

## Products Liability

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### **Manufacturer failed to warn about combustible resin: plaintiff**

**Verdict:** (P) \$122,674,256.00

**Case Type:** Failure to Warn

**Case:** CTA Acoustics Inc. v. Borden Chemical Inc., Factory Mutual Insurance Co. and Exel Corp., No. 04-CI-00122

**Venue:** Laurel County Circuit Court, KY

**Judge:** Roderick Messer

**Date:** 05-21-2007

### **PLAINTIFF(S)**

#### **Attorney:**

- Perry M. Bentley; Stoll Keenon Ogden PLLC; Lexington, KY, for CTA Acoustics Inc.
- Grace A. Carter; Paul, Hastings, Janofsky & Walker LLP; San Francisco, CA, for CTA Acoustics Inc.
- Brian D. Hail; Haynes and Boone, LLP; New York, NY, for CTA Acoustics Inc.
- Howard O. Mann; Law Offices of Howard O. Mann P.S.C; Corbin, KY, for CTA Acoustics Inc.

#### **Expert:**

- Erdem Ural; Fires & Explosions; Boston, MA called by: Howard Mann, Perry Bentley, Grace Carter, Brian Hail
- Ken Laughery Ph.D.; Ergonomics/Human Factors; Houston, TX called by: Howard Mann, Perry Bentley, Grace Carter, Brian Hail
- Alan Reynolds; Cause & Origin; Houston, TX called by: Howard Mann, Perry Bentley, Grace Carter, Brian Hail
- Keith Mayes; Property Management; Lexington, KY called by: Howard Mann, Perry Bentley, Grace Carter, Brian Hail
- Tom Ouimet; Labels & Warnings; Plantsville, CT called by: Howard Mann, Perry Bentley, Grace Carter, Brian Hail
- Gregg Jarrell; Economics; Rochester, NY called by: Howard Mann, Perry Bentley, Grace Carter, Brian Hail

### **DEFENDANT(S)**

#### **Attorney:**

- John G. Prather Jr.; Law Offices of John G. Prather Jr.; Somerset, KY, for Borden Chemical Inc.
- Kara L. McCall; Sidley Austin LLP; Chicago, IL, for Borden Chemical Inc.
- Licha H. Farah Jr.; Clark & Ward, PLLC; Lexington, KY, for Exel Corp.
- Prentice "Hank" Marshall Jr.; Sidley Austin LLP; Chicago, IL, for Borden Chemical Inc.
- R. David Clark; Clark & Ward, PLLC; Lexington, KY, for Exel Corp.
- Thomas S. Brown; Gibbons P.C.; Philadelphia, PA, for Factory Mutual Insurance Co.

#### **Expert:**

- Michele Sullivan Ph.D.; Labels & Warnings; Arlington, VA called by: John Prather Jr., Kara McCall, Prentice Marshall Jr.

- James Farrell C.P.A; Accounting (Forensic); Chicago, IL called by: John Prather Jr., Prentice Marshall Jr., Kara McCall
- Wanda Kinney-Canary; Machinery & Equipment; Lexington, KY called by: Prentice Marshall Jr., John Prather Jr., Kara McCall
- J. Thomas Ph.D.; Cause & Origin; San Antonio, TX called by: John Prather Jr., Kara McCall, Prentice Marshall Jr.
- Adrian Piecorozio; Cause & Origin called by: R. Clark, Thomas Brown, Licha Farah Jr., Prentice Marshall Jr., Kara McCall, John Prather Jr.

**Facts:**

Plaintiff CTA Acoustics Inc. is a Corbin-based manufacturer of acoustical and thermal insulation products for the automotive and construction industries. The manufacturer produced a device that muffled the noise on hoods of automobiles using a fine, powdered phenolic resin known as Durite, which was produced by Borden Chemicals Inc., now known as Hexion Specialty Chemicals Inc. of Columbus, Ohio.

On Feb. 20, 2003, the manufacturing facility exploded, killing seven employees and injuring many others.

CTA alleged that the catastrophic explosion was a result of a secondary explosion that was caused by Durite. CTA claimed that after the initial unknown explosion, the powdered resin was swept up and exploded, causing a "rolling thunder" effect that created more explosions from the Durite that was on the ground and equipment throughout the plant.

CTA sued Borden on a products liability theory, alleging that it failed to warn CTA about the dust explosion hazard associated with Durite. Borden had a contract with Exel Corp., a service-provider company of Massachusetts, and joined the company as a third-party defendant. On the first day of trial, Borden announced that its claims against Exel were resolved, and CTA kept Exel as a defendant. Borden also brought in Factory Mutual Insurance, CTA's carrier, as a third-party defendant, alleging that Factory Mutual gave CTA inaccurate information regarding Durite's properties. Factory was dismissed prior to trial on the condition that Factory would be on the jury form. CTA and Factory Mutual settled on a contractual property damage claim for an undisclosed amount prior to trial.

Erdem Ural, the plaintiff's explosions expert, testified that Durite was explosive and that even a small amount could cause these types of secondary explosions. Alan Reynolds, the plaintiff's cause and origin expert, testified about pinpointing the exact processing line where the initial explosion occurred - the actual cause is unknown - and that Durite can be ignited by using half the energy of an electrical shock present when an individual touches a doorknob.

Durite was believed to be a factor in a similar explosion that killed three and injured nine at the Jahn Foundry in Springfield, Mass., in February 1999. Plaintiff's counsel argued that Borden failed to adequately warn its customers about the explosion, as it drafted a letter dated April 2000, which was to be sent out notifying customers but Borden failed to distribute the letter.

Plaintiff's counsel further argued that Borden failed to change the classification of the powdered phenolic resin on their Materials Safety Data Sheet (MSDS) and change their labeling to indicate the explosive characteristics of Durite. This was reiterated by Tom Ouimet, the plaintiff's labels and warnings expert, who testified that Borden's MSDS and labels did not meet the industry standard. Ken Laughery, the plaintiff's warnings expert, testified about why people react to warnings and the psychological effect on an individual who sees a warning about death, and that Borden's warnings were inadequate because it failed to indicate that Durite could cause deadly explosions.

Plaintiffs' counsel argued that the warning labels that were placed by Exel had been folded and placed on the bags of Durite in such a way that was inadequate.

Borden stipulated that they were responsible for any liability against Exel, which was dismissed by directive verdict at the close of CTA's case.

Borden denied the allegations. Defense counsel contended that its labels and warnings adequately noted that the powdered phenolic resin was a combustible dust, and that "combustible dust" was a term that indicated to safety officials that it could result in an explosion when suspended in air, which was reiterated by Michele Sullivan, defense labels and warnings expert. Defense also contended that it provided adequate instruction on safe use because the MSDS referenced an NFPA (National Fire Protection Association) standard on the subject.

Defense counsel argued that CTA, through its employees, had knowledge of the properties of Durite, since there were minor explosions at the plant that were referred to safety committee meetings. Adrian Piccorazio and J. Kelly Tomas, defense cause and origin experts, testified that the source of the initiating event was a natural gas explosion in an incinerator and not from the powdered phenolic resin. Defense counsel argued that the explosion would not have occurred if CTA had not allowed the resin dust to accumulate to dangerous quantities throughout the plant, to which both parties agreed.

Plaintiff's counsel contested that nothing was indicated to CTA that "combustible" was used as a technical term in Borden's warnings, since the term was not bolded or highlighted in all caps.

**Injury:**

Following the explosion, CTA claimed that it was able to continue operation despite losing one of its key customers, CertainTeed. Gregg Jarell, the plaintiff's economics expert, testified that based on a 2003 to 2008 timeframe, CTA was projected to lose \$116,992,790 in lost profits. Keith Mayes, the plaintiff's property damage expert, testified that CTA sustained \$6.1 million in property damage.

**Verdict Information** The jury found that Borden violated its duty to provide adequate guidelines on how to safely handle Durite and provide adequate warnings of Durite's explosive hazards. The jury found that Factory Mutual did not breach any duty to evaluate the properties of Durite or to report those findings to CTA. The jury found that CTA did not violate its duty to exercise ordinary care in the use and handling of the powdered phenolic resin, or, if it did, such a violation was not a substantial factor in causing CTA's damages. The jury awarded CTA \$122,674,256 in damages.

**CTA Acoustics Inc.**

\$115,968,590 Commercial: Lost Profits

\$4,080,000 Commercial: Property Damage

\$1,312,833 Commercial: Punitive Exemplary Damages

\$1,312,833 Commercial: personal property damage

**Post-Trial:** Defense counsel filed a motion for a new trial and JNOV, which was denied. An appeal is pending.