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LA 4th Cir. Develops Asbestos Issues of Causation and Supplier & Executive Officer Liability

Hoerner v. ANCO Insulations,
2000-2333 (La.App. 4 Cir. 1/23/02)

Hoerner is the Fourth Circuit Court of Appeal's latest struggle with the numerous issues arising from asbestos litigation. Specifically, the Court addressed the plaintiffs' burden of proving causation, the liability of suppliers and the liability of executive officers. Additionally, the Court condoned some egregious trial conduct on the part of plaintiff's counsel.

Proof of Causation Because the precise biological mechanism by which asbestos causes any condition is unknown, the proof of exposure to respirable asbestos fibers from defendant's product serves as a surrogate for proof of direct causation. In Louisiana, plaintiffs and defendants have long fought over the precise description of the exposures from which causation can be inferred. The legal standard adopted is significant because asbestos plaintiffs typically have numerous exposures to a number of different products, at different work sites and at different times. If, as plaintiffs argue, every exposure no matter how trivial contributes to the disease, proof of any exposure equates to proof of causation. Practically, there would be no defense of lack of causation to an asbestos suit. Fortunately, Louisiana appellate courts have consistently rejected this argument requiring proof of a more significant exposure before causation can be inferred.

The Fourth Circuit Court of Appeal began to articulate the Louisiana standard for proof of causation in an asbestos case in *Quick v. Murphy Oil Company,* 93-2267 (La.App. 4 Cir. 9/20/94), 643 So.2d 1291, and subsequently in *In re Asbestos v. Bordelon, Inc.,* 96-0525 (La.App. 4 Cir. 10/21/98), 726 So.2d 926. The Court concluded that plaintiff asbestos plaintiffs must demonstrate significant exposure to a specific product to the extent that it was a significant factor in bringing about plaintiff's injury. Trivial exposures did not meet this requirement, and plaintiffs must prove that the exposure was *frequent and regular.* Applying this standard to proof of liability of settling defendants, the *Hoerner* court held that evidence of the following was necessary to satisfy the standard:

1. Identification of the asbestos-containing product;
2. Evidence of when and where plaintiff was exposed to asbestos from the product;
3. Evidence of the *quality* (duration and intensity) of plaintiff's exposure to the product.

Supplier Liability The suppliers of asbestos-containing products have often avoided liability because they were subject to a negligence rather than a strict liability standard. The *Hoerner* court accepted plaintiff's argument that suppliers could be held strictly liable as *professional vendors,* thereby tremendously increasing their potential liability. The determination of whether a supplier is a professional vendor is based on two considerations, 1) whether the supplier holds out the products it sells as its own, and 2) the supplier's size, volume and merchandising practices. Two large suppliers, McCarty and Eagle, were held liable as professional vendors. A significant factor in this decision appears to be the fact that both companies re-boxed insulation products into cartons bearing their name.

Executive Officer Liability Prior to the 1976 amendments to the Louisiana Workers Compensation Act, the tort immunity afforded to corporate employers did not extend to co-employees including officers and directors of the corporate employer. Because the law in effect at the time of the plaintiff's first significant exposure applies, most asbestos plaintiffs can sue their employers' executive officers and directors. The main issue arising from such claims is whether a particular executive owes a personal duty to provide the employee with a safe working environment. Defendants argue that only the executive officer with day-to-day responsibility for the safety of the employee can be held liable. The *Hoerner* court rejected this contention and found that any executive officer could be held liable if he had *some* direct duty to provide a safe working environment including control over purchasing of supplies and equipment.

Rebuttal Witnesses Unfortunately, the Court implicitly authorized rather egregious trial tactics on the part of plaintiff's counsel which may well encourage future misconduct. Plaintiff's counsel failed to submit any evidence that the products of two defendants, Benjamin Foster and T & N, released any asbestos fibers in normal use during plaintiff's case in chief. However, after Benjamin Foster presented testimony that its product did not release fibers during its case in chief, plaintiff called an expert witness on rebuttal to testify about tests conducted during the trial which indicate that products similar to those manufactured by Benjamin Foster and T & N did release respirable fibers. Defendants objected to the expert's testimony on the grounds that plaintiff had not previously disclosed that the scope of the expert's testimony would include their products, and because they had no opportunity to cross-examine the expert concerning the test results. The trial court overruled the objections and allowed the testimony. Finding that this ruling was within the trial court's discretion, the Fourth Circuit found no manifest error in the ruling.

This case addresses issues which are significant to the numerous asbestos cases pending in Louisiana. We will continue to follow the case in this E*Zine should the litigants persuade the Louisiana Supreme Court to review it.

- William L. Schuette

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5th Circuit Dismisses Drug Class Action for Lack of Standing

Rivera v. Wyeth-Ayerst Laboratories,
___ F.3d ___ (5th Cir. 2/15/02)

Plaintiff obtained class certification from the district court for a class of all patients who were prescribed and ingested the painkiller Duract but suffered no physical or emotional injury. In a blistering opinion which excoriated both the district court and the class claims the Fifth Circuit dismissed this class action against the drug manufacturer for lack of standing, without reaching the issue of class certification.

The painkiller drug Duract which carried a risk of liver damage was voluntarily withdrawn from the market by its manufacturer in June of 1998. Plaintiff filed a nationwide class action of Duract consumers who had no physical or emotional injury but who claimed an "economic injury" due to their purchase of the drug. The district court certified a class without discovery, without a hearing, without

analysis of variations in the laws of the fifty states, and without any delineation of subclasses. Even plaintiff's counsel recognized the rashness of the district court's actions and moved the court to state its intention to reconsider. The district court denied the motion.

On appeal, the Fifth Circuit dismissed the entire case holding that the purported class members had no injury and therefore had no standing to pursue any type of suit against the manufacturer. Standing is an inherent prerequisite not only to the class certification inquiry, but to any suit because the U.S. Constitution limits the judicial power of federal courts to justiciable cases and controversies. Absent standing, a federal court has no jurisdiction to hear a suit.

An injury requires "an invasion of a legally protected interest which is ... concrete and particularized." The Fifth Circuit boiled plaintiff's claim down to: "Rivera would like her money back ..... Merely asking for money does not establish an injury in fact .... [T]he wrongs Rivera and the class allege are those suffered by other, non-class member patients."

The Court explained that the difficulty with plaintiffs' "most plausible argument" – that they were denied the benefit of the bargain – arose from their attempt to blend product liability claims with contract damages. "The plaintiffs apparently believe that if they keep oscillating between tort and contract law claims, they can obscure the fact that they have asserted no concrete injury." The Court also found the plaintiffs failed to prove the second element of standing: causation. "To find causation, we would have to infer the absurd – for example, that an extra warning, though inapplicable to Rivera, might have scared her and her doctor from Duract."

This case points out the importance of considering the often overlooked doctrine of standing when resisting class certification. Although the Fifth Circuit discussed the doctrine under federal law, state courts too require standing before a suit can be considered. A plaintiff's failure to establish standing should result in immediate dismissal of his claim without consideration of class certification.

- *Madeleine Fischer*

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Grant of Summary Judgment on Morning of Trial Affirmed by La. Fourth Circuit

Pierre-Ancar v. Browne-McHardy Clinic,
2000-2409 (La.App. 4 Cir. 1/16/02), ___ So.2d ___

The plaintiff in this suit, Yvette Pierre-Ancar, filed a medical malpractice against multiple defendants in Civil District Court for the Parish or Orleans. Defendants moved for summary judgment, which was heard by the trial judge on April 28, 2000. The court deferred a ruling on the motion until the morning of the trial. On June 1, 2000, immediately preceding the beginning of the trial, the court again considered the motion and granted summary judgment in favor of the defendants.

On appeal to the Louisiana Fourth Circuit, Pierre-Ancar contended that the granting of summary judgment on the morning of the trial violated Louisiana Code of Civil Procedure article 966(D) which states, "[t]he court shall hear and render judgment on the motion for summary judgment within a reasonable time, but in any event judgment on the motion shall be rendered at least ten days prior to trial."

In an opinion by Judge Tobias, the Fourth Circuit affirmed the trial court's grant of summary judgment despite the fact that the ruling came less than ten days before trial -- indeed on the morning of trial itself. Judge Tobias stated that "we understand this requirement to apply to motions that do not dispose of the case in its entirety. The purpose of the ten day requirement is to give the parties and a reviewing appellate court adequate time to review the issues presented by the motion."

Although the opinion is not completely clear, it suggests that the ten day requirement's purpose is to allow the parties who move for partial summary judgment to take a supervisory writ (in the event

the motion were denied) or an interlocutory appeal (in the event the motion were granted) and have it decided by the appeals court before the trial ten days later. Such quick resolution from an appellate court is rare.

This ruling overlooks a very important objective of Article 966(D) which is that the parties really need to know at least ten days in advance of trial what the rulings of the court will be on summary judgment motions (either partial or full motions) so that they can adequately focus their trial preparation, in the case of a partial motion, or cease trial preparation, in the case of a full motion. The court's ruling undercuts pressure on trial courts to dispose of summary judgments on a timely basis, and halt or conserve the running up of trial preparation expenses on both sides of the case. A more satisfactory rule would be that if a court is unable to decide a summary judgment motion more than ten days before trial, the court should continue the trial for as many days as necessary to allow the ten day pre-trial time period to stand.

All the above being said, if the choice is between the Fourth Circuit's solution (full motions allowed until the date of trial) and invalidating otherwise bona fide motions for full summary judgment, any defendant would prefer a ruling up to the date of trial rather than undergoing what might turn out to be a totally unnecessary trial. Delays not attributable to the parties should not be permitted to prejudice their efforts at summary resolution of the case.

For a different result from the Louisiana Fifth Circuit see *Lassere v. State,* 2000-0306 (La.App. 1 Cir. 3/28/01), ___ So.2d ___, 2001 WL 293698, noted in the May 2001, Vol. 5 of this E*Zine ("SUMMARY JUDGMENTS GRANTED WITHIN 10 DAYS OF TRIAL WILL BE VACATED").

- Meredith Young

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U.S. Fifth Circuit Nixes Summary Judgment for Employer and Ozone Generator Manufacturer

Swope v. Columbian Co.,
___ F.3d ___ (5th Cir. 1/24/02)

In a detailed opinion written by former Louisiana Supreme Court Justice Dennis, the Fifth Circuit cleared the way for a trial on the merits on plaintiff's claim that he suffered lung damage due to a long term exposure to ozone at his employer's carbon black manufacturing plant. The court reversed the summary judgment granted by District Court Judge Rebecca Doherty in favor of the plaintiff's employer, Columbian, and Henkel, successor to the manufacturer of ozone generators used by Columbian in the manufacture of carbon black.

For the sole purpose of summary judgment, the defendants did not dispute plaintiff's contention that he sustained repetitive damage to his lungs by exposure to ozone during his nine years working in maintenance at Columbian's carbon black plant. Thus the Court focused on the questions of whether plaintiff had succeeded in raising genuine issues of material fact concerning his intentional tort claim against Columbian and his product liability claim against Henkel.

In what may be the first holding of its kind under Louisiana law, the Court held that an employer could be liable to an employee for the intentional tort of battery when an employee is injured by chemical exposure in the workplace. The Court cited plaintiff's evidence from which "it reasonably may be inferred that Columbia knew that Swope and other employees were being bodily harmed by their unprotected exposures to ozone." The Court found that Columbian's "conclusory" affidavit of its general manager that Columbian neither intended plaintiff's injuries nor was substantially certain his injuries would follow from his work was insufficient to sustain summary judgment. Chipping away at Louisiana's *Bazley* test for proving intentional tort (as tracked in the general manager's affidavit), the Court stated:

Under Louisiana law, in order to prove a battery, it is not necessary for the

> plaintiff to show that a tortfeasor *desired* to do any harm or even that the defendant knew to a substantial certainty the *full extent* of the bodily harm that would result.

Finding that a jury might reasonably conclude *some* physical impairment was substantially certain to follow from plaintiff's "repeated" and "unprotected" exposures to ozone, the Court reversed Columbian's summary judgment.

Next the Court addressed the potential liability of Henkel and plaintiff's claim that the manufacturer of Columbian's ozone generators failed to adequately warn that its generator allegedly had a propensity to retain and recycle ozone so that the prescribed 30-minute purgation period would not ensure worker safety. The Court dealt with the two legal defenses raised by Henkel that 1) plaintiff's claim was perempted by La. R.S. § 9:2772 (10-year statute of repose for construction of an improvement to an immovable); and 2) there was no duty to warn Columbian of dangers because Columbian was a sophisticated user.

LA. R.S. § 9:2772 perempts all causes of action against anyone performing "services prepatory to construction, or against any person performing or furnishing the design, planning, supervision, inspection, or observation of construction or the construction of an improvement to immovable property" ten years after the owner's acceptance or occupation of the improvement. Because the ozone generators were installed by an independent building contractor and because the manufacturer did not custom design the generators for Columbian, the Court held the manufacturer's contract with Columbian was primarily one of sale (an "obligation to give") as opposed to one of construction (an "obligation to do"). Contracts of sale, the Court stated, are not subject to La. R.S. § 9:2772.

The Court also rejected Henkel's sophisticated user defense as a basis for summary judgment. Although Columbian had manufactured carbon black (involving the use of ozone) for over 55 years and held a patent on its process, the Court found that the process of making carbon black with ozone was distinct from the generation of ozone with a generator. Assuming *arguendo* that Columbian's experience with ozone generators created a reasonable inference that Columbian knew or should have known of alleged dangerous characteristics, the Court found that the evidence submitted by plaintiff would allow a jury with "equal" "reasonableness" to find that Columbian did not discover the characteristic until after the plaintiff's final exposure. The Court also held that La. R.S. § 2800.57(B)(2) (the basis for the sophisticated user defense under the LPLA) "does not authorize courts to judicially notice or assume *ipse dixit* that a particular purchaser is a sophisticated intermediary with respect to a specific latent dangerous characteristic or a product." In short, the Court's opinion would limit the sophisticated user defense: unless the sophisticated user knew or should have known of the danger of the particular characteristic at issue, the defense is not available in an inadequate warning case.

- *Madeleine Fischer*

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LA. R.S. 9:2772 Preempts Products Suit Against Supplier of Coker Unit Equipment

Exxon Corp. v. Foster Wheeler Corp.,
2000-2093 (La. App. 1 Cir. 12/28/01), ___ So. 2d ___

Louisiana's First Circuit Court of Appeal affirmed the dismissal of Foster-Wheeler, a company which constructed a coker facility for Exxon in 1963. Exxon had sued Foster-Wheeler claiming that the 1993 destruction by fire of the coker facility was caused by the failure of a pipe elbow installed by Foster-Wheeler in 1963. Exxon's claims were based in products liability as well as other legal theories.

Foster-Wheeler sought the protection of La. R.S. 9:2772, a Louisiana statute which preempts suits against those involved in the design or construction of "immovables" after the passage of ten years from the date the owner accepted the work. Foster-Wheeler pointed out that the unit was built more than thirty years prior to the fire and that, in all that time, the pipe elbow had never been repaired or replaced.

The court's decision, written by Judge Fogg, turned upon the definition of the word "immovable." Exxon agreed that the concrete coker structure fastened to the ground with concrete and permanently embedded in the land was an immovable. However, Exxon asserted that the pipe elbow was not.

The court looked to article 466 of the Louisiana Civil Code for guidance as to whether the pipe elbow was an immovable. The court focused on the first paragraph of article 466 which states that components of constructions may themselves be classified as immovables if they are "permanently attached to a building . . . such as plumbing, heating, cooling, electrical or other installations." Even though the pipe elbow did not qualify as a component part under any of the specific categories listed in article 466, the court found that the pipe elbow satisfied the requirements of article 466 according to the "societal expectations" test. This test may be paraphrased as whether the average, ordinary person would consider that the item was permanently attached and would remain indefinitely.

Judge Fitzsimmons in concurrence noted that the societal expectations test developed under article 466 was difficult to apply and "lack[ed] predictability for lawyers and litigants." Judge Fitzsimmons preferred to proceed under the term "component part" in article 466 and Civil Code article 465 which states merely that things which are integrally incorporated into an immovable become its "component parts." Nothing that the pipe elbow was essential to the operation of the coker facility and had no independent purpose beyond its incorporation as part of the facility Judge Fitzmorris also concluded the pipe elbow became part of an immovable, thus allowing Foster-Wheeler to claim preemption under La. RS 9:2772.

Manufacturers of industrial equipment should not overlook the potential application of La. RS 9:2772 in suits involving equipment installation more than ten years before the incident giving rise to the suit.

- *Madeleine Fischer* back to top

Bad Faith Seller Cannot Recover Against Manufacturer

Willis v. Royal Imports, Inc.,
01-CA-792 (La. 5th Cir. 1/15/02), ___ So. 2d ___

An individual purchased a sport utility vehicle from an automobile dealership. The purchaser paid for and intended to purchase a vehicle equipped with a V-6 engine but was instead sold a four-cylinder model. The manufacturer placed a "V-6" logo on the vehicle, and the plaintiff sought recovery against the retailer on the basis of the misleading insignia.

The dealership was aware that the vehicle was in fact a four-cylinder model, and the dealership filed a third party action against the manufacturer. The trial court granted summary judgment in favor of the manufacturer and dismissed the dealer's claim, holding that the dealership could not recover against the manufacturer since the dealership had knowingly passed the mislabeled vehicle on to the ultimate purchaser.

The Louisiana Court of Appeals for the Fifth Circuit, in a panel composed of Judges Edwards, McManus and Rothschild, affirmed. Article 2531 of the Louisiana Civil Code provides that a seller who is liable for a redhibitory defect "has an action against the manufacturer of the defective thing, if the defect existed at the time the thing was delivered by the manufacturer to the seller, for any loss sustained because of the redhibition." The court relied upon the official comments to this Article and held: "The principle is very simple: a bad faith seller, a seller who knowingly passes on a defective product, may not recover against sellers backwards in the chain of commerce." The court concluded: "The facts of this matter could not be more uncomplicated .... [The summary judgment evidence] leaves no room to doubt that [the dealer] knew about the defect in the [vehicle] which gave rise to plaintiff's original suit."

- *Richard D. Bertram* back to top

No LPLA Intentional Tort Exception as US 5th Strikes Defective Drug Claim

Stahl v. Novartis Pharmaceuticals Corp.,
___ F. 3d ___ (5th Cir. 2/13/02)

Plaintiff Joseph Stahl developed hepatitis after taking defendant Novartis's prescription drug LamisIl. Stahl's dermatologist prescribed the drug to treat a chronic fungal infection of Stahl's toenails. The package insert included a warning that rare cases of cholestatic hepatitis had been reported and stated that liver function tests should be administered after six weeks or sooner if the patient developed symptoms of liver dysfunction. Unfortunately Stahl developed cholestatic hepatitis only three and a half weeks after beginning treatment and had no symptoms before the advent of the disease.

Stahl sued Novartis on three theories: 1) intentional tort; 2) defect in composition; and 3) inadequate warning. The Fifth Circuit affirmed the district court's grant of summary judgment on all three grounds.

The Court noted that Stahl's exclusive remedies under Louisiana law were limited to the four theories of liability set forth in the Louisiana Product Liability Act. The Court rejected Stahl's argument that because the Louisiana Workers' Compensation Act contains an express exception for intentional acts, a similar exception should be implied in the LPLA. Finally the Court observed that no such exception was needed since manufacturers may be liable for intentional acts, so long as they fall within one of the four LPLA categories.

The Court quickly dismissed Stahl's defect in composition claim because Stahl had provided no evidence that the pills he received were different from Novartis's otherwise identical products. Such proof is critical to a claim under the LPLA's section 2800.55 which targets products rendered defective by a mistake in manufacturing.

Last the Court addressed Stahl's three faceted warnings claim. Given that Novartis included some warnings, the issue was reduced to whether Novartis used sufficient care to provide adequate warnings of Lamisil's potential for liver toxicity.

The Court discussed Stahl's assertion that adequacy of warning is always a jury issue and noted that Stahl's dermatologist found the warnings "clear, unambiguous and reasonably adequate to inform him of the risk of liver damage." Under the "learned intermediary doctrine" a drug manufacturer owes the duty of adequate warning to the doctor, not the patient. The Court found Stahl failed to show that Novartis's warnings to the physician were inadequate.

The Court rejected Stahl's argument that the warnings which were given should have been stronger. The Court held that a warning regarding a particular adverse drug reaction was adequate as a matter of law if 1) the package insert specifically mentions the plaintiff's ailment; and 2) the physician unequivocally testifies that the warning provided him with a reasonable understanding of the risk.

The Court also dismissed Stahl's contention that the warning was inadequate because it did not mention liver failure or death. The court found that these were "obvious risks" which followed from the explicit warning of liver dysfunction and cholestatic hepatitis.

The Court spent the most time dealing with Stahl's argument that the medical testing regime included in the package insert (testing after six weeks or sooner if symptoms developed) was inadequate, but in the end rejected this argument as well. Although the Court found that medical monitoring instructions may form the basis for an inadequate warning claim under the LPLA, the Court also found that Stahl's expert failed to create any issue as to whether the instructional language enabled treating physicians to use the drug safely. The Court stated that the expert's testimony was

vague and his conclusions were tenuous. The Court also observed that all but one of the reports the expert relied upon were published *after* Stahl's injury.

The successful defense of this drug manufacturer was the result of its clear and explicit warnings coupled with strong testimony from the treating physician that he understood those warnings.

- *Madeleine Fischer*

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Appetite Suppressant Manufacturer Blocks Class Certification Bid

Kemp v. Metabolife Intern., Inc.,
2002 WL 113894 (E.D. La. 1/25/02)

Chief Judge Berrigan of Louisiana's Eastern District has granted Metabolife's motion for judgment on the pleadings as to plaintiff's request for class certification in an attempted class action of Louisiana consumers against the appetite suppressant manufacturer.

Plaintiffs sought to certify a class of Louisiana residents who had purchased or consumed Metabolife during a certain time period. Plaintiffs contended that Metabolife inadequately warned Louisiana consumers of adverse health effects of ephedrine and/or the combination of ephedrine and caffeine found in the product.

Judge Berrigan first determined she would rule on the defendant's motion without an evidentiary hearing since she was convinced that the issues were clear on the basis of the pleadings.

Noting that "Product liability class actions generally do not meet the predominance requirement," the court went on to enumerate the many individual issues implicated in plaintiffs' claims. The knowledge of each particular user was relevant to the warning claim. Each user's individual degree of exposure was at issue. Plaintiffs suffered various types of harm and some of the claimed diseases could have been caused by other factors.

The court found that the two common issues of whether Metabolife was defective and whether the manufacturer failed to provide an adequate warning did not predominate over the individual issues. She refused to split off these common issues for a class trial under Fed. R. Civ. P. 23(c)(4) holding that "The predominance requirement [of Rule 23(b)(3)] cannot be satisfied by seeking to repeatedly split the claims pursuant to Rule 23(c)(4)."

Plaintiffs argued that their claims contained more commonalities than other cases in which class certification had been denied. They pointed out that they pleaded one cause of action against one manufacturer under one state's law. The court nonetheless found that even though plaintiffs' case had fewer issues, the common issues did not predominate. Of particular interest plaintiffs also cited a recently certified consumer class action in Michigan which claimed the label on the Metabolife product was materially misleading under Michigan law. The court distinguished that case because no personal injuries were claimed and the only relief sought was return of the purchase price and revision of the Metabolife label.

Confident that plaintiffs could not establish predominance of common issues required by Rule 23 (b)(3), the court granted Metabolife's motion for judgment on the pleadings of plaintiffs' request for class certification.

- *Madeleine Fischer*

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Eastern District Court Grants Summary Judgment to Backhoe Manufacturer

Brown v. Barriere Const. Co.,
2002 WL 126577 (E.D. La. 1/29/02)

In an unwitnessed accident plaintiffs' decedent George Butler was killed while using a Caterpillar backhoe loader on a highway construction project. Butler's body was found in a standing position between the backhoe boom and a rear stabilizer of the backhoe loader. The engine was running and an iron bar, not a part of Caterpillar's equipment, was found extended from the cab pressing the swing control lever and activating the backhoe boom.

Butler had been warned by his employer not to leave the cab with the engine running and not to keep items in the cab. The Operations and Maintenance Manual supplied by Caterpillar with the backhoe also contained various warnings and the machine had come with a decal warning to stay clear of the rear of the machine because of the risk of being crushed by the backhoe boom. The loader also came with a boom swing lock pin which, if installed, prevented the boom from swinging to left or right, even with the boom controls activated.

Plaintiffs alleged defective design, lack of warnings and improper maintenance. The court rejected all of these claims noting there is "no legal duty on the part of the manufacturer to train and check out future operators of the equipment it sells or to maintain equipment that it sells after the equipment has been purchased and leaves the custody of the manufacturer. "The Court also held that plaintiffs had failed to prove these essential elements of a cause of action under the LPLA: 1) There was no evidence that the product was unreasonably dangerous under one of the four exclusive theories of the LPLA; 2) There was no proof that a defect caused the accident; and 3) There was no proof that Butler's death involved a reasonably anticipated use of the product.

- *Madeleine Fischer*

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LA 4th Cir. Upholds Prescription on Building Owner's Claim Panels Were Defective

Division Place Partnership v. Woodward,
2000-2151 (La. App. 4 Cir. 1/16/02), ___ So.2d ____

The Fourth Circuit has held that the manufacturer of building panels was entitled to be dismissed on grounds of prescription against a building owner's claim that discoloration of the panels was due to a product defect.

The plaintiff's property manager first noticed spots and stains on the panels in November of 1992 and wrote a letter of complaint to the general contractor. The contractor responded denying responsibility and asserting that the problem was caused by power washing the building with a deleterious substance. The plaintiff did not file suit until December 1993. The trial court granted the panel manufacturer's exception of prescription.

The Fourth Circuit observed that a products liability suit prescribes within one year from the date the victim becomes aware of the defect. Finding that the plaintiff had notice of the alleged defect in November of 1992, the Fourth Circuit agreed that the December, 1993 lawsuit was prescribed.

- *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:

Leon Gary, Jr.
Jones Walker
Four United Plaza
8555 United Plaza Boulevard
Baton Rouge, LA 70809-7000
ph. 225.248.2024
fax 225.248.3324
email lgary@joneswalker.com

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