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Products Liability
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Punitive Damages Not Quite Dead in Louisiana

In a September 6, 2000 decision, the Louisiana Fourth Circuit Court of Appeal allowed the plaintiffs in an occupational asbestos exposure wrongful death suit to pursue a claim for punitive damages, even though the decedent's exposure to asbestos had occurred years before the statute allowing for such damages was enacted. Anderson v. Avondale Industries, Inc., 00-0775 (La. App. 4 Cir. 9/6/00), 769 So.2d 653.

Louisiana Civil Code Article 2315.3, which made punitive damages available in cases involving the improper storage, handling and transportation of hazardous materials, was in effect from September 1, 1984 through April 16, 1996. However, the employee in this case, Mr. Anderson, was exposed to asbestos years earlier, from 1968 until 1980.

In ruling that the plaintiffs could seek punitive damages, the court focused on the date of Mr. Anderson's death in 1994 -- not the date of his alleged exposure to asbestos. The court concluded that the law in effect at the time of Mr. Anderson's death should be applied when determining whether punitive damages are available. Because Mr. Anderson died during the window of time in which the punitive damages statute was effective, his widow could seek these damages from the defendants.

The defendants have appealed the Fourth Circuit's decision to the Louisiana Supreme Court. A motion to consolidate has been filed, which could merge this appeal with a similar previous Fourth Circuit decision currently up for review before the Supreme Court, Bulot v. Intracoastal Tubular Services, Inc., 98-2105 (La. App. 4 Cir. 5/17/00), 761 So.2d 799. In Bulot, the Fourth Circuit also applied the law in effect at the time of the death of certain employees allegedly harmed by occupational exposure to radioactive and hazardous materials while cleaning oil field equipment. Thus, the wrongful death suits brought by the relatives of these employees could include claims for punitive damages, so long as the punitive damages statute was in effect at the time of their deaths.

- Jennifer E. Ancona

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Drug Company Rep's Negligent Verbal Representations Supersede Manufacturer's Adequate Written Warnings of Drug Side Effects

Brown v. Glaxo, Inc., 99-1531 (La.App. 1 Cir. 11/15/00), 2000 WL 1706282

Sharon Brown suffered from severe migraine headaches. Her doctor, Dr. Tyrone Girod, prescribed

injections of the Glaxo drug Imitrex to treat this condition. Mrs. Brown's prescription was filled by her husband Ronnie Brown who was a pharmacist. Both Mrs. Brown's doctor and her husband received not only the printed physician package insert and the consumer information insert that came with Imitrex, but also additional information about the drug from a Glaxo salesman, Mr. Lefort. After taking the injections for almost a year and a half and eventually experiencing some rather alarming side effects which she did not report to her doctor, Mrs. Brown had a severe reaction shortly after an Imitrex injection. Mrs. Brown went into cardiac arrest and entered a vegetative state in which she remained until she died two years later.

Mr. Brown and the Brown's son sued both Dr. Girod and Glaxo for damages. A jury found that Dr. Girod was not at fault, but found Glaxo strictly liable for lack of an adequate warning of an unreasonable danger from a reasonably anticipated use of Imitrex. The jury also found that both Mr. and Mrs. Brown were negligent but that their negligence did not cause Mrs. Brown's injury and death.

On appeal the Louisiana First Circuit Court of Appeal focused on the concept of duty to warn. Under the Louisiana Product Liability Act, which has governed all Louisiana products cases since September 1988, a product is considered unreasonably dangerous if an inadequate warning causes damage, provided the damages arises from a reasonably anticipated use of the product. La. R.S. 9:2800.54A & B(3); 9:2800.57A. However, in cases involving prescription drugs Louisiana case law follows the "learned intermediary doctrine" under which the drug company's duty to warn is fulfilled if the company provides an adequate warning to the doctor, rather than to the patient.

The First Circuit noted that several unusual facts made this "an adequacy of warning case with a twist". Most importantly, Mrs. Brown's pharmacist husband, the plaintiff, was aware of the Imitrex warnings and discussed them with his wife. The Court found that as a matter of law the written warning inserts routinely provided with Imitrex were adequate because they included the warning of potentially life-threatening cardiac events even (though rarely) in people who did not have a prior history suggestive of coronary disease. This was so even though Glaxo had issued an updated warning of an actual Imitrex-related death from cardiac arrest which was not received by Dr. Girod until after Mrs. Brown's cardiac arrest. "Notification of an actual Imitrex-related death would not have added information that the doctor needed or did not already have."

However, Glaxo had another problem -- the sales presentations of their salesman Mr. Lefort to health care professionals. Mr. Lefort admitted making statements to his customers minimizing the seriousness of chest pains as a side effect and stating that for the most part these chest pains were not cardiac in origin. Mr. Brown testified that Mr. Lefort had told him at the pharmacy that chest pains were an expected side effect and that Mr. Brown should tell his customers "don't worry about it." The First Circuit found that these verbal representations superseded Glaxo's written warning and may have lulled the Browns into a false sense of security concerning some of the alarming chest pains. Even though Glaxo would normally be protected by the learned intermediary doctrine, in this case it removed itself from that protection by its own verbal representations (through its agent Mr. Lefort) to Mr. Brown.

The First Circuit also apportioned some of the fault to Mrs. Brown. Although the verbal representations of Mr. Lefort may have explained Mrs. Brown's acceptance of her chest pains, they did not excuse her failure to report the increasing severity of the pain and additional vomiting she experienced over time. Mrs. Brown breached the duty she bore to herself of caring for her own health. Moreover, the First Circuit overruled the jury's finding that this negligence did not contribute to Mrs. Brown's injuries or death since it found that had she reported the serious side effects Dr. Girod would have immediately discontinued the Imitrex.

Ultimately, the court apportioned 30% of the fault to Mrs. Brown and 70% of the fault to Glaxo.

The important teaching of this case to not only drug manufacturers, but to other manufacturers as well, is that a salesperson's verbal representations may supersede adequate written product warnings exposing a well-meaning and careful manufacturer to liability. Accordingly, product representatives should be instructed that it is important in their sales presentations not to deviate from or to minimize written product warnings.

- Madeleine Fischer

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Louisiana's Fifth Circuit Finds Worker's Comp Bar Protects Employers from Asbestos-related Tort Claims When Exposure Occurs Prior to 1976

Brunet v. Avondale Industries, Inc., 99-1354 (La. App. 5 Cir. 12/5/00), ___ So.2d ___, 2000 WL 1779090

In a break with the Fourth and First Circuits, Louisiana's Fifth Circuit Court of Appeal recently held that workers suffering from diseases caused by exposure to asbestos-containing products are limited to worker's compensation against their employers under the law in effect prior to 1976. Both the First and Fourth Circuits had previously held that asbestos was not a listed substance under the pre-1976 version of La. R.S. 23:1031.1, the statute defining the coverage and burden of proof for occupational diseases. Accordingly, those circuits allow workers who contract a disease other than asbestosis (a listed disease) due to pre-1976 asbestos exposure to file tort suits against employers. (Gautreaux v. Rheem Manufacturing Company, 96-2193 (La.App. 4 Cir. 12/27/96), 694 So.2d 977; Thomas v. Armstrong World Indus., Inc., 95-2222)La.App. 1 Cir. 6/28/96), 676 So.2d 1185, writ denied, 96-1965 (La. 11/1/96), 681 So.2d 1272.)

Telles Brunet, a shipyard worker for Avondale Industries, worked at Avondale from 1950 through 1978 where he was exposed to asbestos-containing products. Brunet eventually contracted lung cancer and filed suit against Avondale and others contending that his asbestos exposure led to his cancer. Shortly after filing suit Brunet died and his family was substituted as plaintiffs on survival and wrongful death claims. The wrongful death claim was dismissed by the trial judge, but a jury returned a verdict on the survival action against certain manufacturer defendants while finding that Avondale was not negligent.

On appeal the Brunet family argued that the trial court should have entered judgment against Avondale. Avondale answered the appeal asserting that Brunet could not sue Avondale in tort because his cancer was a covered occupational disease under La. R.S. 23:1031.1 as it read during the time of his employment at Avondale.

La. R.S. 23:1031.1 prior to 1976 provided that employees who contracted occupational diseases would be covered by worker's compensation. However, La. R.S. 23:1031.1 defined occupational diseases as including only diseases listed in the statute. The first category of diseases included disease resulting from certain listed substances -- asbestos was not explicitly named. The remaining diseases listed in the statute included asbestosis, but not other potentially asbestos-related diseases such as Brunet's lung cancer.

Avondale successfully argued that asbestos was both an oxygen compound and a metal compound, substances listed within the statute. Avondale supported this contention with expert testimony and evidence. The Fifth Circuit found that in the event a disease is not specifically listed in 23:1031.1 (e.g., lung cancer) a court must still inquire as to whether the pathogen is listed, and if the pathogen is not specifically listed, whether the substance falls within a subcategory such as compounds of listed elements and metals. The Fifth Circuit also found it persuasive that asbestosis was a specifically listed disease, indicating that the legislature did intend to include substances such as asbestos in categories such as oxygen and metal compounds. "[I]t is not logical that the legislature intended to provide coverage for only some of the workers made sick from asbestos exposure, and not others."

The Fifth Circuit devoted a substantial portion of its opinion to a meticulous explanation of the grounds for its disagreement with the Fourth Circuit case of Gautreaux and the First Circuit case of Thomas, both of which currently allow employees to sue their employers in tort for asbestos-related cancers caused by pre-1976 exposure. Brunet's case contrasts sharply with Gautreaux and Thomas, creating a clear split among the circuits which will have to be resolved by the Louisiana Supreme Court at some point in the future.

- Madeleine Fischer

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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