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# 4th Cir. Recognizes "Unavoidably Unsafe" Defense to Strict Blood Products Liability Case

*Chauvin v. Sisters of Mercy Health System,*
2001-1834 (La. App. 4 Cir. 5/8/02), ___ So. 2d ___.

Louisiana's Fourth Circuit Court of Appeal has broken critical new ground on two fronts: 1) The Court has recognized an "unavoidably unsafe" defense to strict products liability based upon comment k to section 402(A) of the Restatement (Second) of Torts; and 2) The Court has held that no strict products liability cause of action for blood transfusions existed in 1963.

In 1963, plaintiff, Joan Chauvin, gave birth to a child by caesarean section at Mercy Hospital. Mrs. Chauvin received blood transfusions at the hospital. In 1996, Mrs. Chauvin was diagnosed with Hepatitis C and cirrhosis of the liver. Mrs. Chauvin, joined by her husband and daughter, filed suit against the successors to Mercy Hospital alleging she acquired the Hepatitis C through the blood transfusions in 1963.

The trial court granted the defendants' motion for summary judgment on all alleged bases of liability including strict liability and negligence. On appeal, the Fourth Circuit boiled the issues down to two questions of law: 1) Was Mercy entitled to the "unavoidably unsafe" defense found in the Restatement of Law of Torts (Second) Section 402A, comment k; and 2) Did a cause of action exist for damages arising out of a blood transfusion contaminated with Hepatitis C in 1963 based on the facts at issue. The Fourth Circuit answered yes to both questions and affirmed judgment for the defendants, dismissing plaintiff's suit.

A. The presence of Hepatitis C in Mrs. Chauvin's blood transfusion was an "unavoidably unsafe" condition.

In determining whether Mercy Hospital was strictly liable for the blood transfusions, the appellate court acknowledged the standard first enunciated in *DeBattista v. Argonaut-Southwest Insurance Co.,* 403 So.2d 26 (La. 1981). The *DeBattista* decision, relying on the landmark decision in Weber v. Fidelity & Cas. Co. of N.Y., 250 So.2d 754 (1971) and on § 402A of the Restatement (Second) Torts, held that a health care provider could be strictly liable for blood transfusions if the plaintiff proved that the blood was "unreasonably dangerous to normal use." An "unreasonably dangerous" product is one which is dangerous to an extent beyond that which would be contemplated by an ordinary consumer. (The *DeBattista* decision prompted the Louisiana legislature almost immediately to enact blood shield laws -- La. C.C. art. 2322.1 and R.S. 9:2797 – which grant immunity to physicians, hospitals and blood banks from strict tort liability for screening, processing and transfusion of blood and blood components that result in the transmission of viral disease undetectable by medical and scientific tests)

The Fourth Circuit observed that while the Louisiana Supreme Court in *DeBattista* relied on § 402A in defining the "unreasonably dangerous" standard, *DeBattista* failed to address the "unavoidably unsafe" defense outline in comment k to § 402A. Under comment k an "unavoidably unsafe" product is neither defective nor unreasonably dangerous if the product is "properly prepared and is accompanied by proper directions and warning." The Fourth Circuit noted that the Louisiana Supreme Court recently indicated it was open to adopting the "unavoidably unsafe" defense when it spoke favorably of an unpublished dissenting opinion of Judge Weimer (then of the First Circuit and currently a Louisiana Supreme Court Justice) in which Judge Weimer argued that blood that is unavoidably unsafe could not be unreasonably dangerous. *Seal v. St. Tammany Parish Hospital Service District No. 1,* 2000-1489 (La. 6/30/00), 765 So.2d 1057.

The Fourth Circuit cited four factors for determining whether a blood product is unavoidably unsafe as set out in *Doe v. Miles Laboratories, Inc.,* 927 F.2d 187, 191 (4th Cir. 1991):

> 1) the nonexistence of any scientific test capable of detecting the viral agent which contaminated the blood at the time of injury;
> 2) the great utility of the product;
> 3) the lack of any substitute for the product; and
> 4) the relatively small risk of the disease being transmitted by the product.

To these four, the Fourth Circuit added as a fifth factor the fact that there was no scientific test capable of detecting Hepatitis C in 1963, and that the existence of Hepatitis C was unknown in 1963. The Court therefore concluded that in 1963 the presence of Hepatitis C in Mrs. Chauvin's transfusion was an "unavoidably unsafe" condition for which Mercy Hospital could not be liable.

B. Plaintiffs had no strict liability cause of action in 1963.

The Fourth Circuit also held that plaintiffs did not have a cause of action for strict liability for the blood transfusions in 1963. The court noted that *Weber, supra,* decided in 1971, was the first case from the Louisiana Supreme Court recognizing strict products liability based upon § 402 of the Restatement (Second). Though plaintiffs in *Weber* had been exposed to excessive amounts of arsenic in a cattle spray in 1963 – the same year the plaintiff received the blood transfusions – the Fourth Circuit found that defective cattle spray was significantly different from tainted blood. The defect in the cattle spray in *Weber* was man-made and arose in the course of the manufacture of the product. It easily could have been prevented and therefore was avoidably unsafe. In contrast, the Hepatitis C in the blood transfusions was unpreventable, undetectable, and was an unknown, natural occurrence in blood, which is a product of nature and can have no substitute. The Fourth Circuit rejected extending other alleged strict liability and negligence cases concerning defective food, power tools, automobiles, and defective water heaters to support plaintiffs' argument that a strict liability cause of action existed for blood transfusions in 1963:

> [W]e can be certain that in 1963 no one in a position truly analogous to that of the plaintiffs in the instant case would have had any expectation of a right to a claim or cause of action. Moreover, had Mercy Hospital had any reasonable reason to believe that it had such exposure to the unknown and unknowable back in 1963, who knows what steps they might have taken to limit or eliminate that exposure. Therefore, by refusing to extend strict liability back to 1963 under the facts of this case we cause no unfairness to the plaintiffs and probably prevent unfairness to Mercy Hospital. The principles of strict liability upon which the plaintiffs rely represented a clear change in the law, unforeseeable as regards unknown and unknowable blood borne pathogens in 1963. Finally, by refusing to push this theory of liability back to 1963 we further the public policy of this state as expressed in the blood shield statutes; and there is no basis for the plaintiffs to argue that the public policy of this state in 1963 would have favored their claims.

We understand that plaintiffs will seek writs asking the Louisiana Supreme Court to review the Fourth Circuit's opinion. We will continue to keep our readers advised of all developments in this significant case.

*- Stacie M. Hollis*

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# Fed. Court Refuses to Certify National Medical Monitoring Class in Propulsid Drug Litigation

*In re: Propulsid Products Liability Litigation,*
2002 U.S. Dist. LEXIS 10343 (E.D. La. 6/4/02).

This multi district litigation handled by Eastern District Judge Eldon Fallon comprises hundreds – perhaps thousands – of individual claimants and over thirty class actions from fifteen states alleging various tort and product liability claims against the manufacturers of the heartburn drug Propulsid. Plaintiffs contend that people who took Propulsid to alleviate nocturnal heartburn may develop permanent heart problems.

In these suits under Judge Fallon's consolidated pre-trial handling, the plaintiffs asked that the court establish a medical monitoring fund and a clinical study to examine the long term effects of Propulsid. They also wanted to be reimbursed for the purchase price of Propulsid. In this opinion Judge Fallon considered and turned down plaintiffs' request that the case be certified as a single nationwide class action.

The first issue considered by Judge Fallon was whether plaintiffs – persons who had not suffered any cardiac incident, but nonetheless desired a clinical study and a medical monitoring program – had "standing" to pursue their claims. Even though plaintiffs had no proven present physical injury, the court found that they had cleared the "standing" hurdle because they alleged 1) an increased risk of harm which was 2) traceable to the alleged wrongful act of the defendants and 3) could be redressed by the court.

The next issue considered by the court was what law should apply to the proposed class members' claims. After a sophisticated choice of law analysis, the court decided that the rule of "lex loci delicti" should be applied – that is the law of the state in which the drug was ingested would apply to each case. Since the proposed class members hailed from every state in the union, the laws of each of the fifty states would have to be considered, depending on the residence of each individual plaintiff.

Previous landmark case law from the Fifth Circuit held that in multi state class actions, variations in state law often swamp common issues and defeat the purpose of the class action procedure to efficiently manage cases in which common issues predominate over individual ones. Rule 23(b)(3), Fed. R. Civ. P.; *Castano v. American Tobacco Co.,* 84 F.3d 734, 741 (5th Cir. 1996).

The plaintiffs argued that the present case was different from *Castano,* because class certification here was sought under the more rarely used Rule 23(b)(2). Under 23(b)(2) common issues need not predominate. Instead a class may be certified when the defendant "has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate...." In short, 23(b)(2) is designed to cover cases in which the relief sought is of an injunctive nature, rather than money damages.

In deciding whether a 23(b)(2) type class could be certified, Judge Fallon said two issues were determinative: 1) did the monetary relief sought by the class predominate over the injunctive relief sought; and 2) would a class action be manageable in light of the differences in the laws of the fifty states.

On the question of monetary versus injunctive relief, the court found that the plaintiffs' monetary claims were not merely incidental to the injunctive relief they sought (medical monitoring and a clinical study). Rather, the monetary claims could overwhelm the injunctive aspect of the case requiring additional hearings on the merits of each individual's case, further complicated by variations in state law. Because the monetary claims predominated over the claims for injunctive relief instead of vice versa, class certification under 23(b)(2) could have been refused on this ground alone. However, since plaintiffs agreed to abandon their monetary claims to save their class certification request, Judge Fallon had to consider the second question: whether the class action was manageable in view of the many different laws which would have to be applied in the case.

Judge Fallon conceded that a Propulsid medical monitoring program would be most effectively carried out on a national scale, noting that using a smaller or regional group could compromise the results and efficiency of the program. However, he went on to say, "practicality alone is not sufficient to justify a court ruling." The important question still remained as to whether the defendant's conduct could be "generally applicable" to the class under Rule 23(b)(2) when the legal rights asserted by the class members derived from so many different state laws.

Ultimately, Judge Fallon found that the certification could not proceed because of a failure of proof. Judge Fallon held that a complete analysis of the effect of the different state laws on the manageability of the trial was an absolute requirement before a class could be certified. Plaintiffs, who had assumed that the case would proceed entirely under the law of a single state, failed to present any review or summary of the various relevant state laws. This left open the question of whether variations in state law would defeat manageability in a class action format. "Thus the plaintiff has failed to carry her burden of establishing the prerequisites for class certification."

Turning from these concrete questions of Rule 23(b)'s requirements, Judge Fallon ended his opinion by raising a fascinating public policy issue. He expressed grave concern over the purpose of plaintiffs' suit when neither the FDA nor any medical organization or institution "has recommended or suggested that a program of medical monitoring or a group study of all former Propulsid users be undertaken." He questioned "whether the courts should lead the scientific community in an area of medical science."

Judge Fallon distinguished the Diet Drugs Products Liability Litigation in which a medical monitoring class was certified because in that case, apart from the litigation, various governmental agencies and medical organizations had developed recommendations for medical monitoring for those who had been exposed to Fen/Phen.

> However, in the present case there is an absence of recommendations from the medical community regarding the need for a medical monitoring program or a clinical study of the effects of Propulsid on former users. In such a situation the courts should not attempt to fill the void. "The courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science, it does not lead it." [Citation omitted.]

Carried one step further, Judge Fallon's remarks point to a further serious problem with the now wildly popular "medical monitoring" action first recognized by courts several years ago. Court established and run medical monitoring programs take the court out of the traditional role of deciding cases and controversies in a courtroom and require the court to assume the ill-fitting mantle of physician/scientist (as well as administrator/bureaucrat). The superficially appealing "medical monitoring" theory should be revisited now that the doctrine has been accepted in most states for several years. How many medical monitoring classes have been certified? What has been the experience of courts who have had to administer such programs? Do the programs actually accomplish anything of value (for example how many plaintiffs regularly avail themselves of the program's diagnostic services and have medical problems which might be corrected actually been identified)? What time commitment has been required by courts involved in these programs and what effect has that commitment had on courts' ability to perform their traditional courtroom role?

Readers follow closely! The medical monitoring train has left the station and none of these questions have been answered.

*– Madeleine Fischer*

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# Pooled Settlements: One Obligation – Indivisible

*Berlier v. A. P. Green Industries, Inc.,*
2001-1530 (La. 4/2/02), 815 So.2d 39.

As litigation becomes ever more complex, it is increasingly common for multiple defendants to share third party risk administrators and attorneys. While such practices may reduce each defendant's costs. it can lead to unexpected liability.

In *Berlier v. A. P. Green Industries, Inc.,* six plaintiffs settled their wrongful death and survival claims against a group of four defendants GAF Corporation, Turner & Newall, PLC, Union Carbide Corporation and Asbestos Claims Management Corporation for the sum of $450,000.00. The four defendants were represented by attorneys from the same law firm, and were all members of the Center for Claims Resolution. The CCR was a third party risk administrator formed by a number of asbestos defendants for the purpose of spreading liability for defense costs, settlements and judgments.

The fact, but not the details, of the settlement were placed on the trial court's record by defense counsel who stated that a full settlement of all claims had been reached on behalf of the four defendants. Subsequently, a letter from the CCR confirmed the fact and amount of the settlement. A release drafted by counsel for CCR and executed by plaintiffs released all CCR members.

Subsequent to the execution of the release, GAF withdrew from the CCR which deducted GAF's share from the settlement amount and tendered a check to plaintiffs in the amount of $250,028.46. Plaintiffs refused to accept the check and seeking payment of the entire settlement amount filed a Motion to Enforce Settlement against all four defendants. The trial court ruled that the four defendants were solidarily obligated to pay the entire settlement amount of $450,000.00. The four defendants appealed; however, as a result of bankruptcy proceedings, GAF and Asbestos Claims Management Corporation were removed from the case.

The Louisiana Supreme Court carefully analyzed the settlement agreement to determine whether plaintiffs could force the remaining two defendants to pay the entire $450,000.00. Plaintiffs argued that the four original defendants were solidarily liable such that each could be compelled to pay the entire amount. However, the Court disagreed. Louisiana Civil Code article 1796 provides that solidarity must be expressly stipulated, and cannot be presumed. While it is not necessary to use the terms "solidary" or "in solido", there must be a "clear expression" of the obligors' intent to be solidarily bound. The Court found no "clear expression" from the facts that a lump sum settlement figure was stated and that it was the intent of the defendants to pay by a single check.

The Court then considered whether the obligation was several or joint. Because, there was only a single performance, i.e. the payment of the settlement amount, the Court concluded that the obligation was not several, but joint. The Court was then faced with deciding whether the joint obligation was divisible or indivisible. If divisible, each defendant would only be responsible for its share. La. Civ. Code art. 1789. However, if indivisible, any single defendant could be compelled to render full performance. Id. Indivisibility results when the object of the performance cannot be divided because of its nature or because of the intent of the parties. La. Civ. Code art. 1815.

Recognizing that the payment of a sum of money is inherently divisible, the Court considered whether indivisibility resulted from the intent of the parties. Based on the fact that a lump sum settlement amount was used, and no apportionment of the amount was ever disclosed to plaintiffs, the Court concluded that the parties intended an indivisible joint obligation, and the remaining two defendants were liable for the entire settlement amount. The irony of the Court's ruling that the same facts which were insufficient to establish a solidary obligation were sufficient to achieve the same result as an indivisible joint obligation was not lost on Justice Victory in his dissent.

It is not unusual in large, complex cases for groups of defendants, whether represented by a common counsel or not, to pool their resources in creating a settlement fund. In doing so, each defendant anticipates that its liability is limited to its intended share. However, if the actual amount to be paid by each defendant is not communicated to plaintiffs in some fashion, it is likely that any single defendant could be required to pay the full settlement amount leaving him to pursue any defendants who are unable or unwilling to pay their shares. Moreover, the rationale of the Berlier holding is not limited to settlement agreements, and could apply whenever multiple obligors agree to a single performance without specifying the portion to be performed by each.

*- William L. Schuette, Jr.*

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# Eastern District Judge Dismisses Drug Product Claims Falling Outside the LPLA

*Lacey v. Bayer Corp.,* 2002 WL 1058890 (E. D. La. 5/24/02);
*Lee v. Bayer Corp.,* 2002 WL 1058893 (E. D. La. 5/24/02)

In two nearly identical cases, two plaintiffs -- users of Alka-Seltzer Plus Cold Medicine -- sued, its manufacturer, Bayer Corporation. Plaintiff Lacey, who suffered a stroke, and plaintiff Lee who suffered a heart attack and three strokes, both alleged that their injuries were caused by the ingredient phenylpropanolamine (PPA). Plaintiffs sued Bayer for strict liability, negligence, fraud, misrepresentation, negligent and reckless misrepresentation and conspiracy.

The court granted Bayer's motion to dismiss the plaintiffs' claims. The court noted that Plaintiffs' exclusive remedies against a manufacturer under Louisiana law were limited to the four theories of liability expressly available under the Louisiana Products Liability Act ("LPLA"), La. R. S. §9:2800.51 et seq. Under the Act, a plaintiff may only recover against a manufacturer if its product is found to be unreasonably dangerous in construction or composition, design, because of an inadequate warning, or for non-conformity to an express warranty. La. R.S. §92800.54. Further, the Act expressly provides that a claimant may not recover from a manufacturer for damage caused by a product on the basis of any theory that is not set forth in the LPLA. La. R.S. §9:2800.502.

Recognizing that based on this "unequivocal statutory language, courts routinely dismiss claims against manufacturers that do not arise under the LPLA," Judge Porteous dismissed both suits, stating that plaintiffs' claims of negligence, fraud, misrepresentation, negligent and reckless misrepresentation, conspiracy and strict liability were outside the scope of the LPLA.

*- Bonita H. Jones*

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# Retailer Not Liable for Tipping Chair Design Defect under Products Liability Act

*Jackson v. Sears Authorized Retail Dealer Store, 36,166,*
(La.App. 2 Cir. 6/12/02), ___ So.2d ___.

The Second Circuit has affirmed that a non-manufacturing seller cannot be held to the same standard of liability as a manufacturer when the store's customer is injured by a defective product on display.

While shopping at Sears the plaintiff Anthony Jackson sat down on the edge of a three-legged display chair. The chair tipped, Jackson fell, and he was hurt. Jackson's expert believed the chair was defectively designed because it had "a propensity to lean forward when weight [was] applied to the front edge."

Despite Jackson's attempts at artful pleading, the court labeled his suit as a straightforward Louisiana Products Liability Act claim for damages caused by a defectively designed product. Sears, not a manufacturer, could only be liable if it knew or should have known of the defect. Further, Sears had no duty to inspect the product before sale for possible inherent vices or defects. "The imposition of such a duty would effectively make the non-manufacturing seller a guarantor against defects over which it had no control or responsibility."

Sears moved for summary judgment and established that it was a retailer (not a manufacturer) and that the store had previously sold two dozen of the chairs without incident. Jackson introduced no evidence that Sears knew of the design flaw identified by Jackson's expert. Thus, Sears was properly dismissed from the case on summary judgment.

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# Trial to Determine Whether Seller and Manufacturer of Halogen Lamp Are Liable for Home Fire

*Bush v. J.C. Penney Company, Inc.,*
2002 U.S. Dist. LEXIS 10090 (E.D. La. 5/29/02).

Judge Marcel Livaudais of the federal district court for Louisiana's Eastern District has denied summary judgment sought by the seller and the manufacturer of a halogen lamp which the plaintiff claimed started a fire in his home.

J.C. Penney, the seller of the halogen lamp, argued that it could not be liable even if the lamp were defective because it did not manufacture the lamp. However, the judge found that there was an issue of fact as to whether J.C. Penney held itself out as the manufacturer when it stated in its instruction booklet: "Congratulations on your new JCPenney Halogen Torchiere floor lamp!" The Louisiana Products Liability Act includes within the definition of manufacturer, "a person or entity who labels a product as his own or who otherwise holds himself out to be the manufacturer of the product." La. R.S. 9:2800.53.

The actual manufacturer, Rei Jean, joined by J.C. Penney, also argued that the plaintiff would be unable to prove the merits of the claim that the lamp was defective in design or for lack of an adequate warning. However, Judge Livaudais found that there was sufficient question on both issues to require a full trial. Even though the plaintiff's expert was not an expert in the design of lamps, the judge felt that a jury should hear his testimony that the fire was caused when the halogen bulb ignited combustible material in the ceiling of the home, as well as reports from Underwriters Laboratories and the Consumer Product Safety Commission that such lamps posed a fire hazard which could be reduced by adding a guard over the halogen bulb.

As to whether the halogen lamp included an adequate warning, the safety instructions accompanying the lamp pointed out the risk of fire and emphasized that the bulb would get hot during use and should not be touched or placed near materials that could burn. Rei Jean and J.C. Penney also argued that the danger of fire was obvious to anyone placing a hand next to the lamp when illuminated.

The court found that these arguments did not decisively eliminate the question of whether there was an adequate warning. The court again held that a jury must resolve the questions of whether an ordinary person should reasonably have known that the lamp generated such extreme or excessive heat as to be dangerous beyond the danger posed by an ordinary incandescent bulb, and whether the manufacturer's warnings were reasonable.

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