.

The Consumer Product Safety Act does not require the Commission to take any particular action in response to a "substantial product hazard."[1] Under CPSA, if the Commission

[1] A "substantial product hazard" is defined as (1) a product that does not comply with consumer product safety rules issued by the Commission which create a substantial risk of public injury or "(2) a product defect which (because of the pattern of defect, the number of

finds that a consumer product presents a "substantial product hazard," the Commission may take various actions to respond to that hazard. 15 U.S.C. § 2064. If the Commission finds that it is appropriate, it may order the product's manufacturer to provide notice to the public in a manner satisfactory to the Commission. Id. § 2064(c). Furthermore, the Commission may order a product manufacturer to take "corrective action" to eliminate the hazard from commerce if it finds that doing so would be in the public interest. Id. § 2064(d). If ordered to take corrective action, a subject firm may then elect to repair, replace, or refund the purchase price of the product. Id. Before the Commission may order either remedy, it must provide the subject firm and the public with notice and an opportunity to be heard. Id. § 2064 (c) & (d).

In order to afford the public and parties with the required opportunity to be heard, the Commission has promulgated Rules of Practice for Adjudicative Proceedings governing "substantial product hazard" hearings. See generally 16 C.F.R. pt. 1025. The rules also provide the procedure for a subject firm to negotiate a resolution to a potential product hazard directly with the Commission before administrative action is necessary. Id. § 1115.20. If the Commission and a subject firm cannot reach a voluntary settlement, the Commission may file an administrative complaint. Id.

During administrative proceedings, any party to the action may submit a proposal for settlement at any time. 16 C.F.R. § 1025.26(a). The settlement offer is presented to the ALJ who then transmits the offer to the Commission for its consideration. Id. § 1025.26(b). In terms of content, the Rules of Practice require that:

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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).

> The proposed consent agreement and order which constitute the offer of settlement shall contain the following:
> (1) An admission of all jurisdictional facts;
> (2) An express waiver of further procedural steps and of all rights to seek judicial review or otherwise to contest the validity of the Commission order;
> (3) Provisions that the allegations of the complaint are resolved by the consent agreement and order;
> (4) A description of the alleged hazard, noncompliance, or violation;
> (5) If appropriate, a listing of the acts or practices from which the respondent shall refrain; and
> (6) If appropriate, a detailed statement of the corrective action(s) which the respondent shall undertake. In proceedings arising under Section 15 of the Consumer Product Safety Act, 15 U.S.C. 2064, this statement shall contain all the elements of a "Corrective Action Plan," as outlined in the Commission's Interpretation, Policy, and Procedure for Substantial Product Hazards, 16 CFR part 1115.

16 C.F.R. § 1025.26(c). The Interpretation, Policy and Procedure for Substantial Product Hazards provides that

> [c]orrective action plans shall include, as appropriate:
> (i) A statement of the nature of the alleged hazard associated with the product, including the nature of the alleged defect or noncompliance and type(s) of injury or potential injury presented.
> (ii) A detailed statement of the means to be employed to notify the public of the alleged product hazard (e.g., letter, press release, advertising), including an identification of the classes of persons who will receive such notice and a copy or copies of the notice or notices to be used.
> (iii) A specification of model number and/or other appropriate descriptions of the product.
> (iv) Any necessary instructions regarding use or handling of the product pending correction.
> (v) An explanation of the specific cause of the alleged substantial product hazard, if known.
> (vi) A statement of the corrective action which will be or has been taken to eliminate the alleged substantial product hazard. The firm should indicate whether it is repairing or replacing the product or refunding its purchase price. If products are to be returned to a subject firm, the corrective action plan should indicate their

> disposition (e.g., reworked, destroyed, returned to foreign manufacturer). Samples of replacement products and relevant drawings and test data for repairs or replacements should be available.
> (vii) A statement of the steps that will be, or have been, taken to reasonably prevent recurrence of the alleged substantial product hazard in the future.
> (viii) A statement of the action which will be undertaken to correct product units in the distribution chain, including a timetable and specific information about the number and location of such units.
> (ix) The signatures of representatives of the subject firm.
> (x) An acknowledgment by the subject firm that the Commission may monitor the corrective action and that the firm will furnish necessary information, including customer lists.
> (xi) An agreement that the Commission may publicize the terms of the plan to the extent necessary to inform the public of the nature and extent of the alleged substantial product hazard and of the actions being undertaken to correct the alleged hazard presented.
> (xii) Additional points of agreement, as appropriate.
> (xiii) If desired by the subject firm, the following statement or its equivalent: "The submission of this corrective action plan does not constitute an admission by (the subject firm) that either reportable information or a substantial product hazard exists."
> (xiv) An acknowledgment that the corrective action plan becomes effective only upon its final acceptance by the Commission.

16 C.F.R. § 1115.20(a)(1).

The Mahoneys contend that the phrase "shall contain all the elements of a 'Corrective Action Plan'" found in Section 1025.26(c)(6) limits the Commission's authority to accept a proposed settlement to proposals including all fourteen requirements listed in Section 1115.20(a)(1). This would include the requirement that the firm elect to replace, repair, or refund the purchase price of the product found in Section 1115.20(a)(1)(vi). However, the regulation clearly has no such requirement. Specific provisions of a settlement agreement are not required unless they are appropriate to a resolution of the "substantial product hazard" in question. Both Section 1025.26(c)(6) and Section 1115.20(a)(1) explicitly use the word "appropriate" to

establish when specific statements should be included in a settlement offer. A statement of corrective action itself is required only if appropriate to the resolution of a substantial product hazard. Id. § 1025.26(c)(6). Additionally, the specific contents of a corrective action plan are also necessary only as they are appropriate. Id. § 1115.20(a)(1). The use of such permissive language makes clear that the Commission has the authority to consider any type of settlement proposal having the potential to remedy a "substantial product hazard," consistent with the dictates of the statute.

Furthermore, as the regulations make clear, no type of settlement proposal, whether a product of voluntary action or adjudicative proceedings, is complete and effective until it has been accepted by the Commission after notice and comment. Id. § 1025.26 (f) & (g), 1115.20(a)(3). Settlement proposals must include an acknowledgment to that effect. Id. § 1115.20(a)(1)(xiv). As the CPSA provides, the Commission may elect the specific remedy to a "substantial product hazard," whether it be though notice, through corrective action, or through a combination of the two, consistent with its findings of the public interest. See 15 U.S.C. § 2064. The Commission is, therefore, free to accept or reject settlement offers, even those that do not provide for repair, replacement or refund of the purchase price. The Mahoneys are, thus, incorrect in their interpretation of the applicable law.

2. Standing

The doctrine of standing serves "to identify those disputes which are appropriately resolved through the judicial process," Whitmore v. Arkansas, 495 U.S. 149, 155 (1990). Standing is an essential and unchanging part of the case-or-controversy requirement of Article III. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (citing Allen v. Wright, 468 U.S.

737, 751 (1984)). The party seeking to invoke federal jurisdiction bears the burden of establishing standing. Lujan, 504 U.S. at 561.

At a minimum, standing requires three elements. Id. at 560. First, a plaintiff must have suffered an injury in fact, an invasion of a legally protected interest that is both concrete and particularized, and actual or imminent injury, not a conjectural or hypothetical one. Id. (citing Whitmore, 495 U.S. at 155; Allen, 468 U.S. at 756; Warth v. Seldin, 422 U.S. 490, 508 (1975); Sierra Club v. Morton, 405 U.S. 727, 740-41 n.16 (1972)). Second, there must be a causal connection between the injury and the conduct complained of. The injury must be fairly traceable to the challenged action of the defendant, and not the result of an independent action of some third party not before the court. Id. at 560-61 (citing Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41-42 (1976)). Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. Id.

"When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or foregone action) at issue." Id. When the injury arises from the unlawful regulation of someone else, much more is required. In that circumstance, causation and redressability ordinarily hinge on the choices of the regulated third party to the government action or inaction. Id. at 561. It is the plaintiff's responsibility to adduce facts showing that those choices have been or will be made in a manner as to produce causation and permit redressability of injury. Id. at 562 (citing Warth, 422 U.S. at 505). As a result, "when the plaintiff is not himself an object of the government's action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult

to establish." Id. (citing Allen, 468 U.S. at 758; Simon 426 U.S. at 44-45; Warth, 422 U.S. at 505).

The Mahoneys have failed to aver facts in this case demonstrating a concrete and actual injury. The injury of which they complain, the fact that the Commission's decision to settle its administrative case with Daisy deprived them of the economic benefits of a product recall, is too conjectural and hypothetical to entitle them to relief. As the regulations provide, the Mahoneys are not entitled to the repair, replacement or refund of the purchase price of their BB guns because the Commission may accept a settlement that does not call for such a remedy. See supra. As a result, the Mahoneys are not entitled to the economic benefit of which they claim to have been deprived and they have no injury.

Furthermore, even if their alleged deprivation would amount to some type of cognizable injury, it is not one that can be redressed by a favorable decision from this Court. In order for the Mahoneys to proceed they must show that the Commission and Daisy either have proceeded or will proceed in a manner that will cause them injury. See Lujan, 504 U.S. at 563; Warth, 422 U.S. at 505. As a result, they must essentially show that the Commission and Daisy are compelled to enter into a new settlement agreement that requires some form of corrective action. The Mahoneys have failed so to do.

The Mahoneys seek to have the Commission's settlement with Daisy vacated because the settlement does not entitle them to repair, replacement, or refund of the purchase price of the BB guns. However, even if the settlement was to be set aside, doing so would not automatically entitle the Mahoneys to the repair, replacement or refund of the purchase price of their BB guns. If the settlement were to be set aside, Daisy and the Commission would return to

their adjudicative proceeding at which the Commission may elect to find that a "substantial product hazard" does not exist and no further action on Daisy's part is required. The Mahoneys' claim must, therefore, fail.

As the Mahoneys have failed to aver facts establishing an injury cognizable by law and capable of redressability by a favorable decision, this Court is without jurisdiction to proceed and the Commission's Motion to Dismiss will be granted.

B. REVIEWABILITY UNDER THE APA

The Administrative Procedure Act, 5 U.S.C. § 500 et seq, provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Generally, these provisions establish a presumption of reviewability under the APA. See Am. Disabled For Attendant Programs Today v. U.S. Dept. of Housing & Urban Dev., 170 F.3d 381, 384 (3d Cir. 1999) (hereinafter "ADAPT"). However, judicial review may not be had if it can be shown that review is precluded by an applicable statute, or "agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). In cases where review of an agency decision not to undertake an investigative or enforcement action, there is a presumption against judicial review. Heckler v. Chaney, 470 U.S. 821, 828-29 (1985). Questions of enforcement often involve "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise," and as a result, "the agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities." Id. at 831-82. The presumption against reviewability has also been extended to agency decisions to end enforcement actions and enter into settlement agreements with their regulated parties. E.g., Baltimore Gas &

Elec. Co. v. Fed. Energy Regulatory Comm'n, 252 F.3d 456, 460-61 (D.C. Cir. 2001); N.Y. State Dept. of Law v. FCC, 984 F.2d 1209 (D.C. Cir. 1993).

The presumption against reviewability may be rebutted "where the substantive statute has provided guidelines for the agency in exercising its enforcement powers." Heckler, 470 U.S. at 832-33. As a result, this Court has jurisdiction to review the Commission's enforcement decision only if there is "law to apply." ADAPT, 170 F.3d at 384. This Court, therefore, reviews the statues and regulations to determine whether they present a standard by which the Commission's conduct can be judged.

A review of the applicable law and regulations yields no such standard. As noted above, the CPSA does not require the Commission to take any particular action with regard to its findings. See supra; 15 U.S.C. § 2064. The statutes state only that the Commission may order action "[i]f the Commission determines . . . that a product distributed in commerce presents a substantial product hazard." Id. The FHSA uses substantially similar language, allowing the Commission to take action against a substance "defined as a banned hazardous substance," 15 U.S.C. § 1274(a) & (b), but defining a "banned hazardous substance" as one so classified by the Commission by regulation. 15 U.S.C. § 1261(q)(1). The criteria enumerated in the statutes establish the Commission's "broad discretion, not just the limited discretion inherent in every agency action," and as a result do not provide the Court with any indication as to how it would evaluate such a question. See Raymond Proffitt Found. v. U.S. Army Corps of Eng'rs, 343 F.3d 199, 205 (3d Cir. 2003). There are no provisions limiting the discretion of the Commission, no instructions to follow in making its determinations, and no factors to be considered in making a decision.

Additionally, the Commission's regulations are also devoid of substantive requirements this Court could use to make a decision. The Commission uses a single set of regulations for determinations under both the CPSA and the FHSA. 16 C.F.R. § 1025.1. In regard to settlement offers made during the pendency of an adjudicative proceeding, the regulations specify only that "[t]he Commission shall rule upon all transmitted offers of settlement." 16 C.F.R. § 1025.26(f). There are no other requirements placed upon the Commission by the regulations. As a result, the Court has no standard upon which to evaluate the Commission's choices.

In the absence of "law to apply" to this case, the Court must conclude that "agency action is committed to agency discretion by law." 5 U.S.C. § 702(a)(2); see also, Heckler, 470 U.S. 828-29. The decision of the Commission to settle its administrative action against Daisy is, therefore, unreviewable under the Administrative Procedure Act and this Court is without jurisdiction to review it. The Commission's Motion to Dismiss should be granted.

IV. CONCLUSION

As the Mahoneys have failed to aver facts in this case establishing their standing to sue, and the decision of the Commission to settle its administrative action against Daisy is not reviewable under the Administrative Procedure Act, this Court is without jurisdiction to hear the case and the Motion to Dismiss will be granted.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JEROME J. MAHONEY and REBECCA G. MAHONEY, h/w,	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	No. 04-1833
U.S. CONSUMER PRODUCT SAFETY COMMISSION,	:	
Defendant.	:	

ORDER

AND NOW, this 30th day of September, 2004, upon consideration of Defendant U.S. Consumer Product Safety Commission's Motion to Dismiss the Amended Complaint (Doc. No. 9), and the Response thereto, it is hereby **ORDERED** that the Motion is **GRANTED** and the Amended Complaint is **DISMISSED WITH PREJUDICE**.

BY THE COURT:

Robert F. Kelly, Sr. J.