The Future of CCA Claims...
and What Target Defendants Can Do About Them

BY MICHAEL DORE

Consider this a heads-up: Ongoing regulatory, litigation and “public relations” developments on chromated copper arsénate (CCA)-treated wood make it all but inevitable that these products will give rise to extensive and significant toxic tort claims. Indeed, a recent episode of ABC TV’s “The Practice” included a story line that deals with children allegedly injured by contaminants leaching from their playground equipment. As the newsletter of one lumber products trade association noted, “Unless The Practice’s producer...decides to allow Ally McBeal to come to the defense of CCA-treated wood products, it is clear that the industry has not heard the end of personal injury claims based on exposures to ‘defective’ CCA-treated wood products.”

Future CCA Claims
Recent regulatory and judicial activity regarding CCA-treated wood products will almost inevitably pale before the scope of claims anticipated in the future. And the characteristics of CCA claims all but ensure that this product will give rise to numerous and significant toxic tort actions. Those features include:

Regulatory Scrutiny
CCA-treated wood products have been the focus of intense regulatory scrutiny. All pesticides registered before November 1984 are required to undergo re-registration review to ensure that the data supporting their use meet current safety standards. As part of this process, EPA has engaged in a comprehensive re-evaluation of CCA-treated wood products. In addition, the Consumer Product Safety Commission is considering a May 2001 petition from two environmental groups (The Environmental Working Group and The Healthy Building Network) to ban arsenic-treated wood in playground equipment and review the safety of arsénic-treated wood for general use. At least partly in response to these regulatory efforts, in July 2001 the industry voluntarily agreed to place warnings on all CCA-treated wood products advising consumers to wear gloves, goggles and dust masks when working with CCA-treated wood, and never to burn it.

This regulatory activity has not been restricted to federal government agencies. In 1987 California passed a law requiring CCA-treated structures to be coated with paint or sealant every two years. In September 2001, the Wisconsin Department of Agriculture, Trade and Consumer Protection stated in support of the petition pending before the Consumer Product Safety Commission to ban the use of CCA-treated wood in playground equipment that “clearly, there are legitimate uses for CCA-treated lumber. Children’s playground equipment, playsets, and treehouses are not some of them. Thus, we urge the Commission to move swiftly to ban the sale and use of chromated copper arsenicals in playground equipment.”

Unique Product Components
The principal risks associated with CCA allegedly stem from exposure to arsenic, classified by the EPA and the World Health Organization as a known human carcinogen readily taken up by the body, causing a wide range of adverse health effects at high, moderate and low doses. The relevance of those characteristics of arsenic which has not been bound to wood through the CCA-fixation process will be the subject of significant scientific and legal dispute. In addition, complex and crucial exposure, dose, fixation, leaching and related questions will be presented in CCA toxic tort cases. And the fact that at least one component of this product can produce...
significant adverse health impacts outside of the CCA application process promises to greatly expand judicial receptiveness to CCA-based toxic tort claims.

**Children’s Health Issues**

Some 50 million feet of this treated wood is used for playground equipment. Children’s exposure to CCA-treated wood presents unique toxic tort issues, including the question of whether children’s response to arsenic exposures present unique and significant risks.

Recent research has shown that children may metabolize arsenic differently than adults do—that they may not be able to convert arsenic into less toxic forms as readily as adults and thus may be more susceptible to its harmful effects. Other studies have concluded that people with poor nutrition—including children—may be more susceptible to adverse arsenic-related health effects. Indeed, the widespread use of CCA in playground equipment and outdoor decking has led the practice director of the Environmental Working Group (which petitioned the CPSC to bar certain uses of CCA-treated wood) to claim that “by virtue of the use of this material we pretty much set up an arsenic delivery system for kids.”

**Medical Surveillance**

Arsenic-related afflictions may well lend themselves to medical surveillance remedies. Relatively inexpensive and minimally-invasive blood, urine, hair or fingernail tests can determine human arsenic levels.

Treatments for arsenic poisoning are generally accepted in the medical community, meaning anticipatory medical surveillance is far more likely to be requested and ordered on CCA claims than in a wide variety of other afflictions.

**Jurisdiction-Specific Legal Issues**

The intensity of toxic tort litigation is often impacted by the range of outcomes possible in the different arenas in which the key legal battles are fought. Specific state statutes of repose and product liability rules will clearly impact CCA claims. Different state rules on sophisticated-user defense and the liability of component-part manufacturers will impact the liability of many target defendants. The extent to which CCA claims are preempted by federal statutes or regulatory structures and the impact of primary jurisdiction defenses will clearly determine how and where the CCA litigation battles will be fought.

Different states’ views on insurance coverage questions—such as the duty to defend, the trigger and allocation of coverage and the impact of both the “sudden and accidental” and “absolute” pollution exclusion—will almost inevitably determine who will wind up paying whatever compensation is ultimately awarded.

**Media Response**

One troubling storyline on a popular television show will not spell the death knell for any consumer product. But as scientific and regulatory concerns increase with respect to a substance, the media’s attitude toward the alleged toxic exposures will clearly impact the magnitude and resolution of claims. To the extent that CCA becomes lumped in the public’s mind with substances such as asbestos or tobacco products, toxic tort claims will take on added levels of significance. “The Practice” episode may be an isolated circumstance—or it may be the first significant step in this process of raising public concerns. As one commentator recently noted, “Arsenic has quickly grown into one of the front page pollutants of the new millennium.” If the same turns out to be true for CCA, we can anticipate multiple toxic tort claims.

**Alternative Products**

Another crucial factor in toxic tort claims with any product is the uniqueness and utility of that product. But defending CCA products as uniquely beneficial to the public will not be an easy task. For instance, earlier this year PlayNation Play Systems, Inc., a leading manufacturer of wooden playground equipment, announced that it was replacing CCA with arsenic-free preserved wood in all of its products. Other wood preservative manufacturers also have launched advertising campaigns to emphasize that their non-arsenic containing preservatives are not restricted-use pesticides and do not require California Proposition 65 Labeling. With this type of response to public concerns within the CCA wood treatment industry, it promises to be extremely difficult to defend the unique benefits of these products in individual toxic tort claims.

**Sympathetic Plaintiffs and Solvent Defendants**

The sympathetic nature of individual children alleging adverse health consequences as a result of their exposure to a colorless, odorless, and tasteless contaminant leaching from playground or decking materials is obvious. Many others involved in CCA-treated wood transactions, however, are equally sympathetic claimants. Government bodies, for example, that purchased and installed CCA-treated playground equipment will clearly have sympathetic claims if that equipment needs to be removed in order to preserve children’s safety.

Moreover, the range and character of the potential defendants ensure that such claims will enjoy a ‘target-rich’ defendant environment. Major corporations with extensive insurance resources were and are involved in the manufacture of CCA, the application of this product to wood and the distribution, sale and maintenance of CCA-treated wood products. Thus, future CCA-treated wood claims will clearly involve defendants with tremendous financial resources.

**Target Defendants’ Response**

In light of these factors, it’s clear that CCA manufacturers, applicators, product sellers and servicers (along with their insurance carriers) need to be prepared for extensive CCA bodily injury, property damage, economic loss and other toxic tort claims. To begin addressing those claims, target defendants should consider at least the following responses.

**Commercial Terms**

CCA claims will almost inevitably be made against all parties in the distribution chain. These will probably include CCA manufacturers and wood processors as well as distributors, sellers and services. And the solvency of each party in that chain may prove vital to the other participants. For this reason, dealing only with solvent and/or appropriately-insured parties in CCA transactions is extremely important.

Furthermore, contractual indemnity or contribution relationships should be negotiated between parties in this chain of distribution to ensure that uncertain or conflicting common law rules do not control critical liability-allocation issues. For example, a retailer may fail to provide voluntary CCA warning materials to his customers. The impact that should have
on either indemnity or contribution claims made by that retailer, however, is probably best negotiated as part of the contract between those parties, rather than left to resolution under often-conflicting state common-law indemnity and contribution doctrines.

**Insurance**

Few business practices give rise to more significant insurance concerns than the distribution of CCA products. Anyone involved in this distribution should carry adequate product-liability coverage and ensure that exclusions to that coverage will not prevent defense and indemnity in the future, and that its limits are adequate. In addition, all parties in the distribution chain should ensure that they are added as additional insureds to the policies of other parties in that chain to the extent that such additional insurance protections are available.

Product liability coverage and additional insured provisions are not the only insurance issues raised by potential CCA-treated wood claims. Other insurance products exist which could prove valuable. While the results of ongoing government investigations cannot be predicted, the wisdom of obtaining product-recall insurance for CCA products must be carefully considered. In addition, the financial exposure of corporate officers with respect to these claims should be evaluated and the wisdom of obtaining directors and officers (D&O), fiduciary and related coverages should be considered.

**Data and Fact Preservation**

CCA-treated wood claims promise to be extremely fact-sensitive. Unique manufacturing, product composition, or CCA-fixation factors may exist which effectively differentiate the CCA products of one manufacturer from those of another. Such differences will provide a basis for avoiding the sort of “broad brush” liability which will inevitably be sought by plaintiffs.

As with asbestos products, the ability to demonstrate precisely what products were made or sold by a particular party at a particular time may prove crucial to the defense effort. And the ability to demonstrate when, where and to whom those products were sold may be equally vital.

Careful attention should also be paid to document-destruction policies to ensure that they do not require or facilitate the destruction of crucial materials which will be helpful in the defense of such cases. These include manufacturing records, fixation reports, product-release records, sales data and insurance policies covering time frames relevant to the claims.

**Legal Preparation**

CCA-treated wood claims promise to involve at least a four-front legal battle. First, future product-liability litigation will almost certainly be framed by the regulatory decisions made on the alleged risks to the public presented. Second, damage and causation issues will be resolved through litigation brought by claimants allegedly injured by unique and diverse product exposures. Third, within the industry itself, the appropriate responsibility of chemical suppliers, product manufacturers, distributors, retailers, trade associations and other market participants will be fought out. And finally, on each battlefront insurance coverage disputes will have to be resolved. These efforts will require industry-wide coordination and focus on regulatory, liability protection and litigation approaches, mindful of the different considerations at play on each separate fronts in the litigation “war.”

In handling legal issues in each area of concern to CCA defendants, counsel must ensure that all communications are protected by the attorney/client privilege to the maximum extent possible. Adverse judicial findings regarding the tobacco industry’s ability to protect scientific research conducted under the direction of counsel, ensure that it will be very difficult to protect the results of any CCA-related factual investigation. To the fullest extent possible, however, counsel for CCA defendants should ensure that litigation or regulatory disclosure will not be compelled for steps taken by their clients today to evaluate or deal with the impact of existing and future CCA claims. At a minimum, counsel should alert their clients to the danger that such disclosures may ultimately be compelled, and advise them to act accordingly in the creation of documents that could prove problematic.

Counsel should also consult with their clients to ensure that they give appropriate consideration to whether to remain in CCA-related businesses; whether existing corporate structures adequately protect non-CCA assets in the event of significant future claims; and to establishing the best possible structure for funneling future capital to CCA-related businesses.

**Conclusion**

CCA-treated wood will undoubtedly give rise to large and significant toxic tort claims. To deal with them, target defendants need to prepare now by: 1) dealing only with solvent and/or adequately insured parties; 2) using clear and comprehensive contractual indemnity and contribution agreements; 3) obtaining appropriate general liability, product liability, D&O, fiduciary, product-recall and other insurance products; 4) monitoring existing insurance claims to ensure that they will not adversely impact future CCA claims; 5) assembling and preserving CCA-related historical documents, including insurance policies and manufacturing and customer records; 6) closely monitoring ongoing regulatory developments on CCA issues; 7) training a company spokesman; 8) ensuring that inappropriate CCA commentary or evaluation documents are not created; and 9) evaluating corporate structure, organization and financing issues in light of the potential for future CCA-related claims.

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