

## Product Liability - USA

### Looking to litigate in secret? Fourth Circuit creates hurdles for product manufacturers

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In April 2014 the Fourth Circuit ruled in *Company Doe v Public Citizen* that a manufacturer could not hide behind a veil of secrecy, even after successfully enjoining the Consumer Product Safety Commission (CPSC) from publishing an inaccurate report of harm.<sup>(1)</sup> As a result of this ruling, Ergobaby - a company that makes and sells baby carriers - recently revealed itself as Company Doe.<sup>(2)</sup> In light of this opinion, manufacturers must tread carefully if the CPSC attempts to publish a suspect report that could unfairly harm the manufacturer's reputation.

#### Publicly available database

The Consumer Product Safety Improvement Act of 2008 requires the CPSC to maintain a publicly available, searchable database on the safety of consumer products.<sup>(3)</sup> The CPSC implemented this mandate in 2011 by establishing the website [saferproducts.gov](http://saferproducts.gov). The purpose of the database is to provide consumers with an avenue through which to report safety hazards about certain consumer products and to enhance public access to product safety information.<sup>(4)</sup>

Submitters can report a harm or risk related to the use of a consumer product or other product or substance within the jurisdiction of the CPSC. Product manufacturers can then submit claims that a report contains materially inaccurate information. Additionally, manufacturers may submit comments to be displayed in the database along with the report.<sup>(5)</sup>

#### Lawsuit and district court proceedings

In 2011 the CPSC received a report of harm that attributed the choking death of an infant to an Ergobaby carrier.<sup>(6)</sup> Ergobaby filed a claim with the CPSC that the report contained materially inaccurate information.<sup>(7)</sup> Despite four requests by Ergobaby to have the report corrected, the CPSC refused to halt publication of the original report.<sup>(8)</sup> Ergobaby then brought suit in the District of Maryland to enjoin the CPSC from including the report in the database.<sup>(9)</sup> This was the first legal challenge to the implementation of the online database and garnered ample media attention.<sup>(10)</sup>

In addition to asking for injunctive relief, Ergobaby moved to litigate the case under seal and to proceed under a pseudonym.<sup>(11)</sup> It claimed that exposing the content of the report through court documents would have the same effect as disclosure through the database.<sup>(12)</sup> At this time, three consumer advocacy groups - Public Citizen, the Consumer Federation of America and the Consumer's Union - filed objections to the motion to seal.<sup>(13)</sup>

The motion to seal was pending for nine months and the entire case was litigated in secret.<sup>(14)</sup> The court granted Ergobaby's summary judgment motion and permanently enjoined the CPSC from publishing the report.<sup>(15)</sup> Most importantly for Ergobaby, the court ruled that the death of the infant was not caused by or related to Ergobaby's carrier in any way.<sup>(16)</sup> On the motions to seal and to proceed under a pseudonym, the court acknowledged the presumption favouring public access to judicial documents, but determined that Ergobaby's interest "in preserving its reputational and fiscal health" outweighed the public's "abstract interest" in obtaining information about the lawsuit.<sup>(17)</sup> The sealed documents included the pleadings, Ergobaby's motion for preliminary injunction and related briefing, the parties' cross-motions for summary judgment and the docket sheets themselves.<sup>(18)</sup> In addition, the district court released a heavily redacted memorandum opinion.<sup>(19)</sup>

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The consumer groups moved to intervene for the purpose of appealing the district court's sealing and pseudonym orders.<sup>(20)</sup> The district court failed to rule on the motion before the expiration of time to appeal the underlying judgment, so the consumer groups appealed to the Fourth Circuit.<sup>(21)</sup> More than three months after the notice of appeal, the district court denied the consumer groups' motion to intervene, concluding that because the underlying merits of the dispute and the sealing orders were "inextricably intertwined", the consumer groups' objections to the sealing order became moot with the grant of summary judgment in favour of Ergobaby.<sup>(22)</sup>

## Decision

The Fourth Circuit addressed a few threshold issues before deciding on the merits of the consumer groups' appeal. First, the court vacated the district court's denial of the motion to intervene, finding that the timely filing of a notice of appeal deprived the district court of jurisdiction.<sup>(23)</sup> The appellate court also found that there was standing for the consumer groups to appeal the district court's sealing orders because the consumer groups had participated sufficiently in objecting to the motion to seal, and the presumptive right of access to judicial documents gave the consumer groups an interest in the underlying litigation when they were deprived of access.<sup>(24)</sup> Because the consumer groups' interest was entirely independent of the injury that supplied standing for the suit brought by Ergobaby against the CPSC, there was also Article III standing for the consumer groups' appeal.<sup>(25)</sup>

Determining that the jurisdictional and standing requirements were met, the Fourth Circuit moved on to the merits of the sealing and pseudonym orders. The Fourth Circuit stated that the public and press have First Amendment and common-law rights of access to judicial documents and records.<sup>(26)</sup> Courts may permit abrogation of those rights only in "unusual circumstances".<sup>(27)</sup>

Those unusual circumstances did not exist here. The Fourth Circuit held that the right of access under the First Amendment applied to all of the sealed and redacted documents.<sup>(28)</sup> The purpose of the right, in part, is to oversee the courts, which is impossible if the documents supporting a court's opinion and the opinion itself are kept secret.<sup>(29)</sup> Sealing the docket sheets is an even "more repugnant" deprivation of meaningful access to civil proceedings because no one can challenge a sealing order if the proceeding itself is secret.<sup>(30)</sup>

The court then considered whether a compelling governmental interest negated the public's right of access to the sealed case.<sup>(31)</sup> Given the lack of evidence showing how the sealed information might harm Ergobaby, the claim of reputational harm fell short of a compelling interest.<sup>(32)</sup> The fact that a corporation's image or reputation may be diminished in a lawsuit is "the nature of public litigation", and does not alone warrant sealing.<sup>(33)</sup> The Fourth Circuit instructed the district court to unseal the case in its entirety on remand.<sup>(34)</sup>

The district court also committed an error in delaying ruling on the motion to seal until its summary judgment order. The Fourth Circuit rejected the district court's rationale to delay, declaring that the public right of access is not conditioned on whether a litigant wins or loses.<sup>(35)</sup> Finally, the Fourth Circuit held that the district court abused its discretion in permitting Ergobaby to litigate under a pseudonym because it gave no explicit consideration to the public's interest in open judicial proceedings.<sup>(36)</sup>

Although agreeing with the judgment to unseal the court documents and uncover the manufacturer's name, Judge Hamilton wrote a concurrence acknowledging that the district court judge faced a "difficult task" and that the "equities lie with Company Doe".<sup>(37)</sup> The disposition of the appeal would have been "completely different" in Hamilton's view had Ergobaby supported its motion to seal with expert testimony establishing a high likelihood that denying its motion would cause it to suffer substantial and irreparable economic harm.<sup>(38)</sup>

Following this ruling, on May 8 2014 Ergobaby acknowledged that it is Company Doe.<sup>(39)</sup> In addition to informing various media outlets, Ergobaby published frequently asked questions and a message from its chief executive officer on its website, along with contact information for any questions or comments.<sup>(40)</sup> Although it disagrees with the Fourth Circuit's decision, Ergobaby decided not to appeal the decision on unsealing the records because the district court's ruling on the inaccuracy of the original report remains intact.<sup>(41)</sup>

## Comment

The result in *Company Doe* presents product manufacturers with a dilemma in cases where the CPSC disagrees with the manufacturer's claims of material inaccuracy in a report of harm.

The good news for product manufacturers is that the CPSC can be successfully sued, as it was in *Company Doe*. Companies can take heart that it is possible to halt the publication of inaccurate and potentially damaging information, particularly on a

government-hosted and moderated forum such as saferproducts.gov. On the other hand, such a suit is likely to draw increased attention to the report and to the company. Even if the district court ultimately concludes that the report is inaccurate, relief may come too late, especially with the rapid dissemination of information in what Hamilton describes as the "electronically viral world" of today.<sup>(42)</sup>

Further, given the limited scope of judicial review of agency actions under the Administrative Procedures Act, manufacturers must assess whether the facts of its case are sufficiently strong to merit taking the risk of harmful publicity from a lawsuit. An alternative to going to court could be to publish comments in response to the report on the CPSC website.

A manufacturer that decides to sue and wishes to proceed under seal should follow the advice of the concurrence and present evidence that denial of the motion to seal would cause substantial and irreparable economic harm. The manufacturer could also detail why and how that evidence trumps the public's right to access and the public's interest in openness.

If a court denies a motion to seal or overturns a grant of a motion to seal, the manufacturer can follow in the footsteps of Ergobaby and attempt to mitigate any harmful effects by publishing its own disclosure before the unsealing of the record. The spotlight is now on Ergobaby, and whether any economic or reputational harm will result from this announcement remains to be seen.

The unsealing of this case may prove advantageous to manufacturers in one regard: it will provide guidance in bringing similar suits in the future and reveal the arguments that successfully proved that a report of harm was materially inaccurate.

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#### **Endnotes**

- (1) *Company Doe v Public Citizen*, No 12-2209 (4th Cir April 16 2014).
- (2) "Ergobaby in the News", <http://store.ergobaby.com/news> (last visited May 12 2014).
- (3) Consumer Product Safety Improvement Act of 2008, Pub L No 110-314, § 212, 122 Stat 3048 (2008).
- (4) *Company Doe*, No 12-2209 at \*5-\*6 (citing HR Rep No 110-501, at 34 (2007)).
- (5) 16 CFR § 1102 (2010).
- (6) "Ergobaby", *supra* note 2.
- (7) *Company Doe*, No 12-220 at \*7.
- (8) "Ergobaby", *supra* note 2.
- (9) *Company Doe*, No 12-220 at \*8.
- (10) *Id* at \*3.
- (11) *Id* at \*8.
- (12) *Id*.
- (13) *Id*.
- (14) *Id* at \*9.
- (15) *Id*.
- (16) "Ergobaby", *supra* note 2.
- (17) *Company Doe*, No. 12-220 at \*10.
- (18) *Id* at \*39.
- (19) *Company Doe v Tenenbaum*, No 8:11-cv-02958-AW (D Md July 31 2012).
- (20) *Company Doe*, No 12-220 at \*12-\*13.
- (21) *Id* at \*12.
- (22) *Id* at \*13.
- (23) *Id* at \*20.

(24) *Id* at \*23-25.

(25) *Id* at \*35.

(26) *Id* at \*36.

(27) *Id* at \*37 (citing *Stone v Univ of Md Med Sys Corp*, 855 F 2d 172, 182 (4th Cir 1988)).

(28) *Company Doe*, No 12-220 at \*45.

(29) *Id* at \*41.

(30) *Id* at \*44-45.

(31) *Id* at \*45.

(32) *Id* at \*48-\*49.

(33) *Id* at \*50-\*51.

(34) *Id* at \*53.

(35) *Id* at \*55-\*56.

(36) *Id* at \*59.

(37) *Id* at \*62.

(38) *Id* at \*63.

(39) "Ergobaby", *supra* note 2.

(40) *Id*.

(41) *Id*.

(42) *Company Doe*, No 12-220 at \*63.

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