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Double Victory for BVCPS in Toy Recall Lawsuit

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The U.S. District Court for the Western District of New York has handed Bureau Veritas Consumer Products Services (“BVCPS”) a double victory in a lawsuit involving the recall of Aqua Dots, a children’s craft toy. The court granted BVCPS’s motion for a partial judgment on the pleadings and denied plaintiff Spin Master Ltd.’s (“Spin Master”) motion for leave to amend its complaint. Hughes Hubbard represents BVCPS, which tests consumer products pursuant to state and federal safety standards.

In 2007, Spin Master distributed approximately four million units of Aqua Dots, a craft kit for children to create designs using small colored beads. Spin Master is a Canadian corporation that develops and distributes toys in North America, including the U.S. Aqua Dots had been on the market for two months when Spin Master asked BVCPS to perform a live-animal test on a sample of the beads to determine whether they were harmful or poisonous when ingested. BVCPS engaged co-defendant Eurofins Products Safety Labs, Inc. (“EPSL”) to perform the actual testing.

Spin Master maintained that EPSL’s procedure was “profoundly flawed;” as a result, the test incorrectly determined that the beads were safe. Spin Master received the test results in August 2007. Three months later, Spin Master recalled Aqua Dots after learning the beads contained 1,4-butanediol, a chemical that metabolizes into gamma-hydroxybutyrate — the so-called “date rape drug” — when ingested.

Spin Master sued BVCPS and EPSL, initially seeking more than \$120 million in damages. Spin Master claimed the companies failed to properly test the beads, that BVCPS was grossly negligent and had violated New York General Business Law § 349, a consumer fraud statute.

Hughes Hubbard recommended that BVCPS move to dismiss the section 349 claim because it entitles a plaintiff to attorneys’ fees and litigation costs if the plaintiff prevails. A pending section 349 claim can also embolden a plaintiff to continue an otherwise questionable lawsuit, as even a nominal award could shift legal fees to the defendant.

BVCPS argued that section 349 did not govern the transaction at issue — live-animal testing of a product sample — because the transaction was not consumer-oriented. Spin Master maintained that the beads sickened children who ingested them, hence BVCPS’s alleged misconduct directly affected consumers. BVCPS responded, and the Court agreed, that some public harm does not transform a private dispute into consumer fraud. The Court held, “It is not enough under section 349 to simply allege some harm to the end-user consumer. To the extent that plaintiff has alleged harm to consumers of Aqua Dots, its claim for damages as a result of those injuries is indirect and derivative.”

Eric Blumenfeld argued the motion on behalf of BVCPS. Soon after oral argument, Spin Master moved for leave to amend by adding a common-law fraud claim against both BVCPS and EPSL. Spin Master maintained that BVCPS falsely “market[ed] an expertise, then plac[ed] woefully unqualified individuals in highly specialized roles.” Spin Master also alleged that the test report was itself a fraudulent statement and BVCPS intentionally concealed “the inadequacy of [its] test methods,” its “inability to interpret the test results,” and its “lack of oversight.” Besides being potentially damaging to BVCPS’s reputation, the allegations gave Spin Master the opportunity to pursue punitive damages.

Hughes Hubbard opposed Spin Master’s motion, arguing it was out of time and futile, as the common-law fraud claim would not withstand a motion to dismiss. The Court adopted both HHR arguments, holding that Spin Master did not diligently pursue the proposed amendment and that the new fraud claims were, in any event, without merit.

Ted Mayer, Eric Blumenfeld and Brett Collings are defending BVCPS in the case.

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