

## Headline News

### Summary Judgment on Liability Granted Against Weyerhaeuser in \$400 Million Breach of Warranty Case

June 25, 2002

**ATLANTA** -- Summary Judgment was granted in favor of the Chapter 11 Bankruptcy Estate of Paragon Trade Brands against Weyerhaeuser Company in a \$400 million breach of contractual warranty case. United States Bankruptcy Judge Margaret H. Murphy granted summary judgment in the case, which stemmed from a 1993 asset sale by Weyerhaeuser to Paragon which closed concurrent with the sale of 100% of Paragon's newly issued stock to public investors. Weyerhaeuser received approximately \$240 million in proceeds from the IPO.

At the time of the offering, Weyerhaeuser had incorporated patented features into the diapers it sold in the business it transferred to Paragon, but did not have licenses from its competitors for use of the technology. Paragon's use of this patented technology resulted in a patent infringement lawsuit against Paragon by Procter and Gamble a year after the IPO. Paragon's loss of the patent case in late 1997 and the huge damages verdict and injunction that was issued set in motion Paragon's bankruptcy filing. During the bankruptcy, Paragon settled with P&G, and also was forced to enter a costly settlement with Kimberly-Clark Corporation, another major diaper producer which held patents on the product Paragon was making when it was sold to public investors. The legal action against Weyerhaeuser was filed after an investigation by Paragon's shareholders committee during the bankruptcy into the dealings and contracts entered between Paragon and Weyerhaeuser with respect to the 1993 asset sale and divestiture. Andrews & Kurth was counsel to the shareholders committee during the bankruptcy.

The four warranties in question were found in an asset transfer agreement (ATA) and intellectual property agreement (IPA) entered between Paragon and Weyerhaeuser. Judge Murphy found that all four warranties in question were breach as a matter of law, because, among other matters, the intellectual property assets transferred to Paragon by Weyerhaeuser were not adequate to conduct the business that Weyerhaeuser was conducting at the time of the IPO. Judge Murphy also found that, based on confidential internal Weyerhaeuser memoranda and notes discovered by lawyers for the plaintiff, Weyerhaeuser knew, or had reason to know at the time of the asset sale in 1993, that Paragon was selling an infringing product.

The products and patents are all related to an inner leg gather (or dual cuff) disposable diaper, which was the principal product upon which the business of Paragon was based at the time of the Weyerhaeuser divestiture and asset sale.

"The bottom line here is that Weyerhaeuser knew what it was doing to Paragon and Judge Murphy's ruling confirms that. They set this company up for an inevitable result, and what ended up being the third largest patent award in recent history. The next step will be to make Weyerhaeuser pay for the damage they caused by their breach of contract, and the irresponsible steps they took in connection with the public offering of Paragon" says John Lee, a partner with Andrews & Kurth who represented the litigation claims representative for Paragon. "Paragon's creditors and shareholders are now looking to recover the losses of more than \$400 million that Paragon suffered due to Weyerhaeuser's actions," says Lee. The forthcoming trial on damages has not been scheduled, but is expected to be conducted this fall.

Judge Murphy explained the circumstances of the case, in an excerpt of the transcript of the ruling on Monday, June 24, 2002 in U.S. Bankruptcy Court for the Northern District of Georgia, Atlanta Division, "Weyerhaeuser was like a huge ship with a lot of cargo and one of its pieces of cargo was the baby diaper business and it foresaw that the diaper cargo was going to explode....So they got a new boat out, transferred that cargo to a new boat, packed it with all the little sailors that had been tending that cargo and keeping it cool, with Weyerhaeuser's air conditioning help, and sailed it off on a trajectory that was headed straight for the shoals and Weyerhaeuser knew it."

She continued, "Weyerhaeuser just had to get that boat launched and had to make sure that Weyerhaeuser was outside the territorial jurisdiction of landfall and that the little boat was inside the territorial jurisdiction of landfall, territorial waters, when the explosion occurred because they knew where the shoals were."

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Lawyers representing Randall Lambert, the litigation claims representative for Paragon, were Mr. Lee and Scott Locher of Andrews & Kurth (Houston), and co-counsel Parker C. Folsie, III of Susman Godfrey L.L.P. (Seattle) and Charles E. Campbell of McKenna Long and Aldridge L.L.P. (Atlanta).

Andrews & Kurth L.L.P. was founded in Houston in 1902 and today has 365 lawyers in offices in Austin, Dallas, Houston, Los Angeles, London, New York, The Woodlands and Washington D.C. The firm's practice areas include appellate, bankruptcy, business transactions, energy, environmental, corporate and securities, labor and employment, litigation, public law, project finance, real estate, structured finance, technology and tax law for U.S. and international clients.