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New York Law Journal

Latest Developments in Toxic Torts, Sexual Abuse and Other Notable Litigations

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April 20, 2023

Lawsuits Allege Insidious Behavior by Hair Relaxer Companies

A growing number of products liability lawsuits have been lodged against manufacturers of chemical hair relaxers, including the cosmetic giant, L'Oréal, for negligently failing to warn women about the elevated risk of hormone-sensitive cancers and other injuries. Chemical hair relaxing, or lanthionization, breaks down disulfide bonds to relax or loosen the curl pattern of the hair. Groundbreaking scientific literature has sounded the alarm on the link between adverse health conditions and chronic exposure to carcinogenic and hormonally active compounds in hair relaxers.

The U.S. Food and Drug Administration does not require manufacturers to list specific hair relaxing ingredients, allowing them to obscure the presence of phthalates known to cause endocrine disruption. These detrimental effects manifest over years of exposure as many women use different product lines throughout their lives—often beginning at childhood. Multiple factors have influenced the pervasiveness of Black women's use of hair relaxing products for the last century and a half, including: slavery and internalization of acceptable beauty norms, advertisements and media, assimilation and economic security, ease of maintenance, and adherence to cultural norms. Chanel Donaldson, Hair Alteration Practices Amongst Black Women and the Assumption of Self-Hatred, NYU Applied Psychol. OPUS (Fall 2012), https://wp.nyu.edu/steinhardt-appsych_opus/hairalteration-practices-amongst-black-women-and-the-assumption-of-self-hatred/.

The uniform complaints filed by the plaintiffs detail the history of hair relaxers and accuse cosmetic manufacturers of marketing products primarily to Black women and children—further bolstering the historic, Eurocentric beauty standards of straight hair. Cicely A. Richard, The History of Hair Relaxers, Sept. 29, 2017, https://classroom.synonym.com/the-history-of-hair-relaxers-12078983.html.

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On Feb. 6, the U.S. Judicial Panel on Multidistrict Litigation (JPML) officially consolidated dozens of hair straightening lawsuits before U.S. District Court Judge Mary M. Rowland in the U.S. District Court for the Northern District of Illinois. *In re Hair Relaxer Marketing, Sales Practices, and Prodicts Liability Litigation,* 1:23-cv-00818 (N.D. Ill.). The JPML noted that "[c]entralization will obviate the risk of duplicative discovery and inconsistent rulings on pretrial issues such as what level of exposure to phthalates or other EDCs poses a risk of reproductive injury, and what obligation, if any, defendants had to disclose the presence of such chemicals in their hair relaxer products." Transfer Order at 2, Case MDL No. 3060 (J.P.M.L. Feb. 6, 2023).

Revlon, the beauty behemoth, and manufacturer of several hair relaxer brands, filed for Chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the Southern District of New York. *In re Revlon,* 1:22-bk-10760 (S.D.N.Y.). In March 2023, the U.S. Bankruptcy Judge David S. Jones, who oversees the bankruptcy, extended the claims bar date. This allowed individuals with injury claims arising from the company's hair relaxer products to file individualized proofs of claim. The plaintiffs steering

committee in the MDL is closely monitoring the *Revlon* bankruptcy and it is likely that discovery will be necessary to ensure the fair treatment of potential tort claimants in any claim process or bankruptcy proceeding.

The Fight Against Forever Chemicals: Will PFAS Manufacturers Go Down in Flames?

Since the mid-1960s, aqueous film-forming foam (AFFF) has been on the market as an effective substance for extinguishing hydrocarbon, fuel-based fires. The firefighting foam has a fluorochemical-based surfactant that rapidly forms a film across the fire surface and prevents the release of flammable fuel vapors, smothering oxygen from the fuel surface. For decades, firefighting foam has been commonly used by branches of the U.S. military, commercial airports, fire departments, and oil and gas industries.

Several classes of chemicals, collectively known as per and polyfluoroalkyl substances (or PFAS), are present in firefighting foam. PFAS include, but are not limited to, perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS), and related chemicals including those that degrade to PFOA or PFAS. Notoriously known for their inability to break down, as well as for their lingering presence in the human body, PFAS are often referred to as "forever chemicals."

In the 1960s, testing performed by manufacturers of PFAS revealed that PFOA exposure poses toxic health effects to various organs. By the end of the 1970s, further studies conducted by the companies that used or manufactured PFAS showed that these toxic chemical bind to proteins in the blood for substantial periods of time. By the mid-2010s, the C8 Science Panel determined that human exposure to as few as 0.05 parts per billion of one PFAS, PFOA, had probable links to kidney cancer, testicular cancer, ulcerative colitis and other health conditions.

Litigation against manufacturers and distributors of PFAS-containing aqueous film-forming foam has exploded in recent years. In December 2018, AFFF cases were coordinated in the MDL in the U.S. District Court of South Carolina before Judge Richard M. Gergel. *In re Aqueous Film-Forming Foams Products Liability Litigation*, 2:18-mn-2873 (D.S.C.). In the MDL, the Defendants are companies that designed, manufactured, distributed, or sold PFOA and PFOS, the chemical precursors of PFOA and PFOS, or products containing PFOA and PFOS. Plaintiffs claim that defendant companies—including 3M, DuPont, and Chemours—knew that PFAS in AFFF could cause buildup in the body and result in serious health problems, but failed to warn the public of the risks. As of March 2023, the MDL is currently home to approximately 4,058 pending actions, which consist of claims for personal injury, medical monitoring for potential future injury, and property damage.

Three bellwether cases were selected to go to trial in 2023. Each of the three cases involve municipalities alleging that PFAS AFFF contaminated drinking water sources, and PFAS manufacturers, AFFF manufacturers, and suppliers should be liable for damages from the cost of water filtration and treatment as well as for the cost of soil and source remediation.

In June 2023, the Florida city of Stuart is slated to be the first water provider set to go to trial. The city has accused 3M of contaminating its wells with carcinogenic chemicals from AFFF. *City of Stuart, Florida v. 3M,* 2:18-cv-3487 (D.S.C.). The lawsuit claims that the defendants were aware of the health risks associated with the toxic chemicals but failed to warn the city. As a result, firefighters unknowingly contaminated local water wells with hazardous chemicals for years. Although this bellwether cannot be classified as a personal injury case, the trial's outcome may have significant impacts on the future course of the MDL litigation.

Prenatal Pain Relievers, Preemption and Plaintiff Fact Sheets

MDL No. 3043, *In re Acetaminophen—ASD-ADHD Products Liability Litigation,* presides in the U.S. District Court for the Southern District of New York under U.S. District Court Judge Denise Cote. Case No. 1:22-md-03043 (S.D.N.Y.). Plaintiffs in the MDL assert that their children developed autism spectrum disorder, attention-deficit/hyperactivity disorder (ADHD), or both as a result of in-utero Tylenol (acetaminophen) exposure. They also contend that manufacturers and distributors failed to warn consumers of an increased risk of autism and ADHD.

In September 2022, the plaintiffs prevailed against Walmart on the grounds of preemption. Walmart moved to dismiss two lawsuits filed by mothers claiming they used Equate, Walmart's brand of over-the-counter acetaminophen, while pregnant. Additionally, they claimed that this usage resulted in children born with autism and ADHD. Walmart argued that the plaintiffs' state law causes of action should be preempted because federal drug-labeling laws take precedence over any state laws imposed on drug makers. Walmart contended that manufacturers, not retailers, are responsible under the law for the content of the labels. See Op. and Order at 28, ECF No. 145. Judge Cote ruled that the motion was not applicable since the FDA's labeling laws did not prevent Walmart from adding warnings to its Equate brand of acetaminophen. Judge Cote found that Walmart's argument of having "no authority to

alter a drug's composition, label, or design" had no impact on the preemption analysis and she denied the motions to dismiss.

Defendant Johnson & Johnson (J&J), and other retailers of acetaminophen products, have filed motions to dismiss, indicating that they should be immune to liability for state failure-to-warn claims on the grounds of federal preemption. J&J asserted that federal and FDA regulations prohibit them from adding additional pregnancy warnings. J&J's Mot. to Dismiss at 18, ECF No. 426. They further claimed that a pregnancy warning would be misleading and would misbrand acetaminophen, and that certain Tylenol products are subject to an approved New Drug Application. Plaintiffs countered that J&J must demonstrate that federal law prohibited an additional warning about autism and ADHD; the plaintiffs' claims are not preempted by FDA regulations, and the claims are not preempted on the grounds that the label would be "misbranded." Pls.' Opp'n to J&J's Mot. to Dismiss at 28, 30, 40, ECF No. 475. In March 2023, J&J filed a reply in support of its motion and the Plaintiffs remain hopeful that Judge Cote will also reject J&J's motion.

Judge Cote continues to move the MDL forward at an expeditious pace. On March 23, Judge Cote issued an order requiring each plaintiff to complete a court-approved plaintiff fact sheet (PFS), which will streamline the process of gathering information for personal injury claims. The PFS focuses on the products used during pregnancy, the genetic and medical history of the parents and the plaintiff's child. Order ECF No. 517.

Judge Upholds Boy Scouts of America Bankruptcy Plan

There are positive developments for sexual abuse survivors in the Boy Scouts of America (BSA) bankruptcy. The Bankruptcy Court confirmed the BSA's plan of reorganization on September 8, 2022. Certain nonsettling insurance companies and two small groups of plaintiffs appealed the Bankruptcy Court's order to the Federal District Court for the District of Delaware. The district court heard oral arguments on Feb. 9 and 10. On March 28, the district court affirmed the Bankruptcy Court's order confirming the BSA's plan of reorganization. Appellants have moved the district court to impose a stay, at least for the duration of appellants' further appeal to the U.S. Court of Appeals for the Third Circuit. On April 10, appellants appealed the district court's order affirming the Bankruptcy Court to the Third Circuit, also moving the court to impose an emergency stay pending the appeal. On April 11, the district court denied the appellants' motion for a stay. On April 19, The Third Circuit denied the appellants' emergency stay motion; and consequently, the BSA's plan of reorganization went effective.

The bankruptcy case is *In re Boy Scouts of America and Delaware BSA,* No. 1:20-bk-10343 (Bankr. D. Del.), Judge Laurie Selber Silverstein presiding. The lead appellate case is *National Union Fire Insurance Co. of Pittsburgh v. Boy Scouts of America and Delaware BSA,* No. 1:22-cv-01237 (D. Del.), Judge Richard Andrews presiding. The Third Circuit case is *In Re Boy Scouts of America and Delaware BSA*, No. 23-1664 (3d Cir.).

Nuts and Bolts of Camp Lejeune's Toxic Legacy

Congress passed the Honoring Our PACT Act on Aug. 10, 2022. This act includes the Camp Lejeune Justice Act of 2022, which creates a new federal statutory cause of action for individuals who suffered an injury from toxic water exposure while stationed at the camp for least 30 days between Aug. 1, 1953, and Dec. 31, 1987. The burden of proof for these claims is "equipoise"— showing that the relationship between exposure and harm is sufficient to conclude that a causal relationship is at least as likely as not. All claims must be filed by Aug. 10, 2024. The exclusive jurisdiction for these claims is the Federal District Court for the Eastern District of North Carolina. The act includes an administrative exhaustion requirement. Before a victim can file a lawsuit, they must file an administrative claim form with the Department of the Navy. Within six months, the Office of the Judge Advocate General of the Navy (JAG) will provide instructions for completing and filing the administrative claim forms. In January 2023, Navy JAG announced that it was building an online portal specific to submitting and processing claims. The portal is projected to be finalized in summer 2023 and will expedite administrative review. More than 800 victims have already completed their six-month administrative exhaustion requirement and filed lawsuits. Unanswered questions of law abound as victims eagerly await justice.

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