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COURT DENIES NATIONWIDE CERTIFICATION OF AIR BAG CASE DUE TO STATE LAW VARIATIONS

Cole v. General Motors Corp., ___ F.3d ___, 2007 WL 1054697 (5th Cir. 4/10/2007)

In December 2000, the plaintiffs filed a class action suit in Louisiana state court, alleging economic injury because of alleged defects in the side impact air bag system in the 1998 and 1999 model year Cadillac DeVille manufactured by General Motors. Plaintiffs said that the defect had the potential to cause the side impact air bags to deploy inadvertently, without a crash. General Motors was aware of the issue and devised a recall plan to address it. The case was ultimately removed to federal court on the basis of diversity jurisdiction. There, the District Court took up the issue of class certification.

The plaintiffs moved for class certification pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure on behalf of “[a]ll persons and legal entities who have acquired, whether by purchase, lease, donation or otherwise ...anywhere in the United States, 1998 or 1999 Cadillac DeVilles equipped with side impact air bag systems and side impact sensing modules.” After the motion was under advisement for three years, the District Court ultimately certified the class. GM appealed to the Fifth Circuit, asserting that the District Court abused its discretion in certifying the class.

Pursuant to Rule 23(b)(3), as a prerequisite to certifying a class, questions of law or fact common to the members of the class must predominate over any questions affecting individual members. Because the plaintiffs sought to certify a nationwide class, their claims would necessarily be decided under the laws of fifty-one different jurisdictions. In such situations, variations in state laws may swamp any common issues and defeat predominance. Thus, the plaintiffs were required to provide the Court with an “extensive analysis” of the state law variations. Failure to engage in such analysis of state law is grounds for denying certification.

The plaintiffs provided the Court with “an extensive catalog of the statutory text of the warranty ... laws of the fifty-one jurisdictions implicated in this suit.” For its part, GM provided charts of holdings in cases interpreting these warranty statutes which indicated significant variations among the jurisdictions in regard to the ele-

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ments of warranty claims (*e.g.*, reliance, notice of breach, vertical privity, and presumptions of merchantability). The District Court certified the class. On appeal, the Fifth Circuit took a closer look and reversed the District Court's decision.

The Fifth Circuit found that the plaintiffs' submission was inadequate in that it was not the "extensive analysis" required by law. Instead, plaintiffs relied primarily on the textual similarities in the various applicable laws and glossed over substantive legal conflicts. General Motors, on the other hand, provided substantive analysis of the applicable laws, and of the conflicts among the jurisdictions. The Court concluded that there were many differences. Ultimately, the differences in the laws of the fifty-one jurisdictions would create too many individual issues, defeating predominance. The Court reversed and remanded the matter for entry of an order denying class certification.

—[Emily E. Eagan](#)

CAR MAKER NOT LIABLE TO USED CAR MANAGER INJURED BY ROLLING EXPLORER

Evans v. Ford Motor Co., ___ F.3d ___ (5th Cir. 4/10/07)

Mark Evans, an assistant used car manager at Extreme Nissan, sued Ford Motor Company under the Louisiana Products Liability Act, claiming that a 1999 Ford Explorer injured him. Extreme Nissan had purchased the vehicle at an auction at which it was classified as a "green light" vehicle, meaning that it did not have any mechanical defects. After driving and parking the Explorer on the used car lot, Evans alleged that he put it in "Park" and exited the vehicle with the motor running and the door open. The Explorer then rolled backward, knocking Evans to the ground and running over his right leg. Evans contended in the lawsuit that the Explorer had a "perceived park" defect, meaning that the Explorer appeared to be in the "Park" position, when in fact it was not. Though he initially made a number of claims under the Louisiana Products Liability Act regarding the vehicle being unreasonably dangerous, Evans also later contended that the Explorer also failed to conform to an express warranty. The district court denied Ford's motion for judgment as a matter of law and gave the case to a jury that found the Explorer to be unreasonably dangerous because of nonconformity with an express warranty.

The LPLA defines an "express warranty" as a representation, statement of alleged fact, or promise about a product or its nature, material, or workmanship that represents, affirms, or promises that the product or its nature, material, or workmanship possesses specified characteristics or will meet a specified level of performance. Express warranty does not mean a general opinion about or general praise of a product. Evans contended he presented some evidence at trial that the Explorer failed to conform to statements in the owner's manual; the shift indicator was an affirmative representation that the Explorer was in "Park" when it was not; the Explorer did not conform to the "green light" warranty that was given at the auction; and, the Explorer failed to conform to the manufacturer's 46-month/36,000 mile warranty.

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The court found, however, that no evidence existed that Ford made any representation or warranty. Ford had no role in the auction or in tagging the Explorer as a “green light” vehicle. The evidence showed only that at the time the vehicle was purchased the shift indicator was broken, not functioning properly, or both. There was no evidence that Ford was the cause of any disrepair or defect. Further, though the court found that Ford was responsible for any representations or warranties in the owner’s manual regarding the “Park” position, the owner’s manual also warned the driver to “make sure the gearshift is securely latched in P (Park).” The evidence showed, and Evans conceded, that he did not make sure that the gearshift was securely latched. Further, there was no evidence that Evans relied on the owner’s manual before he was injured. To prevail in Louisiana on an express warranty claim, someone injured by using a product must show evidence that he was aware of the express warranty and was induced to use the product because of it. Because there was no evidence that the Explorer failed to conform to an express warranty, the appellate court reversed the district court’s denial of Ford’s judgment as a matter of law.

This case demonstrates importantly that to prevail on an express warranty claim, the plaintiff must provide evidence that he was aware of the express warranty prior to using a product and, in fact, used the product because of the express warranty.

—[Sarah B. Belter](#)

COURT LOOSENS “REASONABLY ANTICIPATED USE” REQUIREMENT IN FORKLIFT DEATH CASE

Harvey v. Toyota Material Handling, USA, Inc., 2007 WL 1115235 (W.D.La. 4/13/07)

Charles Harvey was involved in a fatal workplace accident while operating a forklift. When he was found, his body was positioned over the steering wheel of the machine in such a way that his head and upper torso were outside the operator’s compartment between the uprights of the mast of the forklift while the forklift was running and the mast was raised. He was also not wearing his seat belt. Harvey’s wife, on behalf of herself and her two minor children, filed suit against the forklift manufacturer, Toyota, alleging both defective design and inadequate warning claims under the Louisiana Products Liability Act.

Toyota filed a motion for summary judgment, seeking to dismiss the entirety of Mrs. Harvey’s complaint. In support of that portion of its motion targeting Mrs. Harvey’s defective design claim, Toyota argued that Harvey, who had extensive experience operating forklifts and was aware of proper operating procedures, intentionally placed his head and upper torso outside the operator’s compartment in direct contravention of the warnings both in the operator’s manual as well as on the forklift itself and was therefore not operating the machine in a manner Toyota could have reasonably anticipated. In response to that argument, Mrs. Harvey asserted that her

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husband accidentally fell into that position and was therefore not engaging in an improper use of the forklift.

United States District Judge S. Maurice Hicks, Jr. first explained that liability under the LPLA turns on whether (1) the product is unreasonably dangerous in design; (2) the product is unreasonably dangerous due to inadequate warnings and (3) the characteristic of the product that makes it unreasonably dangerous either existed at the time the product left the manufacturer's control or resulted from an alteration or modification the manufacturer reasonably anticipated. Turning to the question of whether Harvey's use of the forklift was or should have been reasonably anticipated by Toyota, Judge Hicks held that whether the position of Harvey was accidental or intentional was not dispositive of whether his use of the forklift was or should have been reasonably anticipated by Toyota. Instead, the court looked to the use to which Harvey was putting the forklift – unloading freight – and determined that Harvey was simply using the forklift for its intended purpose.

Further explaining his opinion, Judge Hicks stated that even if he were to accept Toyota's position regarding the intent behind Harvey's actions, Mrs. Harvey had presented enough competent evidence demonstrating Toyota's knowledge that its forklifts were being operated by individuals such as Harvey in contravention of operating procedures and warnings. The court pointed to OSHA Accident Search Detail reports regarding similar accidents as well as Toyota's responses to discovery requests made in a prior case which indicated its awareness of accidents occurring under circumstances like those surrounding Harvey's death. Given that Toyota knew or should have known its product was being used in such a way, the court found that Harvey was engaged in a reasonably anticipated use of the machine at the time of his death.

Mrs. Harvey's defective design claim asserted there were alternative, safer designs for the forklift which likely would have prevented her husband's death. Mrs. Harvey advanced a number of alternative designs in support of her argument. Toyota's motion, according to the court, was based solely on the issue of reasonably anticipated use and did not offer an argument regarding the viability of Mrs. Harvey's proposed designs. Thus, the court held, the Toyota defendants did not meet their burden of proving no issues of material fact existed. On this basis, the court denied Toyota's summary judgment motion on the design claim. In a footnote, the court noted Mrs. Harvey's evidence regarding a safety feature which is now standard equipment on all Toyota forklifts and stated this itself was evidence of a viable alternative design, although no evidence was presented regarding the date on which the feature became available.

Next addressing Mrs. Harvey's failure to adequately warn claim, the court first noted that a manufacturer's duty to warn does not encompass those dangers that are or should be obvious to the product's handler and further stated that this is particularly true in cases involving a sophisticated user, such as Harvey. The court cited the presumption in Louisiana that sophisticated users know or should know about certain dangers because of their familiarity with the product. The court reviewed the relevant warnings that were placed either on the forklift itself or contained in the operator's manual. It also considered testimony from Harvey's co-workers regarding both the

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manufacturer's warnings as well as the open and obvious danger inherent in placing body parts in the mast of the machine and concluded that Harvey should have known his actions were potentially dangerous based on his experience and his general common sense. Judge Hicks reasoned that additional warnings, such as those advocated by Mrs. Harvey, would simply be redundant in light of the knowledge a sophisticated user is presumed to already have. The court then granted Toyota's motion on Mrs. Harvey's failure to warn claim.

The *Harvey* opinion provides useful insight into the analytical process courts employ when evaluating claims brought under the LPLA. However, it is also a cautionary tale to manufacturers and demonstrates the latitude some courts are willing to give claimants who argue a particular use of a product was or should have been reasonably anticipated by the manufacturer. This court's interpretation appears to be a throwback to pre-LPLA jurisprudence in which the concept of "normal use" included "reasonably foreseeable misuse". When the LPLA was enacted, the term "normal use" was deliberately avoided and the term "reasonably anticipated use," thought to be more concrete, was adopted. One purpose of the substitution of terms was to convey the idea that the manufacturer would not be responsible for every conceivable misuse. However, as illustrated in this opinion, some courts still find room to hold manufacturers liable when there is evidence that the manufacturer knew that consumers were misusing the product regardless of whether the misuse was clearly improper. Under this more liberal reading of "reasonably anticipated use" the issue becomes then, not whether the use in question is improper and/or contrary to the manufacturer's intentions, but whether the manufacturer knew of the use and failed to take design precautions.

– *Jana Montiel*

JURY MUST RESOLVE WHETHER SHOTGUN WAS IN "REASONABLY ANTICIPATED USE"

Savant v. Beretta USA Corp., 2007 WL 1068481 (W.D.La. 4/4/07)

Russell Savant alleged that, while he was using a 12-gauge shotgun manufactured by Fabbrica d'Armi Pietro Beretta S.P.A. and distributed by Beretta U.S.A. Corp., the shotgun fired without a trigger pull, discharging a shot into Savant's lower abdomen and pelvic area resulting in severe and permanent injuries. Savant filed suit against defendants under the Louisiana Products Liability Act (LPLA) alleging that the Beretta shotgun contained defects that made it unreasonably dangerous. Beretta moved for summary judgment arguing that Savant's use of the shotgun was not a "reasonably anticipated use."

Under the LPLA, a manufacturer is liable for damages proximately caused by a characteristic of the product that renders the product unreasonably dangerous when such damage arises from a reasonably anticipated use of the product. Thus, the threshold requirements are: (1) a reasonably anticipated use of the product and (2) a causal connection between the unreasonably dangerous product and the damages alleged. Both of these elements must be proven and the absence of either one results in a failure of the claim under the LPLA.

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“Reasonably anticipated use,” for purposes of the LPLA, is defined as a use or handling of the product that the product’s manufacturer should reasonably expect of an ordinary person in the same or similar circumstances. The evidence demonstrated that Savant stood in front of the muzzle of the shotgun just before attempting to remove it from his truck and that Savant’s use of the shotgun involved not only the shooting of ammunition, but also the transportation of the shotgun from place to place as needed in order to keep the firearm on hand as he farmed and hunted.

Under the LPLA, a manufacturer will not be held liable for every conceivable, foreseeable use of a product. This is especially true when the danger presented by the consumer’s misuse should have been obvious to the user, whether the user was experienced or not. Savant’s own deposition testimony showed that he was experienced with guns. Savant, with knowledge that the shotgun lying in his backseat may have been loaded, willfully approached the gun from a direction which placed his body directly in front of the muzzle of the gun, even though he was fully aware of the danger involved in handling firearms, specifically, the obvious danger of standing in front of the muzzle of a gun.

The existence of warnings and their adequacy is necessarily “intertwined” with the issue of reasonably anticipated use. Savant testified that the shotgun came with an owner’s manual, which he read several times. The Beretta manual included the following warnings among others: “Don’t take a gun by the barrel”; “Store guns and ammunition separately”; “Guns should always be unloaded.” The Court found that these were adequate warnings as to storing loaded firearms, positioning yourself in front of a firearm, and taking a firearm by the barrel.

To defeat Beretta’s motion for summary judgment, Savant had to present evidence that Beretta should have known that users were disregarding its warnings and using its product in contravention of the warnings. Although the Court disregarded as irrelevant evidence of misfiring of other Beretta shotguns, it did allow evidence by way of affidavits from other hunters that it was common practice for hunters from time to time to stand in front of shotgun muzzles. The court found this relevant to whether Beretta was potentially aware that users of its products were doing so in contravention of its warnings.

Ultimately, the Court found that Savant was a sophisticated firearms user with many years of experience shooting this particular gun, as well as others. The Court further found that he acted in contravention of Beretta’s express warnings and instructions when he positioned himself directly in front of the muzzle of a gun which he generally kept loaded. The danger presented by Savant’s behavior was obvious and should have been known to the ordinary, as well as the sophisticated user. However, the Court found that Savant had submitted evidence sufficient to survive summary judgment. The Court held that the jury would have to weigh the credibility of Savant’s witnesses at trial in order to determine whether or not Beretta should have known that people were using its shotguns in contravention of its express warnings.

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The reader may wish to compare this court's treatment of "reasonably anticipated use" with that of *Harvey* case reported immediately above.

– [Don A. Rouzan](#)

NO EVIDENCE OF "UNREASONABLY DANGEROUS" PRODUCT IN BULLDOZER DEATH CASE

Tyson v. Tammany Holding Corp., 2007 WL 954785 (E.D. La. 3/27/07)

Clifford Tyson died as the result of a bulldozer accident. His son, Johnny Tyson, brought suit against the bulldozer manufacturer, Komatsu American Corporation, alleging violations of the Louisiana Products Liability Act (LPLA). Specifically, Tyson alleged that Komatsu failed to warn purchasers and users of a dangerous condition; failed to provide adequate instructions for using the bulldozer; failed to provide adequate safety devices; and, failed to recall the bulldozer. Komatsu filed a motion for summary judgment arguing that Tyson had no evidence to sustain his allegations that the bulldozer was unreasonably dangerous in any respect. Judge A. J. McNamara of the U.S. District Court, Eastern District of Louisiana, granted the motion and dismissed Tyson's claim against Komatsu.

The federal procedural rules provide that summary judgment is proper if the proponent of the motion demonstrates that there is no evidence to show that there is an issue of material fact, and the party is entitled to summary judgment as a matter of law. To survive a motion for summary judgment, the opposing party must produce sufficient evidence to at least raise a legitimate dispute as to the existence of the challenged essential factual element. Here, Komatsu pointed out that Tyson admitted in interrogatories that he had no knowledge about the accident, and that Tyson lacked information about the allegations against Komatsu. The court noted that in more than two years since the accident and one year since suit had been filed, Tyson produced no evidence to support his contention that the bulldozer was unreasonably dangerous. The court opined that there was no genuine issue of material fact because there was a "complete failure of proof" concerning essential elements of Tyson's case. Consequently, Tyson's failure to produce evidence was fatal to his claim, and Komatsu's motion for summary judgment was granted.

This ruling illustrates the principle that the non-moving party cannot rely upon mere allegations to withstand a motion for summary judgment, but must provide sufficient factual evidence that a material fact is in dispute.

– [Bernard H. Booth](#)

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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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