

July 19 2022

Recall litigation report: 2022 mid-year recap

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In the first half of 2022, manufacturers were as busy as ever navigating recalled products and fielding the class action lawsuits that often (but do not always) follow.

CPAP litigation finds new defendant

For the last year, Philips Respironics (Philips) has been inundated with lawsuits brought by [consumers](#) and [medical device suppliers](#) over its continuous positive airway pressure (CPAP) and bilevel positive airway pressure (BiPAP) breathing machines. In more recent months, SoClean, a manufacturer of sanitation machines specifically designed to work with CPAP and BiPAP sleep apnoea equipment, has been defending itself against a lawsuit of its own.

In October 2021, a Missouri resident filed *Jenkins v SoClean Inc.*⁽¹⁾ a putative class action lawsuit against SoClean, asserting various tort and warranty claims both on their own behalf and on behalf of a class of Mississippi citizens who had purchased or used SoClean devices to clean and sanitise their CPAP, BiPAP or mechanical ventilation machines. In their complaint, the plaintiff alleged that these SoClean machines use harmful levels of ozone gas during the cleaning process. Although originally filed in a federal district court in Missouri, the Judicial Panel on Multidistrict Litigation (JPML) transferred the case on 2 February 2022 to the US District Court for the Western District of Pennsylvania, so it could be heard by Judge Joy Flowers Conti, the same district court judge who is currently presiding over the Philips CPAP multidistrict litigation (MDL)⁽²⁾ in the Western District of Pennsylvania.

Within a week of the consumer class action, SoClean released a [public statement](#) accusing Philips of blaming SoClean following the recall of Philips's products. SoClean also filed a lawsuit of its own against Philips – *SoClean, Inc. v Philips*⁽³⁾ – alleging that Philips had misled the public and placed blame on SoClean to divert attention away from the design flaws that had led to the voluntary product recall of CPAP machines, BiPAP machines and ventilators. SoClean asserted claims under the Lanham Act and Massachusetts statute, Massachusetts General Laws (MGL) chapter 93A, for commercial disparagement, tortious interference with business relationships and unfair competition. In its complaint, SoClean claimed that it suffered more than \$200 million in damages.

Class actions over benzene in recalled consumer products

Recently, several brands of personal care products have come under fire for containing benzene, a carcinogen with the potential to cause serious health effects after long-term exposure. The current wave of class action litigation started last year with consumer class action lawsuits against Johnson and Johnson (J&J), alleging that its Neutrogena and Aveeno-branded Aerosol Sunscreens contained harmful levels of benzene. J&J had recalled these products after Valisure LLC, an independent laboratory, publicly announced test results revealing the presence of benzene in a number of over-the-counter sunscreen products. In October 2021, these lawsuits against J&J – which asserted warranty, fraud, advertising and consumer protection act claims – were consolidated before Judge Raag Singhal in the US District Court for the Southern District of Florida. On 28 March 2022, Judge Singhal [preliminarily approved a class action settlement](#) in the consolidated action⁽⁴⁾ and set a final approval hearing for 12 August 2022. The settlement would include full refunds on recalled products, vouchers toward future product purchases and new testing procedures, and it covers all US consumers who have purchased one or more of the affected products since 26 May 2015.

J&J competitor, Procter & Gamble (P&G) is also facing consumer class actions asserting various tort and warranty claims. They allege that P&G was misleading regarding the alleged presence of benzene in P&G's now recalled "Secret and Old Spice" antiperspirant and deodorant spray products, and its Pantene, Herbal Essense, Aussie, Old Spice, Waterless and Hair Food aerosol dry conditioners and dry shampoos. In April, these cases were consolidated before Judge Michael H Watson in the US District Court for the Southern District of Ohio and, earlier this month, the parties⁽⁵⁾ [announced](#) that they had reached an agreement in principle to settle all of the complaints in the MDL. On 1 July 2022, the plaintiffs filed a motion for preliminary approval of the parties' proposed settlement, which includes cash payment or vouchers for consumers, material and product testing requirements, product sampling and testing protocols, and sale restrictions.

Recently, two New York consumers also filed *Winans Jr v SC Johnson & Son, Inc et al.*⁽⁶⁾ and *Santos v Blistex Inc.*⁽⁷⁾ asserting various tort and warranty claims against SC Johnson & Son and Blistex, respectively, and alleging the existence of and failure to disclose unsafe levels of benzene in personal care spray products. The case against Blistex has already been voluntarily dismissed. However, these cases underscore the fact that manufacturers need to look closely at the benzene content of their products (and the testing in place to monitor the presence of potential carcinogens), whether or not they find themselves on the radar of independent testing laboratories like Valisure.

Effectiveness of at-home covid-19 tests and recalls face scrutiny

As demand continues for easily accessible covid-19 testing with immediate results, so do recalls of covid-19 rapid antigen tests. This includes the DiaTrust Covid-19 Rapid Tests manufactured by Celltrion USA, which were recalled in February 2022 due to a high rate of false positives, and covid-19 rapid, at-home tests by SD Biosensor, LuSys Laboratories and SML Distribution, which were not properly authorised, cleared or approved by the Food and Drug Administration for marketing or distribution in the United States. Although these companies have yet to see any litigation related to these recalls, consumer-facing putative class actions have already been filed against [E25Bio](#) and [Ellume](#), respectively, challenging the effectiveness of these tests and/or the handling of these recalls. As new strains of



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covid-19 emerge and the demand for at-home covid-19 testing remains high, new class action lawsuits are likely to follow.

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Endnotes

- (1) 2:22-cv-00241-JFC (W.D. Mo., filed 4 October 2021).
- (2) In re Philips Recalled CPAP, Bi-Level PAP, and Mechanical Ventilator Prods. Liab. Litig.
- (3) 1:21-cv-11662 (D Mass., filed 12 October 2021).
- (4) In re: Johnson & Johnson Aerosol Sunscreen Marketing, Sales Practices and Products Liability Litigation), MDL 3015 (S.D. Fla).
- (5) In re Procter & Gamble Aerosol Products Marketing & Sales Practices Litigation, MDL No. 3025.
- (6) Case No. 2:22-cv-00451 (E.D.N.Y, filed 26 January 2022).
- (7) Case No. 1:22-cv-00806 (S.D.N.Y, filed 31 January 2022).