

# Jones Walker E\*Zine

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## **American Bar Association Recommends Restriction Of Asbestos Suits By Unimpaired Plaintiffs**

By one vote, the American Bar Association adopted recommendations to restrict asbestos lawsuits by unimpaired plaintiffs. Not usually considered a pro-business organization, the ABA's report indicates that it felt compelled to act because the overwhelming increase in the number of asbestos lawsuits filed by plaintiffs with no identifiable impairment threatened the civil justice system, the economy and future asbestos plaintiffs.

### ***Identification of the Problem***

Sufficient inhalation of asbestos is associated with a number of medical conditions. Some, such as lung cancer and mesothelioma, are incontrovertibly disabling and life-threatening. Others such as pleural plaques and pleural thickening generally cause no symptoms at all. Asbestosis, a fibrosis of the lung tissue, may range from innocuous to disabling, and in severe cases is life-threatening.

While asbestos filings have skyrocketed over the past few years, the ABA correctly recognized that the number of lawsuits for lung cancer, mesothelioma and disabling asbestosis has remained fairly constant. In fact, there is evidence that the rates of lung cancer and disabling asbestosis filings have decreased presumably due to the reductions in the use of asbestos beginning in the late 1960's and early 1970's. The current flood of asbestos litigation is due to claims by persons who may have some findings "consistent with" asbestosis but who do not exhibit any impairment to their health. From 1997 to 1998, asbestos filings increased from approximately 22,000 to 80,000 annually. By some estimates, between 66% and 90% of these filings are by unimpaired individuals.

### ***Consequences***

Such a flood of litigation causes innumerable legal and practical problems. The ABA focused on three of the effects: damage to the civil justice system, damage to the economy and damage to future plaintiffs' ability to obtain compensation.

**Damage to the Civil Justice System** The ABA recognized that the civil justice system is not equipped to handle the volume of asbestos litigation which has clogged dockets causing inordinate litigation delays. Attempts to deal with this problem have been generally unsuccessful.

**Damage to the Economy** Asbestos litigation caused, in whole or in part, at least 67 companies to file for bankruptcy protection. 29 of these were filed since January 2000 and are presumably related to the most recent wave of claims by unimpaired plaintiffs. Each of these bankruptcies damages the economy in a variety of ways including loss of jobs with resulting loss of income and benefits by

displaced workers, and loss of tax revenue to the local and federal governments.

**Damage to Future Plaintiffs** Asbestos liability rendered most of the primary manufacturers of asbestos products, i.e. those companies who manufactured products from asbestos fiber, insolvent. As those companies became unavailable as a source of compensation, plaintiffs shifted their focus to secondary manufacturers, i.e. those who incorporated asbestos-containing products into their own, and even more remote users of these products. The number of bankruptcies has caused concern among some plaintiffs' counsel that if the trend continues there will be insufficient defendants and resources to compensate future impaired plaintiffs.

### ***Cause of the Problem***

Not surprisingly, the ABA avoided identifying asbestos plaintiffs' attorneys and their practices as the cause of the problem. Rather, the ABA focused on a more obscure villain, the "for-profit litigation screening" organizations. According to the ABA report, these gypsy-like bands of physicians and technicians operate on the fringes of law by conducting asbestos screenings in states where they are not usually licensed to practice medicine. The screenings typically involve flawed examinations and tests that are insufficient to diagnose asbestosis; however, reports are generated describing non-specific findings that are "consistent with" asbestosis. As recognized by the ABA, these findings of mildly accentuated lung markings on x-ray may or may not actually represent asbestosis, and do not establish that the plaintiff has sustained any impairment. However, because a finding of a physical change possibly caused by asbestosis by the "for-profit screening" organization may institute the applicable statute of limitations, the innocent plaintiffs' attorney is forced to file suit prematurely to preserve the plaintiffs' rights.

The ABA ignores that the screenings are generally organized and funded by asbestos plaintiffs' attorneys to create a large inventory of asbestos claims. A sufficiently large inventory will induce defendants to enter into an inventory settlement rather than incur the high defense costs and the risk of adverse verdicts. As in many class action settlements, such inventory settlements often generate large fees for plaintiffs' counsel but little compensation to the plaintiff.

### ***The ABA Solution***

While the ABA may have conveniently ignored the actual root cause of the problem, it did correctly identify asbestos screenings as the mechanism generating the large number of claims by unimpaired plaintiffs. The ABA's solution proposes a trade-off by eliminating unreliable "diagnoses" of asbestosis and requiring some actual impairment as a prerequisite to filing suit, but tolling any statute of limitations until those requirements are met. The ABA set forth detailed medical criteria for establishing the requisite impairment as well as the reasons for each criteria. While the criteria do not appear to be as strict as those promulgated by the American Thoracic Society, they are far more rigorous than those generally advocated by plaintiffs' counsel.

**Chest X-Ray** Chest x-rays must generally be of grade 1 quality and interpreted by a B-reader (a physician who has received special training in reading x-rays of dust related diseases) as showing an profusion of s, t or u shaped opacities of 1/0 or higher bilaterally or blunting of the costophrenic angles graded 1B or higher. The results of CT scans and High Resolution CT Scans are not considered because there are no analogous standards for diagnosis of asbestosis by CT scan.

**Occupational Histories** The examining physician is required to take a full and detailed occupational history describing all exposures to asbestos and other substances that could cause pulmonary injury.

**Pulmonary Function Testing** On spirometry, the Forced Vital Capacity (FVC) must be below the lower limits of normal (generally 80%), AND the ratio of FVC to Forced Expiratory Volume in One Second (FEV1) must be normal. This latter requirement, FVC/FEV1, generally excludes persons whose breathing is impaired as the result of asthma, bronchitis, emphysema or other obstructive diseases. Alternatively, a plaintiff may show that his Total Lung Capacity is below the lower limit of normal.

This requirement may be waived where the plaintiff's chest x-ray is read as a 2/1 or higher by a B-reader and the plaintiff's treating physician provides a detailed opinion that the plaintiff does suffer from a restrictive lung disease.

**Pathology** In the rare instances where lung tissue has been removed, pathologists typically

diagnose asbestosis where they identify any fibrosis in association with the presence of asbestos bodies (coated asbestos fibers). Under the ABA criteria, the finding of any amount of fibrosis would not be sufficient. Rather, the pathologist must grade it as 1(B) or higher.

**Reporting Requirements** Recognizing that the description of findings as "consistent with" asbestosis is not a medical opinion that the plaintiff has asbestosis, the ABA recommendations require a detailed medical report with an actual diagnosis signed by the diagnosing physician. This requirement is to make the physician take responsibility for his opinion that the plaintiff does meet the medical criteria for a diagnosis of asbestosis.

### ***Conclusion***

Only time will tell whether the ABA requirements will be incorporated into federal legislation. However, the ABA's action itself may significantly impact asbestos litigation in several ways.

First, the ABA clearly identifies the current wave of asbestos claims as a national crisis with profound consequences. No longer can defendants' predictions of dire consequences from further expansion of asbestos claims be ignored as "crying wolf." Many courts have relaxed normal procedural requirements or adopted novel "asbestos" rules and procedures that facilitate the filing and handling of large numbers of claims. Given the current situation, the judiciary's attention must be focused on whether it should continue to adopt policies and procedures that further exacerbate this crisis.

Second, the ABA rejects the diagnoses and findings generated by "for-profit litigation screenings" as unreliable. The ABA's illustrations of financial bias and incompetence should cause any court to seriously question the reliability and credibility of information generated by such screenings.

Third, the ABA's medical criteria should be brought to the court's attention in any case involving a diagnosis of asbestosis. The ABA relied on both plaintiff and defense medical experts in developing threshold criteria demonstrating that a plaintiff had actually sustained a legally cognizable injury.

*- William L. Schuette*

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## **Heartburn Medicine Not Shown To Be Defectively Designed Per LA. Eastern District Court**

*In Re: Propulsid Products Liability Litigation,  
2003 WL 367739 (E.D. La. 2/18/03)*

Plaintiff filed suit for personal injuries incurred while taking the drug Propulsid, a heartburn medication manufactured by defendants. Judge Eldon Fallon of Louisiana's Eastern District granted summary judgment in favor of defendants finding insufficient evidence to maintain a claim under the Louisiana Products Liability Act ("LPLA").

Plaintiff complained of various gastric problems including diarrhea, nausea, vomiting, indigestion, and epigastric pain. After plaintiff tried a number of medications with no success, plaintiff's treating physician prescribed Propulsid to treat her symptoms. The warning label of Propulsid identified diarrhea, abdominal pain, and rapid heart beat as potential side effects associated with its use. Additionally, physicians prescribing Propulsid were informed that cardiac arrest, sudden death, and prolonged QT were also possible side effects. Plaintiff's treating physician testified that he was aware of all of the side effects, but believed Propulsid to be the best treatment for plaintiff's symptoms.

Plaintiff used Propulsid for five months with some relief; however, eventually her initial symptoms returned. On a subsequent trip to the emergency room with complaints of diarrhea, nausea, and a "weak pulse," treatment with Propulsid was discontinued. A week later plaintiff was taken by ambulance to the emergency room complaining of dizziness. She was discharged with no remarkable physical findings or laboratory results.

Plaintiff later filed this suit for damages against the manufacturers under the Louisiana Products Liability Act. The case was consolidated with MDL proceedings. See [FED. COURT REFUSES TO CERTIFY NATIONAL MEDICAL MONITORING CLASS IN PROPULSID DRUG LITIGATION, July 2002 issue](#). Plaintiff's only claim under the LPLA was that Propulsid was unreasonably dangerous in design due to the potential side effects of sudden death, arrhythmia, and prolonged QT.

Under the LPLA a product is unreasonably dangerous in design if at the time the product left the manufacturer's control, there existed an alternative design for the product that was capable of preventing the damage. The court held that plaintiff failed to offer evidence of an alternative design capable of preventing her damage. Plaintiff's symptoms were the same before, during, and after use of Propulsid. Other medications did not relieve or cure her symptoms.

Plaintiff also failed to prove that Propulsid's design caused her damage. The court reasoned that the plaintiff's damages were limited to her intestinal tract, the condition she had before, during, and after the use of Propulsid. Plaintiff showed little evidence of the side effects which she contended rendered the drug defective in design. Although plaintiff's expert indicated increased QTc interval during the time she used Propulsid, he could not exclude other causes for that condition nor state that Propulsid was the cause. The only problems the expert affirmatively attributed to Propulsid were diarrhea, abdominal pain, and an increased heart rate, all of which pre-dated her use of Propulsid.

- Mary Mitchell Felton

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## Supplier of Sand Succeeds in Asserting Sophisticated User Defense to Silicosis Claim

*Bergfeld v. Unimin Corp.*, \_\_\_ F.3d \_\_\_ (8th Cir. 2/11/03)

The plaintiff, after contracting silicosis, sued various suppliers, including Lockheed Martin, which sold silica to his employer, a foundry. The plaintiff, who was never exposed to silica in excess of OSHA's permissible exposure limit of 100 micrograms per cubic meter, asserted that Lockheed Martin had a duty to warn that silicosis could be contracted from exposure to concentrations of respirable silica dust below the OSHA limit. While Lockheed Martin's MSDS described the silica as "nontoxic," silica, when used in the foundry's manufacturing process, fractured into respirable silica dust.

The U.S. District Court for the Northern District of Iowa granted summary judgment in favor of Lockheed Martin, concluding that the supplier did not have a duty to warn the foundry that silicosis could be contracted from exposure to concentrations of respirable silica dust below the OSHA limit as the foundry was a sophisticated user of silica. The plaintiff argued that the foundry was not a sophisticated user of silica because it did not know that NIOSH had recommended an exposure limit of 50 microgram nor did the foundry set up safeguards to limit exposure below NIOSH recommended levels. But several of the foundry's industrial hygienists testified that they were aware of the NIOSH recommendation. As far as the failure of the foundry to implement safety procedures to comply with the NIOSH recommendation, the court of appeal, in affirming summary judgment, wrote: "That [the foundry] chose not to adopt the NIOSH recommended standard is insufficient to rebut the substantial evidence of the company's knowledge of that standard."

For analysis of a similar case (*Cowart v. Avondale Industries, Inc.*, 2000-0894 (La.App. 4 Cir. 7/3/01), 792 So.2d 73, writ denied, 2001-2719 (La. 1/4/02), 805 So.2d 211) applying Louisiana law to a claim against a supplier of bulk silica to a "sophisticated user", see the article [Sand Supplier Not Liable To Shipyard Under Warnings Theory in Jones Walker's August 2001 Products Liability E\\*Zine](#).

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- [Robert L. Walsh](#)

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## 4th Circuit Holds Lift Truck Not Defective for Lack of Backup Alarm

*Reaux v. Deep South Equipment Co.*,  
2002-1571 (La. App. 4 Cir. 2/5/03), \_\_\_ So.2d \_\_\_

Plaintiff was injured when he was struck by a lift truck being backed up by a co-worker. The lift truck was not equipped with an audible reverse signal alarm. Plaintiff sued Hyster, the manufacturer of the lift truck, and the lessor of the lift truck, Deep South, alleging claims for negligence and strict liability under the Louisiana Products Liability Act. In this opinion the appellate court affirmed the trial court's granted of summary judgment in favor of Deep South.

The Fourth Circuit held that Deep South's failure to lease to Dupuy, plaintiff's employer, a lift truck with a backup alarm was not the cause-in-fact of plaintiff's injury. Rather, under OSHA regulations, Dupuy was required to post a third party observer when equipment without an alarm was operated. Further, the court held that Deep South, a non-manufacturing "seller", was not liable under the LPLA. The court held that the lift truck was not defective because it lacked a backup alarm. Had Dupuy complied with OSHA regulations by using a third party observer to monitor the lift truck being driven in reverse, the accident could have been avoided. The court also held that Deep South was not liable because it did not have custody of the truck at the time of the accident.

- [Stacie M. Hollis](#)

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## Fraudulent Joinder of Non-Consenting Co-Defendants Won't Defeat Removal

*Watson v. Wyeth Company*, 2003 WL 203096 (E.D. La. 1/28/2003)  
*Benquist v. Wyeth Company*, 2003 WL 203095 (E.D. La. 1/28/2003);  
*Hitchen v. Wyeth Company*, 2003 WL 203099 (E.D. La. 1/28/2003).

The Rule of Unanimity requires all defendants to consent to removal before it can be effected. In these products cases, Judge Porteous refused to tax removing defendants with the requirement of unanimity because plaintiffs had no claims against the non-consenting defendants.

Three sets of plaintiffs filed separate lawsuits against the same defendants in state court. They sought to recover for damages allegedly caused by their use of the diet drugs Redux, Pondimin and/or Phentermine. They raised state law claims under strict products liability and other theories of recovery. The defendants alleged prescription (statute of limitations) of the plaintiffs' claims against the Phentermine defendants. Furthermore, in each lawsuit, some of the defendants removed on diversity grounds even though some of the Phentermine defendants and/or the only non-diverse defendant did not consent to removal. Each set of plaintiffs timely filed a motion to remand, contending that removal was improper because not all the defendants consented. The defendants countered that plaintiffs had fraudulently joined the defendants who did not consent. Alternatively, the plaintiffs argued that to rule on prescription the court would have to delve into the merits of the case which, under state law, it could not do before jurisdiction was established. The ultimate issue before the court was whether removal was proper. To reach a resolution, the court had to answer three sub-questions.

First, the court determined whether plaintiffs had fraudulently joined the non-consenting defendants. It reasoned that plaintiffs could not have any real intent to pursue a claim and could not

possibly state a cause of action against the Phentermine defendants in state court because no reliable evidence existed to suggest that phentermine caused Valvular Heart Disease or Primary Pulmonary Hypertension. Accordingly, the court found that the defendants carried their “heavy” burden of persuasion on the fraudulent-joinder question. It concluded that plaintiffs had fraudulently joined the Phentermine defendants.

Second, the court addressed the plaintiffs argument that the removal was improper because the Phentermine defendants did not consent to removal. Having found that plaintiffs’ fraudulently joined these defendants, the court stated that their consent was unnecessary. It concluded that the removal was proper.

Third, the court considered plaintiffs’ alternative contention that remand was imperative because the court could not entertain issues on the merits, such as prescription, before jurisdiction attached. The court disagreed, stating that it was not necessary to examine the merits of the case to determine whether plaintiffs’ claims against the Phentermine defendants had prescribed. It found that the claims had indeed prescribed.

In conclusion, the court held that defendants’ removal was proper because plaintiffs had fraudulently joined the Phentermine defendants who had not consented to removal and/or because plaintiffs’ claims against these defendants had prescribed, rendering their consent unnecessary. It denied the plaintiffs’ motion to remand.

*- Andrew M. Obi*

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## **LPLA Doesn’t Bar Damage Claims Against Manufacturer’s Employee for Negligent Use of Product**

*Lavergne v. America’s Pizza Company, LLC,*  
2002-889 (La.App. 3 Cir. 2/5/03), \_\_\_ So.2d \_\_\_

Plaintiffs sued America’s Pizza Company when their three year old son sustained a second degree burn due to a hot pizza sauce spill. Plaintiffs sued both for negligence contending that the waitress was negligent in placing the hot sauce within reach of the small boy, and for failure to warn under the LPLA. The trial court dismissed the LPLA claims and the Third Circuit affirmed.

The Third Circuit explained that the plaintiffs had not really asserted a claim under the LPLA for any defect in the pizza sauce itself. The claim instead was for the negligence of the waitress in placing the heated sauce within close reach of the child. The court explained: “While the LPLA’s exclusivity provision eliminates a general negligence cause of action for damages *caused by a product*, it does not eliminate the liability of a manufacturer for damages *caused by the negligent use of its product* by one of its employees. Thus, America’s Pizza cannot escape its liability for the negligence of its employee by claiming to be the manufacturer of the sauce, even if it was, in fact, the manufacturer. This is a simple negligence claim, not one under the LPLA.”

*- Madeleine Fischer*

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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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