FEAR DRIVES NON-WOOD BASEBALL BAT CONTROVERSY

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Media attention surrounding the filing of a personal injury lawsuit has apparently reinvigorated ongoing concerns and debate about increased risk and potential liability arising from the use of non-wood baseball bats. On May 19, 2008, the Associated Press (AP) reported that "the family of a boy who suffered brain damage after being struck in the chest by a line drive off a metal bat while playing baseball filed a lawsuit" against the manufacturer of the bat, Hillerich & Bradsby Co. (H&B), alleging metal baseball bats are inherently unsafe for youth games because the ball comes off them faster than from wooden bats.

According to the AP report, in June 2006, Steven Domalewski, age 12, was pitching in a youth baseball game in Wayne, New Jersey when he was struck in the chest by a line drive hit off a bat manufactured by H&B. As a result of his injuries, Steven cannot speak, walk or stand on his own, and needs help with everything from using the bathroom to eating.

"STEVEN'S LAW"

In response to this incident, a 2006 Bill has been reintroduced for 2008 in the New Jersey State Assembly (Bill No. 3388) to enact "Steven's Law" prohibiting the use of non-wood bats in certain organized games in which minors are participants. In so doing, the expressed language of the Bill makes the following findings by the Legislature:

> (a) The hitting of baseballs using non-wood bats may cause a baseball to repel off of a bat at a velocity that exceeds the human reaction time necessary to perceive the ball and properly react;
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> (b)While the safety hazard presented by non-wood bats is difficult to quantify, it is generally agreed that non-wood bats hit the ball with greater force than wood bats and present a greater risk of injury;
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> (c) Between 1991 and 2001, 15 players were killed by batted balls from bats determined to be made of non-wood aluminum, composite, or unknown substances, while only two deaths are known to have been caused by bats made from wood;
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> (d) Steven Domalewski, a 12-year-old pitcher from the Police Athletic League in Wayne, New Jersey, was struck in the chest with a ball hit by a non-wood bat, and suffered a near-fatal disruption of the heart's electrical system that caused his heart to stop, sending him into a coma; and
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> (e) It is necessary and proper for the State to intervene to protect the health and safety of its young athletes, and that the benefits associated with a reduced risk of death or serious injury outweigh the costs associated with replacing non-wood bats with wood bats.

As defined in the Bill, "Non-wood bat" includes "any non-wood baseball bat including, but not limited to, a bat made of metal, titanium, scandium, aluminum or any other alloy compound, but shall not include any wood, composite, laminated or composite-coated wood bat that shall be approved for play upon verified test data that these bats perform, weigh and are balanced like wood bats." Further, "Organized game" is defined as "any baseball game organized by or affiliated with: a public or nonpublic school; any nonprofit youth serving organization… including but not limited to, Little Leagues, Babe Ruth Leagues, Police Athletic Leagues, and the American Legion; a county or municipal recreation department; or the governing body of a county or municipality."

The proposed legislation would make it "unlawful to use a non-wood bat in any organized game in which minors [i.e., a person who is less than 18 years of age] are participants," unless the game involves a team "organized by or affiliated with a school, nonprofit youth organization, county or municipal recreation department, or governing body of a county or municipality outside of this State."

In 2007, a similar legislative proposal (House Bill 1482) was introduced in Pennsylvania to "prohibit the use of non-wooden bats in baseball and softball." Violators of the proposed Baseball and Softball Safety Act" would be subject to a $25 fine for individuals and $50 for organizations.

INCREASED RISK

Reported case law on point is quite limited; the first most notable reported appellate court opinion appearing in 2002. In the case of *Sanchez v. Hillerich & Bradsby Co*., 104 Cal. App. 4th 703; 128 Cal. Rptr. 2d 529 (12/19/2002), plaintiff Andrew Sanchez was pitching for California State University, Northridge (CSUN) in April 1999 when he sustained serious head injuries after being struck by a line drive hit by an aluminum bat in a game against USC. Sanchez filed suit against the bat manufacturer and others, including the NCAA and Pac-10 conference, alleging that the design and use of this particular bat significantly increased the inherent risk in the sport of baseball that a pitcher would be hit by a line drive.

The NCAA argued that it did not owe a duty to Sanchez because at the time of the accident the baseball community was in significant disagreement over the risk of aluminum bats. The Pac-10 maintained that "a pitcher being struck by a batted ball was a risk inherent in the sport of baseball." Accordingly, defendants argued that Sanchez's claim was barred by primary assumption of risk. In response, Sanchez argued that primary assumption of risk was not applicable because of an increased risk presented by the Air Attack 2 over that of other bats previously in use and that the increased risk was a substantial cause of Sanchez's injuries.

According to the court, a defendant owes no duty of care to protect a plaintiff against risks inherent in a particular sport voluntarily played by the plaintiff. On the other hand, the court noted that the defendant owes a duty to participants not to increase the risk of harm over and above that inherent in the sport. Accordingly, if actions of a defendant did increase the risk of

harm above that inherent in the sport, primary assumption of the risk would not available as a defense to negligence liability.

Under the circumstances of this particular case, the appeals court found Sanchez had presented sufficient evidence to establish that use of this particular bat significantly increased the inherent risk that a pitcher would be hit by a line drive and that the unique design properties of this bat were the cause of his injuries.

Before the incident at issue, the NCAA adopted new rules to regulate the exit speed of such bats, but postponed implementation of the rules until a date after this incident. As a result, at the time of the accident, the NCAA still allowed the use of metal bats, and the bat in use was apparently in compliance with NCAA standards.

It was undisputed that the bat in question, the Air Attack 2, was designed to cause the ball to come off the bat at a higher launch speed than with wooden bats and older metal bats. In fact, there was evidence on the record that the inventor of the Air Attack 2 believed the Air Attack 2 substantially increased the risk of a pitcher being hit by what he termed a "come backer" and that he complained to his employers at H&B about these increased risks.

Further, 1998 correspondence from the NCAA indicated that the Baseball Rules Committee was unanimously convinced that bat performance was indeed a safety risk to pitchers and infielders, that there was "simply no question that aluminum bats substantially outperform traditional wood bats, that the risk of injury to pitchers and infielders is real,"

Having found clear evidence that defendants were aware of the additional danger presented by the newer aluminum bats, the appeals court concluded that primary assumption of risk did not necessarily apply in this case. The appeals court, therefore, reversed the trial court's summary judgment in favor of defendants based on the assumption of risk defense.

Similarly, in the case of *Brett v. Hillerich & Bradsby Co*., No. CIV-99-981-C (W.D. Okla. 2002), plaintiff alleged that the Air Attack 2 was unreasonably dangerous and defective because it allowed batted balls to be hit much harder and faster. As a result, pitchers were unable to react in time to protect themselves. In this particular instance, a federal jury found defendant liable for head injuries sustained by a high school pitcher struck by a line drive off an Air Attack 2 aluminum bat.

INSUFFICIENT DATA

In 2000, the inventor of the Air Attack 2 petitioned the Consumer Product Safety Commission (CPSC) to issue a regulation requiring all non-wood bats perform like wood bats. According to the petition, the faster swing speed and lower balance point allowed balls hit with non-wood bats "to achieve a faster exit velocity so that the pitcher does not have time to react if a ball is batted at him." As a result, the petitioner claimed such high performance non-wood bats "have become increasingly dangerous" and "present an unreasonable risk of injury." On June 15, 200, CPSC published a notice in the *Federal Register* (65 FR 37525) soliciting comments from interested persons on the petition.

On March 6, 2002, CPSC voted to deny the petition. In considering whether to approve or deny the petition, CPSC regulations required a determination (1) whether the product presents an unreasonable risk of injury; (2) whether a rule is reasonably necessary to eliminate the risk of injury; and (3) whether failure to initiate rulemaking would unreasonably expose the petitioner or other consumers to the risk of injury alleged by the petition. 16 C.F.R. §1051.9(a)

In correspondence to the petitioner dated April 5, 2002, CPSC determined "available incident data" was "not adequate to show increasing injuries to pitchers over the period of time that bat performance increased." On the contrary, CPSC found overall data reported through the National Electronic Injury Surveillance System (NEISS) showed a significant decrease in injuries associated with baseball and softball during the 1990's. CPSC noted that NEISS data indicated non-wood bats had been involved in deaths.

> Of 51 deaths due to ball impact from January 1991 to January 2001, 17 were identified as being due to impact with a batted ball. Of those 17, 8 were reported to have involved non-wood bats. But, deaths also occurred involving wood bats (2) and thrown balls (18 deaths). In many of the deaths the circumstances are not clear (in 16 cases it is not known whether the ball was thrown or batted, and in 7 of the cases involving batted-ball impact the type of bat is not known).

In addition, the CPSC found data from other sources, including the NCAA and Little League, was not "clear or detailed enough to determine that an increase in injuries has occurred with an increase in bat performance." As a result, CPSC concluded that "available incident data are not sufficient to indicate that non-wood bats may pose an unreasonable risk of injury."

According to CPSC, "[d]eveloping requirements for non-wood bats would be a complex matter," and CPSC did "not have information to determine where the line should be drawn,"

> Essentially, the Commission would need to determine what is an unsafe level of play and what performance requirements for bats are necessary to bring them to a safe level. Current data and information are not sufficient for this task. Any bat, wood or non-wood can produce injuries or death. The Commission cannot simply decree that non-wood bats must perform like wood bats. It cannot presume that wood bats are safe and non-wood bats are unsafe. Rather, it would have to show that performance requirements are necessary to change bat performance from some unreasonable level to an acceptable level.

In so doing, CPSC noted that "the NCAA, ASTM, the Amateur Softball Association, and the National Federation of State High School Associations are actively involved in evaluating the performance of non-wood bats and their possible impact on safety." According to CPSC, there was no indication that these non-governmental efforts were insufficient. CPSC, however, indicated that its staff would continue to monitor bat performance and bat-related incidents and the measures taken by these other organizations to address the safety of non-wood bats.

RATIONAL BASIS

In the absence of current incident data and performance information, CPSC could not presume that wood bats are safe and non-wood bats are unsafe. As illustrated by the case of *United States Baseball v. City of New York*, legislative bodies would have no constitutional obligation to produce any scientific evidence that metal or other non-wood bats create a higher risk of injury before banning their use. On the contrary, a court will uphold a legislative determination that non-wood bats are unsafe as long as there is some conceivably rational basis for doing so.

In the case of *United States Baseball v. City of New York*, 509 F. Supp. 2d 285 (S.D.N.Y. 2007), the issue before the federal district court was whether the New York City Council acted constitutionally by excluding the use of metal bats by high school age students use in competitive baseball games. Plaintiffs alleged that the City had no empirical evidence to show that the "Bat Ordinance" regulation would meet the stated safety objective, i.e., to protect high school age students from the risk of injury.

According to the court, the appropriate role of the courts was not to "judge the wisdom, fairness, or logic of legislative choices." On the contrary, the court would find the Bat Ordinance constitutional as long as there was "a rational relationship between the disparity of treatment and some legitimate government purpose." Further, to pass constitutional muster, "the legislature that created the classification need not actually articulate at any time the purpose or rationale supporting its classification," i.e., banning metal bats in high school baseball games. Moreover, the court noted that the City Council had no constitutional "obligation to produce evidence to sustain the rationality of its classification." Rather, the court would uphold the legislative classification to ban metal bats "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

In this particular instance, plaintiffs alleged that there was no rational basis for the Bat Ordinance because there was "no scientific evidence that metal or other non-wood bats create a higher risk of injury than wood bats." The court rejected this argument.

According to the court "a rational basis exists for legislatively determining that metal and composite bats result in an increased risk of injury to infielders from hard-struck balls" because metal bats "have larger 'sweet spots' than traditional wood bats and therefore produce more hits and greater offense."

> The provisions of the Bat Ordinance appear to address this concern about injuries to infielders from more frequent hard hits by limiting the bats to be used in New York City high school baseball games to those that perform the same as solid wood bats in order to limit the offensive statistics to a safer level.

According to plaintiffs, it was "unfair to say that all non-wood bats have larger sweet spots or other high-performance characteristics" because "metal and composite bats can be calibrated to a wide range of specifications." As a result, plaintiffs contended that "the City could achieve the same purpose in a less restrictive way by imposing technical performance specifications on bats

of all compositions, rather than excluding all metal bats." The federal district court rejected this argument.

According to the court, "a classification need not form a perfect fit between means and ends to satisfy rational-basis review." In this particular instance, the court found general agreement that "many existing metal and composite bats do produce more hits than wood bats." In the opinion of the court, the city council could rationally determine that more hits with metal and composite bats could "result in an increased risk of injury to infielders from hard-struck balls."

As a result, the federal district court concluded that it was rational for the city council to find "high school baseball players' safety is more important than higher batting averages and more offense." Having found "a conceivable rational relationship exists between the Bat Ordinance and the legitimate purpose of public safety," the federal district court characterized "the link between a perceived danger and the Bat Ordinance" as "a classic legislative judgment that the City Council could constitutionally make."

> The City need not adopt the least restrictive alternative; it has wide latitude in formulating its legislative response to a legitimate perceived problem… Protecting persons of high school age from baseball injuries plainly falls within the City's police power to protect its residents' health and safety, and the Court has already concluded as a matter of law that the Bat Ordinance reasonably relates to this legislative purpose.

LITTLE LEAGUE

Shortly after the New York City Council voted to ban the use of non-wood bats in high school baseball games in 2007. Little League International (LII) received an increased number of inquiries regarding the safety of non-wood bats, particularly. While noting that ban only applied to high school games played in New York City, Little League expressed its concern that "the same governmental imposition may soon be directed at Little League Baseball and other youth baseball programs." In so doing, LLI expressed continued support for the right of local leagues and individuals to choose wood or non-wood bats in its baseball program. On the other hand, LLI rejected "the premise that the game will be safer if played exclusively with wood, simply because there are no facts – none at all – to support that premise." According to LLI, "any individual or league choosing a wood-only option must understand that the choice is not being made because of any factual data or scientific information."

> A common misconception is that lighter bats always translate into a baseball being hit harder. This is not the case, because there is a point at which a lighter bat (even though it is swung at a higher speed) does not exert the same force on the pitched ball as a heavier bat does…This is why the non-wood bat manufacturers have agreed to the current standard – so that the non-wood bats perform at a level close to wooden bats, even though a Little Leaguer may be able to swing them faster.

According to Little League International (LLI), since records were kept beginning in the 1960s, there have been eight fatalities in Little League Baseball from batted balls, six from balls hit by wood bats and two from balls hit by non-wood bats. The two non-wood bat fatalities occurred in 1971 and 1973, prior to the 1993 implementation of today's youth bat standards.

In the early '90s, Little League International (LLI) noticed the number of reported injuries to pitchers who were hit by batted balls had increased to about 145 in a year. In response, LLI entered into an agreement with the manufacturers of non-wood bats to limit their bats to a "Bat Performance Factor" (BPF) of 1.15." Since that agreement, LLI noted that these types of reported injuries have decreased to their current level of 20-30 per year. As described by LLI, the BPF is essentially a measure of a non-wood bat's performance (how fast the ball exits the bat when hit) in relation to a standard wood bat's rating of 1.00.

> A very good wood bat's BPF is 1.15. That means today's best non-wood bats (usually made of aluminum) used in Little League perform statistically the same, in terms of how fast the ball exits the bat, as the best wood bats.,, Most of these bats are already printed with the BPF of 1.15, but beginning in 2009, all bats used in Little League Baseball must be imprinted with the BPF…
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> Little League also has addressed the baseballs used in games. Requirements for baseballs to have standardized hardness and liveliness have been in place for several years as well.

See: "Little League Statement on Non-Wood Bats"
http://www.littleleague.org/media/nonwoodbatsfacts.asp

Beginning in 2005-2006, the Sporting Goods Manufacturers Association (SGMA) formed a coalition with LLI, other baseball organizations, concerned parents and players to address the issue of state and local legislation banning the use of non-wood bats in youth play. In so doing, this coalition, "Don't Take My Bat Away," conducted a study using injury data from games played by college age players which found:

> minor injuries, such as bruises, primarily to the lower body are more common when a ball is hit off a non-wood bat, however more severe injuries, concussions and fractures, are more likely when a wooden bat is used.

In addition, a new study using youth players statistics and data is currently being conducted by LLI. According to SGMA, the coalition is not opposed to wooden bats for youth play. Rather, the SGMA coalition is opposed to the government officials telling youth players what type of bat they must use. Additional information can be found on the "Don't Take My Bat Away" website at www.dtmba.com