Jones Walker E*Zine

Products Liability
November 2002 Vol. 22

IN THIS ISSUE:

5th Circuit Holds Class Action Attorney's Fees Are Part Of Jurisdictional Amount

Grant v.Chevron Phillips Chemical Co.,
--- F.3d --- (5th Cir. 2002)

In *Grant v. Chevron Phillips Chemical Company,* a panel of the United States Fifth Circuit of Appeals held that attorney's fees allowed to class representatives pursuant to Louisiana state law can be included in calculating the requisite amount in controversy to determine the existence of diversity jurisdiction. While not a products liability case, this holding will have important ramifications down the road for federal jurisdiction over Louisiana class actions.

On the day following an industrial accident at a chemical plant operated by Chevron in St. James Parish, attorneys filed a class action in state court. The plaintiffs alleged that the claim of each individual plaintiff was less than $74,999. Nonetheless, Chevron removed the case to the Eastern District of Louisiana asserting that diversity jurisdiction existed because the amount in controversy exceeded the jurisdictional limit of $75,000. The district court denied a motion to remand, relying on a prior Fifth Circuit decision, *In re Abbott Laboratories,* 51 F.3d 524 (5th Cir. 1995), that held that the potential for an award of attorney's fees under a specific Louisiana statute should be included by the district court in determining the amount in controversy.

Relying on its prior holding in *Abbott* that when calculating the amount in controversy, all awardable attorney's fees must be attributed to the class representatives to the exclusion of the other members of the class, the Fifth Circuit affirmed the refusal to remand the case. In so holding, the court found that Louisiana Code of Civil Procedure article 595(A), which allows the "representative parties reasonable expenses of litigation, including attorney's fees, when as a result of the class action a fund is made available, or recovery or compromise is had which is beneficial, to the class," is a default provision in Louisiana law which functions to ensure that class representatives will "enjoy the possibility of recovering attorney's fees and other expenses of litigation, even if such recovery should come not from the defendant but from the individual recoveries of the other class members." The plaintiffs had argued that *Abbott* was not controlling because *Abbott* dealt with a specific statute allowing attorney's fees based on the cause of action. The Fifth Circuit did not agree with this distinction, stating that for purposes of determining diversity jurisdiction the source of the grant of attorney's fees is immaterial so long as they are allowable by the court and attributable to the class representatives. Thus, the calculation of an anticipated recovery of the class representatives must include potential attorney's fees in addition to damages. By this calculation, the district court did not err in concluding the amount in controversy exceeded $75,000.

- *L. Etienne Balart*

back to top

Tortfeasor Can Assert Malpractice of Health Care Provider as an Affirmative Defense

Dumas v. State ex rel. Dept. of Culture, Recreation & Tourism,
2002-0563 (La. 10/15/02), --- So.2d ----

The longstanding rule in Louisiana has been that original tortfeasor is also liable for his victim's injuries caused by negligent medical treatment if such medical treatment arose out of the incident. The two leading cases setting forth that rule are *Weber v Charity Hosp. of La. at New Orleans,* 475 So. 2d 1047 (La. 1985), and *Lambert v U. S. F. & G. Co.,* 629 So. 2d 328 (La. 1993), both decided prior to the 1996 amendments to Civil Code articles 2323 and 2324(B).

The noted case, *Dumas v. State,* arose out of an accident that occurred only 6 days after the effective date of the 1996 amendments. The defendant asserted that the victim's death was the result of subsequent medical malpractice at the hospital where the plaintiff was sent after the accident. Relying on *Weber* and *Lambert,* the trial court granted plaintiff's motion to strike the defendant's allegations of the medical provider's fault, ruling that the initial tortfeasor was legally responsible for any subsequent medical malpractice. The Second Circuit Court of Appeal granted writs and affirmed.

In reversing both lower courts, the Louisianan Supreme Court, per Justice Kimball, concluded that the rationale behind the *Weber* and *Lambert* cases (that innocent victims receive full compensation) did not survive the 1996 amendments to Civil Code articles 2323 and 2324(B) and that the plain and clear language of articles 2323 and 2324(B) allow the defendant to use as a defense the fault of any party, including the subsequent negligence of a health care provider. "The policies upon which *Weber* and *Lambert* were based have simply been changed by the legislature.... [We] cannot allow the policy-based rule of *Weber* and *Lambert* to prevent the [defendant] from presenting a defense to which it is clearly entitled under the amendments to La. C.C. 2323 and 2324(B).... If the fact finder concludes that plaintiff's damages were caused by more than one person, then each joint tortfeasor is only liable for his degree of fault and cannot be held solidarily liable with another tortfeasor for damages attributable to that other tortfeasor's fault."

Based on this decision, a defendant in any accident arising after the effective date of the 1996 amendments (April15, 1996) can assert the fault of third parties, including the fault of a health care provider. As such a defense is an affirmative defense, it must be timely asserted in the answer or supplemental answers. So, for example, if after a case is proceeding defendant learns of unnecessary surgery or excessive treatment, that defendant must amend its answer to assert the improper treatment.

- Robert L. Walsh

back to top

Tractor Defect Can't Be Inferred When Other Reasonable Explanations for Fatal Accident Exist

Marks v. Dupre Transport, Inc.,
2002 WL 31319940 (E.D.La. 10/15/02)

Judge Berrigan of Louisiana's Eastern District has dismissed a wrongful death claim against a tractor manufacturer when plaintiffs' counsel had no proof of any defect in the tractor at the time it left the manufacturer's control.

Plaintiffs argued that a defect in the tractor could be inferred from the fact that two of the decedent's co-workers had suffered other fatal accidents when driving the same type of tractor.

Plaintiffs admitted they could not identify a specific defect and had no expert testimony to support their case.

Judge Berrigan discussed plaintiffs' theory of *"res ipsa loquitur"* – an evidentiary doctrine permitting an inference of negligence in certain unusual circumstances when there is no other reasonable conclusion as to an accident's cause. She rejected application of *res ipsa loquitur* finding that the evidence did not support the required unusual circumstances. It was undisputed that the tractor involved was four to five years old and had been driven over 600,000 miles; and, there were many other possible causes of the accident, included driver error, loading error, or defects in the trailer or roadway.

Since plaintiffs had no affirmative proof of a defect, Judge Berrigan dismissed their case granting defendant's motion for summary judgment.

- Madeleine Fischer

back to top

Premises Owner Not Entitled to Indemnity from Work Light Manufacturer in Electrocution Case

Hesse v. Champ Service Line,
2002-0284 (La.App. 3 Cir. 10/2/02), ___ So.2d ___

Plaintiff, while employed by Goodyear, was injured by an electrical shock when he grabbed a vehicle's water pump after hanging a portable work light on its engine block. Plaintiff brought suit against the manufacturer and the distributor of the work light, Snap-On, as well as against his employer, Goodyear, and the lessor of the premises, Investors-Ryan. Goodyear and Investors-Ryan brought third-party claims against the work light manufacturer, alleging that if they were found strictly liable to plaintiff, then they were entitled to indemnity from the work light manufacturer. They argued that their liability for the premises would only be passive strict liability whereas the manufacturer's fault (which the court referred to several times as "negligence") would be active. After the manufacturer settled with the plaintiff, it moved for summary judgment on the indemnity claims of the co-defendants. The trial court granted summary judgment to Snap-On.

The Third Circuit Court of Appeal of Louisiana affirmed the trial court. The court noted that the products liability claim and the premises claims alleged two separate acts of negligence and/or strict liability. Though a party who is found strictly liable as the owner of an unreasonably dangerous structure may seek full indemnity from the party who caused the unreasonably dangerous condition, the court reasoned that here, Snap-On, who was sued in products liability for the allegedly defective work light, had resolved its product liability issues when it settled with the plaintiff. The allegations of faulty premises generally involved electrical problems which Snap-On could not have caused. The court thus dismissed the indemnity claim against Snap-On reserving the right of Investors-Ryan to seek indemnity from Goodyear, if Goodyear was found to have maintained the premises in a defective condition.

- Stacie M. Hollis

back to top

Eastern District Judge Dismisses All but Two Claims Against Pesticide Manufacturer

Barrettte v. Dow Agrosciences, LLC,

2002 WL 31365598 (E.D.La. 10/18/02)

Judge Zainey of the Eastern District reaffirmed the exclusivity of the Louisiana Products Liability Act as he dismissed multiple claims asserted against the manufacturer of a pesticide called Dursban. The plaintiff claimed that a variety of his physical symptoms were caused by exposure to Dursban – the most widely used pesticide in the United States until it was banned by the EPA in June of 2000.

The defendant asserted that the LPLA was the sole remedy available against a manufacturer for damages caused by its products. Judge Zainey agreed and dismissed most of the plaintiff's claims, including those for negligence, strict liability, fraud and misrepresentation, and breach of implied warranty. Plaintiff was allowed to proceed only with his claims under the Louisiana Products Liability Act and for economic damages in redhibition.

- Madeleine Fischer

back to top

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

To subscribe to other E*Zines, visit our Web site at http://www.joneswalker.com/news/ezine.asp.