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COURT CLEARS CAR MAKER IN AIR BAG CASE, BUT SAYS PRODUCT DEFECT MAY BE INFERRED

***Lawson v. Mitsubishi Motor Sales of America, Inc.*, 2005-0257 (La. 9/6/06), ___ So.2d ____**

The Louisiana Supreme Court has held that under some circumstances a plaintiff may prove that a product left the manufacturer in defective condition through inference rather than direct evidence. This significant ruling comes in this case involving an exploding air bag which broke the plaintiff's thumbs and injured her right wrist.

In 1996, plaintiff Kelly Lawson and her husband bought a used Mitsubishi Galant that had over 21,000 miles on it. The previous owner of the car had been a car rental company. Over two years and 25,000 miles after the Lawsons bought the car, this accident happened. Lawson was in the car, temporarily stopped, and blew the horn. The driver's side airbag unexpectedly deployed, injuring Lawson.

Lawson sued Mitsubishi and the case was tried for two weeks to a Calcasieu Parish jury. During the course of the trial Lawson's attorneys sought to prove that a defect in the manufacture of the car, specifically the misplacement of a "clock spring" on the steering column, caused the malfunction of the air bag. Mitsubishi defended the case contending that, because plaintiff's expert had disassembled the air bag system without noting or documenting the position of the clockspring and before anyone else could look at it, there was no proof that the clockspring was not in proper position when the car was assembled at the factory. Mitsubishi's witnesses maintained that if there had been a manufacturing defect such as a misaligned clockspring, the accidental deployment

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of the air bag would likely have occurred much earlier in the car's history. Further, Mitsubishi asserted that there were other reasonable explanations for the malfunction that had not been ruled out—such as an event that could have occurred while the car was owned by the car rental company, whose maintenance records were never produced.

Lacking direct proof of the cause of the accident, Lawson asked the court to instruct the jury on the legal doctrine of *res ipsa loquitur*—literally, "the thing speaks for itself." *Res ipsa loquitur* is a rule of evidence, traditionally used in negligence cases, by which the plaintiff proves the negligence of the defendant through inference, rather than direct evidence. Product liability cases, like the one at hand, are not considered to be true "negligence" cases, because a product manufacturer may be responsible for a defect in its product even if it uses all reasonable care. Rather, product liability cases are considered "strict liability" cases—"strict" because the manufacturer is liable for defects existing at the time of manufacture without regard to whether the manufacturer was careless.

The trial judge agreed with Lawson that *res ipsa loquitur* could be applied in a strict liability case and gave the jury an instruction on the rule at the end of the case. Nonetheless, the jury still found that Mitsubishi was not liable for the accidental air bag deployment and rendered a unanimous verdict that the car was not defectively manufactured.

The trial judge overturned the jury's verdict, finding that "the evidence points so strongly in favor of the Plaintiffs that reasonable men could not reach a different conclusion." Mitsubishi, stripped of its favorable jury verdict, took an appeal to Louisiana's Third Circuit Court of Appeal. The Third Circuit agreed with the trial judge—not the jury—and affirmed the trial judge's action. The Third Circuit took the additional step of awarding the plaintiff over $1,000,000 in damages. Mitsubishi, refusing to give in, asked the Louisiana Supreme Court to review the case and the court accepted that invitation.

The Louisiana Supreme Court vindicated Mitsubishi and reinstated the jury verdict in Mitsubishi's favor. The court held that while the doctrine of *res ipsa loquitur* could be used to prove a product defect, the doctrine did not fit the facts of this case. *Res ipsa loquitur*, or the inference of fault in absence of direct evidence, can only be applied when three factors are present: "1) the facts must indicate that the plaintiff's injuries would not have occurred in the absence of negligence; 2) the plaintiff must establish that the defendant's negligence falls within the scope of the defendant's duty to the plaintiff; and 3) the evidence must sufficiently exclude inference of the plaintiff's own respon-

sibility or the responsibility of others besides defendant in causing the accident." In simpler terms, *res ipsa loquitur* may be applied if the circumstances of the accident are so unusual that one would conclude the accident was caused by the defendant's fault and that there are no other reasonable explanations of how the accident happened.

The Louisiana Supreme Court held that the malfunction of the clockspring was not necessarily the result of a defect in the placement of the clockspring at the time of manufacture. The plaintiff had not established the third part of the test, because there were other reasonable explanations for the accident. Plaintiff's expert, by removing the clockspring without noting its position, destroyed the only direct evidence of the clockspring's position immediately before the accident. Furthermore, it was possible that the previous owner had done something to the clockspring while repairing something within the steering column—a possibility that could not be ruled out because the car's early maintenance records were not produced. Thus, the court held that it was reasonable for the jury to have concluded that plaintiffs had *not* proved a manufacturing defect.

Although the Louisiana Supreme Court upheld the jury verdict in favor of the car manufacturer in this case, its approval of the use of *res ipsa loquitur* in product liability cases may make it somewhat easier for plaintiffs to prove manufacturing defects if the three factors are present.

—*Madeleine Fischer*

LOW LEVEL OF "PLASTICIZER" MAY HAVE RESULTED IN ROOF PANEL FAILURE IN HAILSTORM

***United Fire Group v. Duro-Last, Inc.*, 2006 WL 2620206 (E.D. La. 9/11/06)**

In April and May of 2004, Space Walk/Inflatable Zoo, Inc., located in Kenner, Louisiana, sustained damage to its building as a result of several severe weather events including a hailstorm, a severe rainstorm, and a tornado. United Fire Group, Space Walk's insurer, paid $294,995.59 to the owners of the property for their damage. To recoup that payment, UFG filed suit against Duro-Last, Inc., the manufacturer of the roof of the building, contending that the damage was caused by the defectiveness of its product.

Plaintiffs' experts, Phil Wilbourn and Andrew Armstrong, concluded the roof was defective in both design and composition. Wilbourn observed that some

of the roof panels sustained damage during the severe weather, while others were unscathed. The panels that sustained damage were universally lighter in color than those that did not. Armstrong, a chemist, concluded that the lighter colored panels that were damaged contained a lower level of plasticizers (a chemical that contributes to the roof membrane's durability) than the darker, undamaged panels. Armstrong was further of the opinion that this defect existed at the time the panels left the Duro-Last factory.

Duro-Last filed a motion for summary judgment contending that plaintiffs could not demonstrate that there was a defect in the roofing material; therefore, summary judgment was appropriate.

Judge Kurt Engelhardt struggled to determine what theories of liability the plaintiffs were asserting. Finding that the only potentially viable claims were defective design, defect in composition, and redhibition, Judge Engelhardt limited his in-depth analysis to these three theories.

Design—To demonstrate that a specific product has an unreasonably dangerous design, a claimant must generally identify a specific alternative design for the allegedly dangerous product that was capable of preventing the injury complained of. Additionally, a plaintiff must perform a risk-utility analysis. Here, UFG did neither of these things. Notwithstanding UFG's failure to meet these prerequisites, Judge Engelhardt refused to grant Duro-Last summary judgment on its design. Judge Engelhardt relied on Fifth Circuit cases that allow a relaxation of the evidentiary burden when a product is relatively uncomplicated and the defect may be deduced by "background knowledge and common sense." Here, Judge Engelhardt concluded that, based on the chemist Armstrong's opinion, a jury could conclude that the darker panels containing a greater amount of plasticizer constituted an alternative, superior design available to Duro-Last. Therefore, Judge Englehardt denied summary judgment on the design issue.

Composition—In a similar vein, Judge Engelhardt held that an issue of material fact also existed as to whether the Duro-Last roof panels contained a composition defect that existed at the time the panels left the control of Duro-Last or resulted from a reasonably anticipated alteration or modification of the panels. Normally, in order to prove a defect in composition, a plaintiff must put forth evidence that the defective product differed from the manufacturer's specifications and/or performance standards. Judge Engelhardt applied the doctrine of *res ipsa loquitur* to save plaintiffs' composition defect theory from dismissal. *Res ipsa loquitur* is applicable when the circumstances surrounding an accident are so unusual as to give rise to an inference of negligence or liability on the part of the defendant and that, under the circumstances, the

only reasonable and fair conclusion is that the accident resulted from a breach of duty or omission on the part of the defendant. (See lead article this issue, COURT CLEARS CAR MAKER IN AIR BAG CASE, BUT SAYS PRODUCT DEFECT MAY BE INFERRED, in which the Louisiana Supreme Court, three days before the decision here, decided *res ipsa loquitur* was applicable to product liability cases.) Reviewing the facts of the case, Judge Engelhardt concluded that the circumstances of the accident were unusual and that a reasonable fact finder could conclude that because the darker panels held up well during severe weather, the lighter colored panels might have contained a defect in composition.

Redhibition—Judge Engelhardt also allowed UFG to continue with its claim under Louisiana's law of redhibition in which UFG asserted that the defect in the roof made it useless. Judge Engelhardt found that even though the roof had performed properly for 11 years, it was arguable that the roof was useless for any future use. Furthermore, under specific provisions of Louisiana redhibition law, if the roof were found to be defective at trial, Duro-Last could be given a "credit" for the 11 years of use of the roof.

As a result of these decisions, UFG's case against Duro-Last will go forward on theories of defective design, defect in composition and redhibition.

—*Michelle D. Craig*

VIOXX FOREIGN CLASS ACTIONS DISMISSED

***In re: Vioxx Products Liability Litigation*, ___ F.Supp.2d ___, 2006 WL 2504353 (E.D. La. 8/30/06)**

Two Vioxx foreign class actions have dismissed by Judge Eldon Fallon of the United States District Court for the Eastern District of Louisiana. The decision confirms the availability of forum non conveniens to dismiss foreign class actions and limits the ability of foreign plaintiffs to maintain class actions in U.S. courts.

Vioxx belongs to a general class of pain relievers known as non-steroidal anti-inflammatory drugs ("NSAIDs"). NSAIDs have long been used to treat osteoarthritis and other musculoskeletal conditions. These drugs, however, do increase the risk of gastrointestinal perforations, ulcers, and bleeds ("PUBs"). Merck and several other pharmaceutical companies developed Vioxx as a COX-2 inhibitor that reduced the risk of PUBs. The Food and Drug Administration ("FDA") approved Vioxx for sale in the United States in 1999, and

Vioxx gained widespread acceptance for treating arthritis and other conditions causing chronic or acute pain. Vioxx was later introduced into markets around the world, including France (April 2000) and Italy (summer 2000). After studies indicated that Vioxx increased the risk of certain cardiovascular events, Merck withdrew Vioxx from worldwide sales. Over 5,000 lawsuits followed.

The Judicial Panel on Multidistrict Litigation ("JPML") ordered that all Vioxx litigation be centralized, designated as a Multidistrict Litigation ("MDL"), and assigned to Judge Fallon in the U.S.D.C. for the Eastern District of Louisiana. The MDL cases included 11 lawsuits filed on behalf of purported classes of foreign citizens. Merck moved to dismiss all of the foreign class action complaints under the doctrine of forum non conveniens. The parties agreed to limit the motion only to the class-action complaints of French and Italian citizens. Judge Fallon granted the motion.

A dismissal for forum non conveniens is proper where there exists an available and adequate alternative forum and the balance of relevant private and public interest factors favors dismissal. Judge Fallon held that both Italy and France were available alternative forums for their citizens' claims, because Merck's Italian and French subsidiaries were amenable to service of process in those countries, and Merck had agreed to submit to jurisdiction in civil actions filed in Italy and France. Judge Fallon found these forums adequate even though both Italy and France allegedly lacked class-action devices, employed fee-shifting, and prohibited lawyers from working on a contingency-fee basis. Because neither Italian nor French courts would completely deprive consumers of all remedies, dismissal is appropriate even though the foreign citizens may not enjoy the same benefits available in an American court. Judge Fallon then held that private and public interests favored dismissal, because the majority of the events relevant to the litigation occurred abroad, the U.S. courts did not have easy access to the relevant foreign documents and witnesses, the actions were localized Italian and French controversies which Italy and France had strong interests in deciding at home, retaining jurisdiction over classes of Italian and French residents would result in administrative difficulties, and foreign laws would apply to the claims.

Additionally, Judge Fallon held that the general rule to defer to a plaintiff's choice of forum does not apply to a plaintiff who is a citizen of a foreign country. That is, a foreign plaintiff's choice of an American forum can reasonably be scrutinized for reasons of forum-shopping, *i.e.*, the perception that U.S. courts award higher damages than are common in other countries.

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This *Vioxx* decision effectively limits the availability of U.S. forums for litigating class actions by foreign citizens, even those against American companies.

Earlier decisions in the Vioxx litigation have been noted in this E*Zine.

- Vioxx Cases Centralized Before Judge Fallon in Louisiana's Eastern District, March 2005;
- Judge in Vioxx Cases Approves All Experts for Both Sides to Testify, December 2005;
- Vioxx Trial Judge Bars Plaintiffs' Expert from Testifying as to Cause of Death, February 2006.

—*Judith V. Windhorst*

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50 MILLION DOLLAR VIOXX AWARD DEEMED EXCESSIVE

***In re: Vioxx Products Liability Litigation*, 2006 WL 2504350 (E.D. La. 8/30/06)**

This case is part of the continuing multi-district Vioxx litigation being handled in New Orleans by Judge Eldon Fallon. (See immediately preceding article VIOXX FOREIGN CLASS ACTIONS DISMISSED.)

In this individual case, plaintiff, Gerald Barnett, a citizen of South Carolina, filed suit against Merck, the manufacturer of the prescription drug Vioxx, for a heart attack he claimed was the result of taking Vioxx for a period of five years. Barnett sought recovery under South Carolina's products liability law. Ultimately, the jury returned a verdict for Barnett and awarded him $50 million in compensatory damages and $1 million in punitive damages. However, Judge Fallon of the U.S.D.C. for the Eastern District of Louisiana held that no reasonable jury could have found that Barnett was entitled to $50 million in compensatory damages. Therefore, Judge Fallon granted a new trial on the issue of damages.

The case was tried in two stages. In the first stage, Barnett sued Merck under the following three theories of South Carolina law: (1) strict liability failure to warn; (2) negligent failure to warn; and (3) deceit by concealment. The jury found that Merck was liable to Barnett for: (1) negligent failure to warn and (2) deceit by concealment and awarded the plaintiff $50 million in compensatory damages. However, the jury did find for Merck on Barnett's strict liability claim. Following the announcement of the verdict, Merck orally moved for judgment notwithstanding the verdict, or alternatively, for a new

trial. Merck argued that the verdict on strict liability failure to warn should exonerate it on the negligent failure to warn claim because the latter claim was identical to the former claim except for the additional element of fault.

In the second stage of the trial, the jury considered the issue of punitive damages and returned a $1 million verdict in favor of Barnett. Following the announcement of this second punitive damages verdict, Merck orally moved for judgment as a matter of law, or in the alternative, for a mistrial on the punitive damages issue.

After all jury verdicts were entered, Judge Fallon evaluated all of Merck's post-trial motions. Judge Fallon found that the defendant was not entitled to a judgment notwithstanding the verdict. As to Merck's argument that the jury's findings on strict liability failure to warn and negligent failure to warn were inconsistent, Judge Fallon found that even if the findings were inconsistent, the jury's finding for the plaintiff on the deceit by concealment claim would be unaffected by the inconsistency and the plaintiff would still be entitled to damages.

Judge Fallon then evaluated whether a new trial should be granted. Under South Carolina law, a damage award is grossly excessive if it appears to be the result of passion, caprice, prejudice, or some other influence outside the evidence. Under federal Fifth Circuit law a new trial may be granted if a jury verdict results from passion or prejudice. After weighing the evidence, Judge Fallon concluded that the $50 million compensatory damages award was excessive under any conceivable substantive standard of excessiveness. Although Barnett had a reduced life expectancy, medical bills, and other intangible losses, Judge Fallon found that there were a number of factors that weighed against the $50 million award. For example, Barnett was retired and, as a result, had no claim for lost wages and lost earning capacity. Judge Fallon also looked to the fact that Barnett was able to return to many of his pre-heart attack daily activities. Thus, no reasonable jury could have found that Barnett's losses totaled $50 million. Judge Fallon acknowledged that in the Fifth Circuit when a new trial is granted on compensatory damages, a new trial must also be granted on the issue of punitive damages. Thus, while Judge Fallon thought that the $1 million punitive damages award was reasonable, he was nevertheless obliged to order a new trial on both compensatory *and* punitive damages. As a result, Judge Fallon granted Merck's motion for new trial on the issue of damages and denied Merck's other post-trial oral motions as moot.

—*Katie V. McGaw*

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POLYMER MANUFACTURER TO REMAIN A DEFENDANT IN LEAKING PIPE CASE

***Brookshire Bros. Holdings, Inc. v. Total Containment Inc.*, 2006 WL 2548185 (W.D. La. 9/1/06)**

Brookshire Brothers is a chain of retail grocery stores in East Texas and West Louisiana, which also operates and sells gas to consumers. It filed suit in the U.S.D.C. for the Western District of Louisiana against Total Containment Inc. ("TCI") and several other defendants, including Shell Chemical, LP ("Shell"), claiming that the underground pipe it bought from TCI to link its gas tanks to the surface gas pumps was defective and failed, causing leaks. Shell manufactured a polymer, Carilon, which was used to create an insulation layer in the pipe. Shell filed for summary judgment on several issues, alleging that Brookshire Brothers' claims were time barred, barred by the economic loss rule, and that Brookshire Brothers could not prove one or more elements of its claim. Building on earlier rulings in the case, Judge Trimble granted the motion in part, and denied the motion in part. (See our previous story, FLEX-PIPE PART MANUFACTURER PARTIALLY LIMITS CLAIMS THAT ITS PIPE LEAKED, September 2006.)

With respect to whether the statute of limitations had run, the first issue was whether Louisiana law or Texas law applied. In keeping with his previous rulings, Judge Trimble concluded that Louisiana law applied, and, thus, Brookshire Brothers' claims were subject to the one year statute of limitations. Again, in keeping with previous rulings, Judge Trimble ruled that Brookshire Brothers had notice of the defect for more than a decade before filing suit. Accordingly, all claims made prior to one year before filing suit, August 15, 2002, were barred by the statute of limitations, and Judge Trimble granted Shell's summary judgment, dismissing all claims occurring prior to that date.

Next, Judge Trimble tackled the issue of whether Brookshire Brothers' claims were barred by the economic loss rule. Because there is no economic loss rule in Louisiana, the first determination that had to be made was whether Louisiana or Texas law applied. In keeping with previous rulings, Judge Trimble determined that Louisiana law applied to injuries occurring in Louisiana, and Texas law applied to those injuries occurring in Texas. Accordingly, the economic loss rule could only bar recovery for the Texas injuries. However, Brookshire Brothers argued that not all of its damages in Texas were purely economic, but rather included environmental pollution, a type of damage not barred by the economic loss rule. Judge Trimble ruled that the economic loss rule applied to Brookshire Brothers' Texas economic loss, but not

to its Texas environmental pollution injuries. Thus, summary judgment on this issue was granted in part to deny recovery for Brookshire Brothers' Texas economic injuries, but otherwise denied.

Third, Shell argued that its polymer, Carilon, was not itself defective, and, thus, Brookshire Brothers could not prove one or more elements of its products liability claim against Shell. As the supplier of Carilon, a component of the insulation layer of the pipe, Shell could only be liable for a defect in the finished product if its component was defective or if Shell "substantially participat[ed]" in the integration of the component into the design of the product. In response to this argument, Brookshire Brothers submitted evidence that the polymer was, in fact, defective, and also that Shell worked closely with its customers, including TCI, in integrating the polymer into the finished product. On the basis of this evidence, Judge Trimble found that there was a genuine issue of material fact as to whether Carilon was defective, and as to whether Shell materially participated in the integration of the Carilon into the finished product. He denied summary judgment on this issue.

Finally, Judge Trimble found that Brookshire Brothers had no action for breach of warranty under either Texas or Louisiana law, and, accordingly, granted Shell's motion on this issue.

Judge Trimble's opinion was thoughtful and thorough. While he paired down Brookshire Brothers' claims considerably, he also left open the issue of whether Shell might be liable under a products liability theory. The ruling quotes extensively from the evidence submitted by Brookshire Brothers in opposition to Shell's argument that Carilon was not defective itself. This suggests that Judge Trimble found this evidence compelling, and that Shell may have a difficult time overcoming it at trial.

—*Emily E. Eagan*

DRUG MANUFACTURERS CAN'T KEEP LIVER FAILURE CASE IN FEDERAL COURT

Stanley v. Wyeth, Inc., 2006 WL 2588147 (E.D.La. 9/8/06)

This case presents issues regarding the jurisdiction of a federal district court to hear a case, and the duty of pharmacists to their customers. The case also illustrates the often repeated efforts of product manufacturers to have their cases tried in federal courts rather than Louisiana state courts.

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Stephanie Stanley's doctor prescribed a drug called Cordarone, manufactured by the defendants. Stanley took the drug as prescribed, and developed severe liver complications allegedly as side effects from the drug. Stanley underwent two liver transplants, and ultimately died. Her family sued for her death, alleging that the pharmaceutical manufacturers, as well as the pharmacist who filled the prescription, were at fault and liable for damages. The suit was originally filed in Louisiana state court, but the defendant manufacturers removed the case to federal district court. Although none of the parties challenged federal jurisdiction, U.S.D.C. for the Eastern District of Louisiana Judge Barbier raised the issue on his own and asked the parties to justify why the case should remain in federal court.

The manufacturers asserted that the suit should be tried in federal court because their actions were in accordance with, and at the direction of, the Food and Drug Administration. They reasoned that because the pharmaceutical industry is highly regulated by the federal government, the federal courts would be the proper place to litigate the claim. Judge Barbier found that while the manufacturing and marketing of pharmaceuticals is a highly regulated activity, extensive regulation alone does not bring a claim within the purview of federal jurisdiction.

Next Judge Barbier addressed whether there was diversity jurisdiction. To achieve diversity, all defendants must be diverse in citizenship from all defendants. Although the defendant pharmacist was from Louisiana, like the plaintiffs, the manufacturers argued that the pharmacist should not have been sued because the facts did not support any way in which the pharmacist could be found responsible under Louisiana law.

Plaintiffs claimed that the pharmacist who filled Stanley's prescription was potentially liable for failure to include a "Patient Insert" containing warnings with the drug. Under Louisiana law, pharmacists generally have no duty to warn their customers and are protected by the "learned intermediary" doctrine, *i.e.*, the prescribing doctor, not the pharmacist, is the person who has the duty to warn the patient. However, Louisiana also applies the "uniform national rule" that a pharmacist has no duty to warn when the prescription appears valid *and* "neither the physician nor the manufacturer has required that the pharmacist give the customer any warning." Judge Barbier finally concluded that Louisiana law was simply not clear regarding the extent of a pharmacist's legal duty under these circumstances.

This determination would prove fatal to the manufacturers' attempt to invoke federal jurisdiction. The district court stated that while the claim against the defendant pharmacist was tenuous, the test was whether there was an arguably

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reasonable basis for predicting that Louisiana law would allow recovery against the defendant. Judge Barbier found that the very ambiguity in Louisiana law regarding a pharmacist's duty did provide an "arguably reasonable basis" for the plaintiffs to proceed with their case against the pharmacist. Finding that there was a reasonable basis to sue the pharmacist, the inclusion of the Louisiana pharmacist as a defendant destroyed diversity jurisdiction. Accordingly, the case was remanded to state court.

—*Bernard H. Booth*

FEDERAL COURT SENDS PAIN PUMP MANUFACTURER BACK TO STATE COURT

***Albritton v. ABC Corp.*, ___ F.Supp.2d ____, 2006 WL 2506143 (M.D.La. 8/25/06)**

Plaintiff, Billie Blount Albritton, filed suit in Louisiana state court against, among others, Medtronic, Inc. and Dr. Paul Joseph Hubbell, III. Albritton alleged that a pain pump manufactured by Medtronic was implanted in her back while under the care of Dr. Hubbell, and that a mass of crystallized medicine formed in her back, which caused her permanent damage. Albritton contended that Medtronic's pain pump was unreasonably dangerous for its intended use under the Louisiana Product Liability Act.

Medtronic removed the State court case to the U.S.D.C. for the Middle District of Louisiana. Medtronic contended that jurisdiction was proper in federal court because the plaintiff's Louisiana law claims regarding its allegedly defective pain pump were preempted by a federal law known as the Medical Device Amendments of 1976.

Judge Parker of the Middle District raised the question of whether federal subject matter jurisdiction existed. Without federal jurisdiction, Judge Parker could not decide the case. The presence of federal question jurisdiction is governed by the "well-pleaded complaint rule," which provides that jurisdiction exists only when a federal question is presented on the face of the plaintiff's complaint. However, federal preemption, as raised by Medtronic, is a defense that is normally not apparent on the face of the complaint. It is settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of preemption, even if the defense is anticipated in the plaintiff's complaint, and even if both parties concede that the federal defense is the only question truly at issue.

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The "complete preemption doctrine," is an exception to the well-pleaded complaint rule. Where an area of state law has been completely preempted, "the preemptive force of a statute is so 'extraordinary' that it 'converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.'"

Plaintiff's state court petition made no mention of federal law and her claims against Medtronic were alleged solely under the Louisiana Product Liability Act. Because Medtronic failed to meet its burden of showing that the complete preemption exception to the well-pleaded complaint rule applied in this case, Judge Parker determined that he had no subject matter jurisdiction, and remanded the matter to state court.

—*Don A. Rouzan*

FAILURE TO OPPOSE SUMMARY JUDGMENT RESULTS IN VICTORY FOR LUMBER COMPANY

***Burdell v. Lowes Home Centers, Inc.*, 2006 WL 2535222 (W.D. La. 8/31/06)**

Gerald Burdell injured his hand while cutting a piece of lumber with a table saw. Burdell claimed that it was a defect in the lumber, not the saw, which was the cause of his injury. Specifically, he claimed the lumber was improperly cured and was still green, causing it to jerk violently and bring his hand in contact with the saw. He sued several defendants including a lumber company, Georgia-Pacific Corporation. Georgia-Pacific moved for summary judgment on the grounds that it was not the manufacturer of the lumber. A Georgia-Pacific manager attested in an affidavit that the logo and mill stamp on the lumber were not Georgia-Pacific's.

Burdell did not file an opposition to Georgia-Pacific's motion. Without opposition, the court concluded that Georgia-Pacific was entitled to summary judgment.

—*Emily E. Eagan*

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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