

MASS TORTS UPDATE

Expert Analysis

Developments in CPAP Machine, Weedkiller and Other Litigations

This article focuses on the latest developments in nationwide litigations that are poised to make significant strides in 2022. This installment details the Philips CPAP recall and Paraquat multi-district litigations, sexual abuse allegations against fashion mogul Peter Nygard, and the bankruptcy mass torts involving Boy Scouts and Purdue Pharma.

FDA Investigation Breathes New Life Into CPAP Recall Litigation. A surge of lawsuits has been leveled against Philips in response to the life-threatening health risks associated with the Polyester-based Polyurethane (“PE-PUR”) foam in more than three million of the company’s sleep apnea breathing machines.

Seven weeks before the massive recall in the summer of 2021, Philips acknowledged that the type of PE-PUR foam that it used to minimize the noise in many of its Continuous Positive Airway Pressure (CPAP), Bi-Level Positive Airway Pressure (Bi-Level PAP), and mechanical ventilator devices, posed potential health risks to users. *First Quarter*

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Results, Phillips (April 26, 2021) at 2. Philips’s own testing revealed that the foam in the recalled devices may break down and lead users to ingest particles or inhale dangerous chemicals such as Toluene Diamine, Toluene Diisocyanate,

Lawsuits will ultimately hinge on whether Philips was aware of the substantial risks with the degradation of foam in its breathing devices and failed to warn the public about these hazards.

Diethylene glycol, and Volatile Organic Compounds (VOCs). *Sleep and Respiratory Care update, Clinical Information for Physicians*, Philips (June 14, 2021).

Personal injury and class action lawsuits across various federal districts were consolidated in the Western District of Pennsylvania in October 2021

before Senior U.S. District Judge Joy Flowers Conti, a seasoned jurist with vast experience in complex litigation. The MDL has amassed over 137 total actions since its inception and is expected to grow to thousands.

Lawsuits will ultimately hinge on whether Philips was aware of the substantial risks with the degradation of foam in its breathing devices and failed to warn the public about these hazards. Plaintiffs have argued that Philips knew of the dangers long before the CPAP-maker recalled the devices. The U.S. Food and Drug Administration (FDA) recently released a report of an inspection at Philips’s manufacturing plant in Murrysville, Pennsylvania, suggesting that the company may have been aware of potential foam deterioration problems for years. The inspection report noted that “[t]here were at least fourteen instances, assessments, and/or test reports, dated from 04/01/2016 to 01/22/2021, where your firm was aware of issues and concerns related to potential foam degradation and/or Volatile Organic Compound (VOC) emissions.” Philips Respironics FDA Form 483 at 3.

Later this month, Judge Conti will interview candidates to serve on the plaintiffs’ steering committee. Pretrial

Order No. 5 at 1, *In re: Philips Recalled CPAP, BI-LEVEL PAP, and Mechanical Ventilator Prods. Litig.*, MDL No. 3014, No. 2:21-mc-01230-JFC (W.D. Pa. Dec. 20, 2021). In multi-district litigations, steering committees are often composed of a panel of attorneys that render decisions on behalf of all plaintiffs in the MDL and focus on specific aspects of the day-to-day litigation, such as organizing discovery, presenting oral and written arguments, selecting experts, working with opposing counsel in developing a litigation plan, and selecting bellwether trial cases. FJC, *Manual for Complex Litig.* (4th ed. 2004) at 24-25.

Defendants Try To Weed Out Claims in Paraquat MDL. Roundup is not the only popular herbicide that has raised concerns. Product liability lawsuits claiming that exposure to paraquat leads to Parkinson's disease have continued to mount against Chevron and Syngenta, the manufacturers of the controversial weedkiller. The commercial-grade herbicide has become more popular in recent years, partly thanks to plants becoming resistant to Roundup.

A multi-district litigation is currently underway in the Southern District of Illinois. Plaintiffs suffering from the life-long, progressive disease have alleged that the defendants knew of the link between paraquat and Parkinson's, and deliberately concealed the dangers of the herbicide for at least 40 years.

The number of new cases being filed continues to grow as the MDL works its way to the first bellwether trial, with the total number of lawsuits reaching nearly 500 at the end of the year. The first bellwether trial has been tentatively scheduled for November of 2022, which reflects presiding Chief U.S. District Judge Nancy J. Rosenstengel's plan to

aggressively push paraquat lawsuits to trial or settlement. CMO No. 4, *In re: Paraquat Prods. Liab. Litig.*, No. 3:21-md-3004-NJR (S.D. Ill. July 14, 2021). A bellwether trial is a pivotal time because it allows the parties to put their theories to the test and dictate the future resolution of the MDL. On Jan. 7, 2022, the court identified 16 cases for early trial selection (the plaintiffs selected eight cases and the defendants selected eight cases). ECF No. 803 at 2.

In the latest round of herbicide litigation, defendants Chevron and Syngenta both filed partial motions to dismiss, seeking to toss out a large block of cases and claims in the MDL. Syngenta moved to dismiss claims for breach of warranty, fraud, and violation of certain consumer protection statutes. *Def. Syngenta's Mem. in Supp. of Mot. To Dismiss*, ECF No. 352-1. Chevron maintained that many claims were time-barred by various state statutes of repose and limitations, several warranty and consumer protection claims should be dismissed under specific state laws, and certain public nuisance claims failed to state a claim. *Def. Chevron's Mem. in Supp. of Mot. To Dismiss*, ECF No. 351. Plaintiffs opposed the defendants' motions arguing that, "[t]he factual basis for the cases that comprise this consolidated proceeding, including the widespread and decades-long harm that paraquat has caused and continues to cause, sets these cases outside of the realm of claims and damages that may be more typical in other personal injury cases." *Pls.' Opp. to Def. Chevron's Mot. To Dismiss*, ECF No. 695 at 1. Plaintiffs' opposition reasoned that the applicable limitations period should be extended because the "[d]efendants intentionally fraudulently concealed the dangers of

Paraquat usage." *Id.* at 3. The defendants submitted replies in support of their motions on January 10, challenging the plaintiffs' fraudulent concealment argument and seeking to dismiss claims under particular state statutes of repose. *Def. Chevron's Reply Mem. in Supp. of Mot. To Dismiss*, ECF No. 812. The defendants attacked all of the plaintiffs' public nuisance claims contending that they were merely "rebranded product liability claims." *Id.* at 4.

Fashion Tycoon Peter Nygard Acquiesces to U.S. Extradition to Face Sex-Trafficking Charges. The 80-year-old Canadian fashion mogul, Peter Nygard, consented to extradition to the United States in October 2021, where he faces federal sex trafficking charges in the Southern District of New York. Nygard was born in Finland and grew up in Manitoba, eventually running his own name-sake apparel companies and becoming one of the wealthiest people in Canada.

U.S. federal prosecutors charged the "King of Polyester" with nine counts of sex trafficking, racketeering, and related crimes in December 2020. Nygard was taken into custody by Canadian authorities in Winnipeg pursuant to an extradition treaty with the U.S. The criminal indictment stated that over a 25-year period Nygard allegedly sexually abused dozens of women and minors in the United States, Canada, and the Bahamas. Authorities further accused Nygard of forcibly drugging, assaulting, and coercing victims into sexual contact using numerous tools such as false promises of lucrative career opportunities, "pamper parties," cash payments, and psychological pressure or physical force. The indictment also alleged that Nygard targeted, recruited, lured, and exploited vulnerable children and

women who had a history of abuse or came from disadvantaged backgrounds.

57 women have filed a class action lawsuit in the U.S. District Court for the Southern District of New York against Nygard and his companies, alleging that Nygard's corporate entities and higher-level employees engaged in a sex trafficking venture spanning several decades. The landmark class action accusing Nygard of sexual assault and trafficking all facilitated by Nygard's companies seeks damages under the federal Trafficking Victims Protection Act (the TVPRA), 18 U.S.C. §§1591 et seq., and other laws. The complaint details Nygard's complex constellation of corporate entities and how a network of employees acted in tandem as co-conspirators in recruiting, advancing, financing, aiding, and concealing the trafficking enterprise. The lawsuit states that Nygard used the help and influence of his companies and intimidation tactics to ensure that his illegal sex acts would remain undetected. See *Jane Does Nos. 1-57 v. Nygard, et al.*, No. 1:20-cv-01288-ER (S.D.N.Y. Feb. 13, 2020).

In August 2020, the class action lawsuit against Nygard was stayed and placed on hold until further notice. Nygard has vehemently denied all allegations.

Civil litigation under the federal TVPRA has emerged as an increasingly important tool for trafficking survivors in their fight for justice because it holds third parties accountable if they participated and conspired in the sex trafficking. It is likely that the number of sex trafficking civil cases will surge as attorneys become more sophisticated in attacking civil cases under §1591.

Boy Scouts of America Update. The Boy Scouts of America (BSA) Chapter 11 bankruptcy case is pending before Hon. Laurie Selber Silverstein in the U.S. Bankruptcy Court for the District of Delaware. The case was commenced in February 2020 and it has been particularly active in recent months.

BSA filed its proposed fifth amended plan of reorganization on Sept. 15, 2021. Voting on the proposed plan, as modified, commenced in mid-October and ended on Dec. 28, 2021. Sexual abuse survivors were entitled to vote on the plan and the voting results are expected to be announced shortly.

BSA's proposed plan of reorganization provides for a compensation fund currently worth roughly \$2.7 billion to be set aside for survivors of sexual abuse. The compensation fund is comprised of the settlements negotiated by the Coalition of Abused Scouts for Justice with the BSA itself, an ad hoc group of BSA local councils, the Church of Jesus Christ of Latter-day Saints, The Hartford Insurance Company, Chubb Insurance Company, and the Methodist Church, among others. If the plan is approved, the settlement fund would be the largest compensation fund for sexual abuse survivors in history. Additionally, mediation remains ongoing, and the compensation fund could be further enlarged if additional settlements are reached with the remaining entities.

Approval of BSA's proposed plan would pave the way for BSA to emerge from bankruptcy. The hearing at which BSA will seek approval of its proposed plan is currently scheduled to commence on Feb. 22, 2022 and is expected to last a number of weeks. Judge Silverstein may render her decision

at the conclusion of the hearing or sometime shortly thereafter. *In re Boy Scouts of America and Delaware BSA*, No. 20-10343-LSS (Bankr. D. Del.).

Purdue Bankruptcy Plan Update. In an unprecedented move, on Dec. 16, 2021, U.S. District Court Judge Colleen McMahon rejected the Purdue bankruptcy plan that had been confirmed by Bankruptcy Judge Robert Drain on Sept. 1, 2021. Judge McMahon's decision was based upon nonconsensual releases of third-party claims for non-debtors (the Sackler family) in the bankruptcy plan. Judge McMahon granted Purdue and the Sacklers the right to appeal her rejection of the Purdue bankruptcy plan to the Second Circuit as long as the appeal was made by Jan. 17, 2022. Judge McMahon further ordered that the parties request expedited consideration of the appeal. While Judge McMahon's decision is being appealed, the parties have been ordered to mediation by Judge Drain to attempt to resolve the nonconsensual releases dispute.