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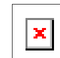

Products Liability
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Medical Monitoring Factors Must Converge Before 7/9/99; Crooks Vacated & Remanded

Crooks v. Metropolitan Life Ins. Co.,
01-03 (La. 5/25/01), ___ So.2d ___, 2001 WL 561250

In our March issue we reported on this case when the Third Circuit overturned a summary judgment for medical monitoring defendants and held that Act 989 of 1999 banning pure medical monitoring suits could not be applied to exposures before its effective date. *Crooks v. Metropolitan Life Ins. Co.,* 2000-0947 (La.App. 3 Cir. 1/18/01), 779 So.2d 966. In the noted case, the Louisiana Supreme Court vacates the Third Circuit's decision and remands for further evidence on the summary judgment. Since the Crooks case was filed three months after Act 989 took effect, when a defendant seeks summary judgment the plaintiff must submit evidence demonstrating that the seven prerequisites for a medical monitoring claim established in *Bourgeois v. A.P. Green Industries, Inc.,* 97-3188 (La. 7/8/98) 716 So.2d 355 converged before Act 989's effective date.

- Madeleine Fischer

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Mayor Morial's Hired Guns Shoot Blanks: Louisiana Supreme Court Rules City's Claims Against Gun Makers Retroactively Barred

Morial v. Smith & Wesson Corp.,
00-CA-1132 (La. 4/3/01), --- So.2d ----, 2001 WL 316267.

In 1998, Mayor Marc Morial and the City of New Orleans, represented by high profile plaintiff attorneys, sued various entities in the gun industry for the "economic harm" allegedly suffered by the City "related to the marketing, promotion, and sale of unreasonably dangerous firearms." In 1999, the Louisiana legislature enacted Act 291 (codified as La. R.S. 40:1799), which only allowed the state to bring lawsuits against manufacturers, dealers and trade associations for damages relating to the lawful design, manufacture, marketing or sale of firearms and ammunition. The legislature also passed Act 1299 of 1999 (codified as La. R.S. 9:2800.60) which stated that the Louisiana Products Liability Act was not intended "to impose liability on a manufacturer or seller for the improper use of a properly designed and manufactured product" and "that the manufacture and sale of firearms by duly licensed manufacturers and dealers is not unreasonably dangerous." Both acts specified that their provisions were to be applied to cases pending or filed after their respective effective dates.

Relying on the two acts, the firearm defendants filed exceptions of no cause of action and no

right of action in the trial court. In overruling the exceptions, the trial court found that the acts were unconstitutional attempts by the legislature to deprive the plaintiffs of vested property rights.

In the noted case the Louisiana Supreme Court ruled in favor of the firearm defendants, holding that the acts could be retroactively applied to bar the City's claims. First, the legislature expressly intended for the statute to be applied both retroactively and prospectively. Such retroactive application was constitutional as there was no violation of federal and state constitutional prohibitions against the impairment of contractual obligations or the disturbance of vested rights.

The City, as a political subdivision of the state, was not entitled to the protections afforded by the due process and contract clauses of the federal and state constitutions. Also, the City, as a political subdivision of the state, could not assert constitutional prohibitions against bills of attainder against the state. An indirect attempt to regulate the lawful design, manufacture, marketing and sale of firearms, the suit was an abridgment of the state's police power and thus was not protected by the Louisiana Constitution's home-rule clause.

As Act 291 applied to all political subdivisions and affected all such political subdivisions without granting privileges to some while denying them to others, Act 291 was not an unconstitutional local or special law.

- Robby Walsh

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Exposure, Contraction, Or Manifestation: When Does A Cause of Action Accrue?

Austin v. Abney Mills, Inc.,
34,495 (La.App. 2 Cir. 4/4/01), 2001 WL 322754
AND
Abadie v. Metropolitan Life Ins. Co.,
00-344 (La.App. 5 Cir. 3/28/01), 2001 WL 300774

Louisiana's intermediate appellate courts are split on when a cause of action accrues in long-latency occupational disease cases. Nationwide some courts hold that the cause of action accrues when the plaintiff is exposed to a hazardous substance which later results in disease; other courts hold that the cause of action does not accrue until the disease is actually contracted; still others find manifestation of the disease to be the critical date. Opposing views of the Second and Fifth Louisiana Circuits are well illustrated in the recent cases of *Austin v. Abney Mills, Inc.,* 34,495 (La.App. 2 Cir. 4/4/01), 2001 WL 322754 (rejected exposure test) and *Abadie v. Metropolitan Life Ins. Co.,* 00-344 (La.App. 5 Cir. 3/28/01), 2001 WL 300774 (adopted exposure test).

In *Abadie* some plaintiffs suffered from asbestosis, while others suffered from asbestos-related cancers. Plaintiffs sued, among others, their employer's executive officers. They contended their cause of action accrued at the time of exposure to asbestos, prior to the date in 1976 when negligence suits against executive officers were legislatively banned. The defendant executive officers argued that a cause of action did not accrue until plaintiffs contracted their respective diseases which occurred long after 1976 -- thus their claims were barred by the 1976 law.

The Fifth Circuit agreed with plaintiffs. The Court relied in part on *Cole v. Celotex,* 599 So.2d 1058 (La. 1992) in which the Supreme Court held that comparative negligence does not apply in cases in which "tortious exposures" occurred prior to the date of the comparative negligence law. Although the Louisiana Supreme Court recently limited *Cole* in *Walls v. American Optical Corp.,* 98-0455 (La. 9/8/99), 740 So.2d 1262, the Fifth Circuit seized upon one sentence out of the *Walls* opinion to uphold *Cole's* continuing application in long latency occupational disease cases: "*Cole* established the ‘exposure theory' for determining the applicable law within the context of the direct tort action and survival action." 740 So.2d at 1273.

The Fifth Circuit in *Abadie* adopted a "significant exposure" test, holding that "tortious exposures are significant when asbestos dust has so damaged the body that the fibrogenic effects of its inhalation will progress independently of further exposure." Plaintiffs have the burden of producing a preponderance of the evidence to show that pre-1976 exposure "was sufficient enough to begin the disease process...."

In *Austin v. Abney Mills,* 34, 495 (La.App. 2 Cir. 4/4/01), 2001 WL 322754 the Second Circuit took a different view and rejected the exposure test in the case of an asbestos-caused mesothelioma. Again, the issue of the date of accrual of a cause of action was important because the plaintiff had sued his employer's executive officers.

The Second Circuit stated that the critical question was whether plaintiff's cause of action vested prior to the dates of the applicable laws. In contrast to *Abadie,* the Second Circuit felt that *Walls* significantly limited *Cole,* and that *Cole* only applied to the unique language of the comparative negligence law. The court stated that Cole, while acknowledging the difficulties of pinpointing when damages occur in long-latency diseases, did not suspend the application of the general laws for determining the accrual of a cause of action. Fault, causation and damage must coincide for a cause of action to accrue.

Interestingly, the court freely acknowledged that empirical evidence suggests a continuous significant exposure has a high probability of causing damage and that it can be argued that a plaintiff may begin to sustain tissue damage shortly after the initial inhalation of asbestos fibers. Exposure is not, however, damage and the court noted that exposure does not automatically lead to damage. The court rejected the exposure theory holding that it fails to include the element of "damage" necessary for the accrual of a cause of action in negligence.

The court declined to choose between the remaining manifestation and contraction theories, since the *Austin* plaintiff had no proof to show that he either manifested or contracted mesothelioma prior to 1976. Plaintiff's medical expert testified that mesothelioma is typically caused by asbestos exposure twenty years earlier. The court found that this testimony linking exposure to plaintiff's disease was insufficient to show that plaintiff sustained an injury prior to 1976.

Interestingly, both *Abadie* and *Austin* relied upon an earlier Fourth Circuit case, *Faciane v. Southern Shipbuilding Corp.,* 446 So.2d 770 (La.App. 4 Cir. 1984). In *Faciane* the Fourth Circuit held that a cause of action for silicosis accrued when "the silica dust has so damaged and maimed the body that the fibrogenic effects of silica inhalation will progress independent of further exposure, [and, therefore,] a disease has been contracted. It is at this point and not before that the consequences of exposure to silica becomes inevitable and in our opinion, actionable."

The Fifth Circuit argued that its "significant exposure" theory was similar to the *Faciane* Fourth Circuit's "contraction" theory, stating:

> Similarly to the Fourth Circuit in *Faciane*, we hold that in order to establish when their cause of action accrued, *plaintiffs will have to show more than mere exposure to asbestos.* Plaintiffs will have to present evidence that the exposures were significant, and that the asbestos exposure started the disease process in their lungs. While the plaintiffs cannot document each and every exposure and the resulting consequence, expert testimony based on medical and scientific studies can establish whether the pre 1976 exposures were significant enough to produce injury.

(Emphasis added.)

The *Abadie* case adopted the "significant exposure" theory, but relied upon *Faciane* which used the "contraction" theory. *Austin* rejected the "exposure" theory and left us guessing as to whether the Second Circuit will ultimately adopt "contraction" or "manifestation". Given *Austin's* reliance on *Faciane,* are these courts saying the same thing but giving it different names? We will await review of this issue by the Louisiana Supreme Court for a final resolution of this question for the state of Louisiana.

Postscript: For those interested in previous treatments of this issue in the courts *see Pitre v. GAF Corp.,* 97 1024 (La.App. 1 Cir. 12/29/97), 705 So.2d 1149, *writ denied,* 98-0723 (La. 11/19/99)

(exposure); *Lebleu v. Southern Silica of Louisiana,* 554 So.2d 852 (La.App. 3 Cir. 1989), *writ denied,* 559 So.2d 489 (La. 1990) (discussing but not adopting contraction theory, authored by Judge Knoll, now on the Louisiana Supreme Court) and *Cole v. Celotex Corp.,* 588 So.2d 376 (La.App. 3 Cir. 1991), *affirmed on other grounds,* 599 So. 2d 1058 (La. 1992) (applying contraction theory without discussion); *Faciane v. Southern Shipbuilding Corp.,* 446 So.2d 770 (La.App. 4 Cir. 1984) and *Quick v. Murphy Oil Co.,* 446 So.2d 775, *writ denied,* 447 So.2d 1074 (La. 1984) (on rehearing) (both contraction). *See also Ducre v. Executive Officers of Halter Marine, Inc.,* 752 F.2d 976 (5th Cir. 1985) (discussing unsettled state of Louisiana law on this issue and concluding that further evidence was necessary at trial level to determine when damages were sustained). The Louisiana Supreme Court has yet to resolve this conflict. In fact it appears that they have thus far deliberately avoided deciding the issue. *See Owens v. Martin,* 449 So.2d 448, 452 at n. 5 (La. 1984) (referring to contraction as "the more realistic theory" but declining to formally adopt for lack of evidence in record as to whether contraction "can be established with sufficient legal certainty to hold that the cause of action arises at that time."); *Cole v. Celotex Corp.,* 599 So.2d 1058, 1064 at n. 16 (La. 1992) (the issue "is not directly before us"); *Walls v. American Optical Corp.,* 98-0455 (La. 9/8/99), 740 So.2d 1262, 1268 (critiquing the *Pitre* case which applied the exposure rule in reliance upon *Cole;* result of *Pitre* was correct but rationale was not).

- 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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