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MANUFACTURER OF HELICOPTER ENGINE MAY HAVE HAD DUTY TO WARN OF MISMATCHED PART

***Landry v. Apache Corp.*, 2008 WL 115190 (W.D. La. Jan. 10, 2008)**

On February 18, 2005, a helicopter piloted by John Landry crash-landed in the Gulf of Mexico. The helicopter was powered by an engine manufactured by Rolls-Royce Corporation and maintained and operated by Rotorcraft. The helicopter lost power due to the collapse of the engine's fuel nozzle inlet screen. The nozzle screen collapsed after becoming clogged with "apple jelly," a slimy, gel-like substance formed by the presence of water and an anti-icing additive in the helicopter's fuel.

John Landry and his wife Chantelle, individually, and on behalf of their minor son Connor, filed suit under the Louisiana Products Liability Act ("LPLA"). They named as defendants Rolls-Royce (the manufacturer of the helicopter engine), Rotorcraft (the owner and operator of the helicopter), Bell Helicopter Textron, Inc. (the manufacturer of the helicopter), and Midstream Fuel Services, LLC (the supplier of the fuel used in the helicopter at the time of the crash). The parties agreed that the LPLA provides the exclusive theories of liability against manufacturers for damage caused by their products, and that Rolls-Royce was a manufacturer as defined by the statute because it incorporated into its helicopter engines the fuel nozzle screen that caused the helicopter crash.

The helicopter Landry was operating at the time of the crash had been overhauled on October 4, 2004. The old design Rolls-Royce nozzle screens, prone to "apple jelly" clogs when anti-icing additives were used, were replaced with a new design. However, one week before the crash, Rotorcraft replaced the new design screen with an old design screen manufactured by Rochester Products Division of General Motors Corporation.

Based on these facts, Rolls-Royce brought a motion for summary judgment, arguing that the engine was not being put to a reasonably anticipated use under the LPLA by Rotorcraft, because Rotorcraft replaced the new design nozzle screen with an old design screen. Under the pertinent section of the LPLA, a manufacturer of a product is liable for damages "proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arose from a reasonably anticipated use of the product by the claimant or another person or entity." La. R.S. 9:2800.54(A). Under the act, a product is unreasonably dangerous when the manufacturer has failed to provide an adequate warning about the product. La. R.S. 9:280.54 (B)(3). Reasonably anticipated use, as defined in the LPLA, means "a use or handling

of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances." La. R.S. 2800.53(7). This statutorily-defined concept is meant to be narrow. It is an objective standard which does not include uses clearly contrary to manufacturers' warnings. *See Green v. BDI Pharmaceuticals*, 35,291 (La.App. 2 Cir. 2001) 803 So. 2d 68.

Rolls-Royce alleged that it provided Rotorcraft with adequate warning of the "apple jelly" clog problem with the old design nozzle screens. According to Rolls-Royce, it took every step possible to warn Rotorcraft, "an extremely sophisticated and knowledgeable user of the engine," as to the potential for a problem with the fuel nozzle screen, and further supplied Rotorcraft with the means to prevent the problem. These steps included the publication by Rolls-Royce of Service Letters, Commercial Engine Bulletins, and an amended Operations and Maintenance manual, which provided specific warnings to operators of Rolls-Royce engines "regarding the dangers of this fuel contamination [apple jelly] and offered an improved fuel nozzle screen to allow for further resistance to collapse as a result of the contamination." Additionally, the Federal Aviation Administration published an Airworthy Directive, making the removal and replacement of old design nozzle screens mandatory. In its motion, Rolls-Royce pointed out that Rotorcraft had in fact replaced the old screen with a new screen, only to replace the new screen with an old design one week before the accident.

In its opposition, Rotorcraft argued that Rolls-Royce had actual knowledge that the specific nozzle screen installed in the helicopter at the time of the crash could render a helicopter engine unreasonably dangerous, but failed to specifically list it as a part that had to be removed or replaced. Similarly, Rotorcraft argued that the FAA's Airworthiness Directive failed to list the screen they installed as one that had to be removed and replaced. Furthermore, the warnings issued by Rolls-Royce referred to "fuel contamination" and the "use of Jet A Fuel and an anti-icing inhibitor (DiEGME)." Rotorcraft argued that the use of these terms in the warnings and notices was insufficient to warn the aviation community of problems caused by anti-icing fuel additives. According to Rotorcraft, it was not part of the aviation industry norm to associate the word contamination with the use of approved jet fuel additives, such as the anti-icing additive used in this case. Furthermore, multiple aviation experts confirmed that they had never heard the term DiEGME prior to Landry's helicopter crash.

Judge Tucker Melancon of the United States District Court for the Middle District of Louisiana held Rolls-Royce could not "rely on a warning which was not issued to assert that Rotorcraft's actions were not reasonably anticipated." Judge Melancon found that the record did not support summary judgment because of factual disputes regarding the wording of the warnings and notices, specifically the use of terms not recognized in the aviation community. Because genuine issues of material fact existed as to whether or not an adequate warning about the product was provided, the court found that the question of Rotorcraft's use of the old design nozzle screen being a reasonably anticipated use of the engine was a genuine issue of material fact. Accordingly, Rolls-Royce's motion for summary judgment was denied.

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Under the reasoning of this case, for a manufacturer's warning to be considered adequate under the LPLA, the manufacturer must be careful to use the terminology that is the industry norm and cannot rest on the presumption that the users of the product are "sophisticated and knowledgeable." Furthermore, to be adequate, the manufacturer's warnings should specifically mention any compatible parts of substantially similar design if the manufacturer has actual knowledge of the existence of these parts, such as the nozzle screen manufactured by Rochester that caused the helicopter engine to lose power in this case. Here, the manufacturer tried to argue that the Rotorcraft's use of this old design part was not a reasonably anticipated use of the Rolls-Royce engine; however, the court found that genuine issues of material fact existed, including the wording of and information contained in the Rolls-Royce warnings, the information Rolls-Royce provided to the FAA for issuance of its AD, and the evidence that the term "DiEGME" was not recognized in the aviation community.

– *Wade B. Hammett*

GENERAL MOTORS ASSEMBLY LINE DEFECT CASE DISMISSED

***Davis v. Handling Specialty Mfg. Ltd.*, 2007 WL 4552974 (W.D.La. Dec. 19, 2007)**

On May 12, 2005, Mark Davis suffered severe injuries when he stepped off an assembly line/conveyor system that had inadvertently risen approximately three to four feet from the ground at a General Motors plant in Shreveport, Louisiana. Davis brought a products liability action against various manufacturers alleging that a design defect in the assembly line/conveyor system, also known as a "skillet," caused it to rise at an inappropriate time. Davis also alleged that the skillet was unreasonably dangerous because it did not have adequate warnings or instructions about the risks associated with the system.

The case was originally filed in the First Judicial District Court, Caddo Parish, Louisiana, but was subsequently removed to Louisiana's Western District before District Judge Donald E. Walter. Each of the defendant manufacturers moved for summary judgment. Davis, who was representing himself, failed to file any opposition.

Judge Walter granted the defendants' motions and dismissed all of Davis' claims with prejudice. This was based in large part on Davis' failure to provide the court with any evidence to counter the summary judgment motions. The defendants, however, brought forward numerous depositions and affidavits from General Motors and various manufacturers. This evidence demonstrated that there was no history of maintenance on the skillets related to inadvertent rising or lowering, and there were no other complaints of injury similar to that of Davis. Judge Walter also observed that there was no evidence as to which of the many skillets at the GM plant was involved in the accident. Furthermore, there was proof that General Motors trained Davis in the appropriate use of the system.

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In granting summary judgment, Judge Walter cited to Davis' complete lack of evidence necessary to carry his burden of proof under the Louisiana Products Liability Act. In particular, Davis did not identify any specific product defect that may have caused the accident. He also failed to demonstrate how the manufacturers' warnings were inadequate. Judge Walter noted that a "mere allegation of inadequacy" was insufficient to survive summary judgment. Rather, Davis was required to designate specific facts showing that there were genuine issues for trial.

Judge Walter's dismissal of Davis' claims highlights the importance of providing the court with sufficient and specific facts. The defendants crafted a comprehensive combination of evidence through deposition testimony and affidavits, which exposed the inadequacies of Davis' general allegations. This proof, combined with Davis' failure to respond and provide the court with more specific facts, was fatal to the claim.

– *Michael DePetrillo*

CAR DEALER NOT A "MANUFACTURER" UNDER LOUISIANA PRODUCTS LIABILITY ACT

***Taylor v. Shetler Lincoln Mercury, Ltd.*, No. 07-0097, 2007 WL 4551935 (W.D. La. Dec. 18, 2007)**

On September 22, 2005, Tommy Gene Taylor lost control of his 1998 Mercury Mountaineer while attempting to avoid another vehicle. The Mountaineer rolled over, killing both Taylor and his wife. The Taylors' children filed a survival and wrongful death action against the manufacturers of the Mountaineer and the retail seller, Shetler Lincoln Mercury, in the Fourteenth Judicial District Court for Calcasieu Parish alleging design, composition, and failure to warn defects due to the Mountaineer's "alleged propensity to roll over." Defendants, except Shetler, removed the action to the United States District Court for the Western District of Louisiana. After Plaintiffs sought remand to state court, District Judge Minaldi, on the Report and Recommendation of Magistrate Judge Wilson, granted the motion to remand for lack of subject matter jurisdiction over the suit because the parties lacked complete diversity.

In seeking remand, the Taylor children argued that the Western District of Louisiana lacked subject matter jurisdiction because Shetler was a Louisiana defendant. Defendants posited, however, that removal was proper because Shetler was "improperly joined" as a defendant. The "improper joinder" doctrine establishes that an "improperly joined" defendant need not join in removal and its presence will not destroy diversity jurisdiction in federal court. A defendant establishes improper joinder in one of two ways: (1) "actual fraud in the pleading of jurisdictional facts" or (2) "an inability of the plaintiff to establish a cause of action against the non-diverse party in state court." This case involved the latter.

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Defendants argued that Shetler, as a retail seller, could not be sued pursuant to the Louisiana Products Liability Act ("LPLA"). The Court agreed and noted that "[g]enerally, a retail seller such as Shetler is not considered to be a 'manufacturer.'" Although limited exceptions to this rule exist, the Court concluded that the Taylor children failed to plead facts that would bring Shetler within one of the exceptions, and therefore "failed to state a claim against Shetler under the LPLA."

Surprisingly, though, the Court did not conclude that the Taylor children improperly joined Shetler. Instead, the Court held that while the Taylor children had no remedies against Shetler under the LPLA, they could, and indeed did, implicitly advance tort claims against Shetler. Judge Minaldi cited the Taylor children's allegations that the Mountaineer was defective and that Shetler "'deceptively induced' the Taylors to purchase the Mountaineer." In effect, the Taylor children advanced a tort-based claim that Shetler "knew or should have known that the product sold was defective and failed to declare it" – a claim of which Defendants had fair notice. This liberal interpretation precluded the Court from concluding that "there is no reasonable possibility of recovery against Shetler." Thus, the Court granted the Taylor children's motion to remand to state court.

Taylor emphasizes the need for defendants to be particularly vigilant and cognizant of fact-based pleadings in Louisiana state court proceedings. Since Louisiana utilizes fact-based pleading, a court is free to interpret facts to support differing theories of recovery even where the plaintiff does not advance that particular theory. This is precisely what the Western District of Louisiana did in *Taylor*. Here, Defendants failed to adduce summary judgment evidence identifying discreet and undisputed facts that would preclude recovery against Shetler under *any* theory. As a result, Defendants were not only relegated to state court, but were also assessed costs incurred in federal court for the removal.

– *Eric Michael Liddick*

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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