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Products Liability
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LA. Fourth Circuit Reverses Trial Court on Prescription of Blood Products Claim

Lucas v. Tenet Health System Hospitals, Inc.,
2001-2219 (La. App. 4th Cir. 5/1/02), ___ So.2d___

On January 24, 2000, the plaintiff filed suit against Tenet Health System and the Blood Center, alleging that a transfusion she received at St. Charles General Hospital on March 28, 1986 caused her to contract the hepatitis C virus. The plaintiff was first informed that she had the virus on February 5, 1999. The Blood Center filed an exception of prescription based upon the three-year prescriptive period of La. R.S. 9:5628, which was granted by Judge Medley. However, the Fourth Circuit reversed and remanded the case for trial.

The court relied primarily on *Williams v. Jackson Parish Hospital,* 2000-3170 (La. 10/16/01), 798 So.2d 92, which was reported on in the February, 2002, Volume 13, issue of the Jones Walker Products Liability E*Zine. In *Williams,* the Louisiana Supreme Court overruled its previous decision in *Boutte v. Jefferson Parish Hospital Service District No. 1,* 99-2402 (La. 4/11/00), 759 So.2d 45, and held that a "plaintiff's action in strict products liability arising out of a defective blood transfusion is not within the scope of § 5628;" rather, the general tort prescriptive period set out in La. C.C. art. 3492 applies, requiring only that plaintiffs file suit within one year from the date of discovery of the alleged tainted transfusion. There is no dispute regarding the fact that the plaintiff filed suit within one year of being informed for the first time that she had contracted the hepatitis C virus.

In addition, the plaintiff's argument was supported by the *Williams* decision's treatment of La. R.S. 9:5628.1:

> In 1999, the Legislature expressly addressed for the first time the applicable prescriptive period governing claims arising out of defective blood transfusions by enacting La. R.S. 9:5628.1. That statute provides a special one-year prescriptive period and three-year peremptive period for liability arising out of the 'use of blood,' which liability includes causes of action based on 'products liability' and 'strict liability' arising out of defective blood transfusions. Designated as a remedial statute, § 5628.1 is retroactive; however, the Legislature provided two exceptions: (i) for those claims filed within the 'window of opportunity' provided in the Act [before July 1, 2000], and (ii) for pending claims.

Williams, 798 So.2d at 928. The court found that plaintiff's claim against the Blood Center was timely since it was filed before July 1, 2000.

Finally, the Fourth Circuit evaded the plaintiff's constitutional challenge to § 5628. Similarly, the

Supreme Court declined to address this issue in *Williams.* As such, serious questions remain regarding the viability of the protection afforded to suppliers of blood and blood products under the statute.

- Meredith P. Young

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2d Cir. Finds Hospital's Liability for Contaminated Sutures Outside Medical Malpractice Act

Netherland v. Ethicon, Inc., 35, May 31, 2002229
(La.App. 2 Cir. 4/5/02), 813 So.2d 1254.

In 1995 the plaintiff Sherry Netherland underwent a cesarean section at Willis Knighton Hospital. Following her discharge she returned several times complaining of pain and drainage from the wound site. The incision never properly healed and she eventually had to have the incision surgically closed six weeks after the delivery of her baby.

Netherland filed a complaint with the Louisiana Compensation Fund contending that the hospital and her doctor had committed malpractice. The medical review panel unanimously ruled that neither the hospital nor the doctor's conduct fell below the standard of care, and Netherland failed to follow up with a malpractice suit.

In August 2000 Netherland filed this products liability suit claiming that the difficulties with the healing of her incision had been caused by contaminated sutures manufactured and marketed by a group collectively referred to as Ethicon. She included Willis Knighton Hospital in her suit. She argued in her petition that she was unaware of the issue of the contaminated sutures until September 1999 (less than a year before she filed her lawsuit) "due in large part to DEFENDANTS' concealment of material facts regarding the contaminated vicryl sutures."

Willis Knighton Hospital filed an exception arguing that the case was prescribed under the Medical Malpractice Act (La. R.S. 9:5628). The Second Circuit disagreed finding that a hospital's strict liability claim for use of defective products did not fall within the definition of malpractice. Further, even though Willis Knighton was not technically a manufacturer, the court found Willis Knighton could still be held liable as the seller of a defective product if it knew of the defect when it "sold" it to Netherland as she alleged.

Because the claim against Willis Knighton was one in simple negligence, not medical malpractice, the rule of tort prescription (one year from date of injury) applied. Although the case was prescribed on its face, Netherland alleged in her petition that she had been prevented by the defendants from knowing about the cause of her injury and only learned that her problems had been caused by the defective sutures less than one year before filing suit. The court held that she was entitled to attempt to prove this fact before the trial court as a means of keeping her case alive and surviving Willis Knighton's argument that the case was prescribed.

– Bonita Jones

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2d Cir. Enforces Restrictions in Manufacturer's Indemnity Contract

McGill v. Cochran-Sysco Foods,
35,898 (La.App. 2 Cir. 5/8/02), ___ So.2d ___

In this case plaintiff was injured while adjusting an automatic tea-making machine manufactured and sold by Jet Spray Corporation, and owned and installed by Sysco, which provided it to plaintiff's employer. Plaintiff was adjusting the machine in a manner not contemplated by the manufacturer, having been shown how to do so by a Sysco representative.

Plaintiff sued Sysco who cross-claimed seeking indemnity and defense costs from Jet Spray, along with damages for breach of contract. The contract between Sysco and Jet Spray provided that Jet Spray would indemnify Sysco and hold it harmless against any judgments, damages, expenses, and other losses arising out of the delivery, sale, re-sale, labeling, use or consumption of Jet Spray's product. Specifically excluded, though, was a claim caused by the negligence of Sysco. Jet Spray also agreed to maintain insurance coverage, including product liability coverage, to protect both itself and Sysco from liabilities insured by such coverages.

The court found that the negligence of Sysco's employee, who improperly demonstrated the adjustment of the product, was the cause of the accident, and that the product itself did not contain a defect that caused the accident. It therefore denied indemnity based upon settled principles of contract interpretation. The court recognized that contracts had to be interpreted according to the plain meaning of their words and the intent of the parties as expressed therein. It also noted that a contract indemnifying a party against its own negligence must be strictly construed and that no such indemnity would be available unless the intent is expressed in "unequivocal terms". There was no such "unequivocal" intent to indemnify Sysco expressed in this contract. To the contrary, the negligence of Sysco was explicitly excluded, as a result of which Sysco's negligence negated any obligation to indemnify.

As for the claim that insurance coverage should have been available to Sysco, and the claim that Jet Spray was in breach of its contractual obligation to provide insurance, the court had little difficulty rejecting these claims as well. Coverage was claimed pursuant to a vendor's endorsement which, as the court noted, is intended to provide coverage where a seller (here Sysco) is found liable because of its sale of a defective product manufactured by another, rather than as a result of its own actions. Coverage under such policies is traditionally excluded if the vendor is independently negligent. Again, based upon the factual findings that the cause of the accident was the negligence of Sysco's employee, the court had little difficulty concluding that it was not the product that was at fault, but rather the negligence of Sysco. Thus, there was neither coverage under the policy nor any breach of the obligation to provide insurance, as there was no underlying indemnity obligation.

The case stands mainly for the proposition that a contract will be held to mean what it says, at least in the Second Circuit. Sysco attempted to avoid the plain language of the contract, seeking indemnity for what it alleged was a defect in the product, but which turned out to be the actions of its own employee. The case breaks no new ground but is encouraging to those who believe that contractual language does, or at least should, have some meaning.

- John G. Gomila, Jr. back to top

Milk Van Manufacturer Not Liable in Death of Standing Unrestrained Passenger

Blanchard v. Midland Risk Insurance,
01-1251 (La.App. 3 Cir. 5/8/02), ___ So.2d ___.

The Louisiana Third Circuit has affirmed summary judgment in favor of joint manufacturers of a milk delivery van finding no defect in the van related to the death of a passenger who was ejected from

the vehicle.

Christopher Blanchard was employed by Borden as a milk delivery person. Borden owned a number of delivery vans manufactured by Navistar and American Body Company. As originally designed the milk vans had only a seat for the driver and none for any passenger. Borden installed two eye bolts to which a safety harness for a standing passenger was intended to be hooked. However, the van in which Blanchard was riding had no harness.

Blanchard's supervisor Hillary Touchet was driving the van with Blanchard as a standing passenger when the van was struck by a car. The van overturned, and Blanchard was ejected and killed.

Navistar and American Body moved for summary judgment and the trial court granted the motion. The Third Circuit affirmed. The court found that it was undisputed that the van was delivered with one seat for the driver and no other seating and that it was Borden who added the eye bolts to the interior of the passenger compartment. The manufacturer could not have reasonably anticipated that the one passenger compartment would be modified to allow the attachment of restraints for a standing passenger and/or that the restraints would not then be made available. Further the dangers of riding in a passenger compartment which provides neither seating nor restraint are open and obvious.

The court's holding was a natural extension of the Louisiana Product Liability Act's "reasonably anticipated use" requirement. A manufacturer can be liable for damage only when that damage arises from a reasonably anticipated use of its product. Although courts often stretch this concept to include misuses of products when they are deemed "foreseeable", this case illustrates that courts will still draw the line when product misuses are flagrant.

- *Madeleine Fischer* back to top

Federal Judge Stays Individual PPA Suits for Group Handling in Multidistrict Setting

Clark v. Bayer Corp., 2002 WL 987367 (E.D. La. 5/13/02)
Hoofkin v. Novartis Pharmaceuticals Corp., 2002 WL 987369 (E.D. La. 5/13/02)
Washington v. Bayer Corp., 2002 WL 1009472 (E.D.La. 5/16/02)
Davis v. Bayer Corp., 2002 WL 1009482 (E.D.La. 5/16/02)

Judge Sarah Vance of the United States District Court for the Eastern District of Louisiana has granted the defendants' motion for a stay in these suits arising out of plaintiffs' claims that they were injured when they took over-the-counter drugs containing the ingredient Phenylpropanolamine (PPA).

Plaintiffs filed individual cases in Louisiana state courts against drug manufacturers and drug stores. The defendants removed these cases to federal court on the basis that the citizenship of all plaintiffs was diverse from all legitimate defendants, and that those defendants who were not diverse (the drug stores) were fraudulently joined. (See discussion of the doctrine of fraudulent joinder in Plaintiffs Thwart Drug Manufacturers' Removal by Adding Local Med Mal & Pharmacy Defendants, May 2002, Vol. 16.)

The cases before Judge Vance were about to be conditionally transferred to the Western District of Washington by the Judicial Panel on Multidistrict Litigation along with many other cases throughout Louisiana and other parts of the country all dealing with the same theme of plaintiffs claiming to be injured by PPA. The defendants moved to stay proceedings before Judge Vance to allow the cases to proceed in the Western District of Washington. The plaintiffs argued that Judge Vance should not allow the transfer or the stay, but should handle the cases herself because she was better suited than the Washington court to rule on the peculiar issues of Louisiana law which were presented by the fraudulent joinder questions that defendants had raised.

Judge Vance rejected the plaintiffs' argument noting that many other similar Louisiana cases had already been sent to the Washington court that would rule on issues common to all the cases. "[T]he policies of efficiency and consistency of pre-trial rulings are furthered by a stay of the proceedings in this Court pending a decision of the transfer of this case to the MDL [Multidistrict Litigation]."

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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