Jones Walker E*Zine

Products Liability
November 2003 Vol. 34

IN THIS ISSUE:

Fourth Circuit Holds Comparative Fault Not Applicable in Asbestos Death Case

Landry v. Avondale Industries, Inc.,
2003 WL 22245031 (La.App. 4 Cir. 9/17/03)

In a recent asbestos case, the Louisiana Fourth Circuit held that the Comparative Fault Act was not applicable to a wrongful death action when the death occurred after the effective date of the Act but the exposures to asbestos occurred before the effective date of the Act.

Raleigh Landry was employed by Avondale Industries from 1965 through 1967, and died of mesothelioma in November 2002. Suit was brought against his employer, various Avondale executive officers, and manufacturers and distributors of asbestos products.

The Comparative Fault Act instituted a system under which the fault of all responsible parties is quantified proportionately to the degree of each party's fault, and abolished the previous system of contributory negligence under which every party found at fault was automatically assigned an equal share of damages. The Act provides that, "The provisions of this act shall not apply to claims arising from events that occurred prior to the time this act becomes effective." The term "events" in the Act has been interpreted by the Louisiana Supreme Court to mean incidents of exposure. On a summary judgment motion from one of the defendants the trial court declared that the Comparative Fault Act applied to the wrongful death claim since Landry's death occurred after the effective date of the Act (August 1, 1980).

The Fourth Circuit reversed the trial court's summary judgment and held that contributory negligence, not comparative fault applied to the wrongful death claim because Landry's exposures to asbestos occurred before the effective date of the Comparative Fault Act. The Fourth Circuit distinguished the case of *Walls v. American Optical Corp.,* 98-0455 (La.9/8/99), 740 So.2d 1262 in which the Louisiana Supreme Court held that significant changes in Louisiana's Worker's Compensation Act in effect at the time of a worker's death, but not in effect at the time of his exposures, *did* apply to an asbestos wrongful death action. The Fourth Circuit found that the *Wall*s analysis could not be applied to the Comparative Fault Act because of the specific language in the Comparative Fault Act concerning its inapplicability to "events" (read: exposures) occurring before the effective date of the Act. In contrast the amendments to the Louisiana Worker's Compensation Act contained no such expression of legislative intent regarding retroactive or prospective application.

- Mary Mitchell Felton

back to top

Eastern District Maintains Jurisdiction over Metabolife Suit after Class Certification Is Denied

Kemp v. Metabolife International, Inc.,
2003 WL 22272186 (E.D. La. 10/1/03)

This case, originally filed as a class action in Louisiana state court but removed to federal court, was denied class action certification in January, 2003. Recently, plaintiffs filed a renewed motion to remand and defendants filed motions to sever and dismiss. District Judge Ginger Berrigan found that removal jurisdiction continued to exist, denied the motion to dismiss, but severed the claims of 302 plaintiffs.

A number of Louisiana residents who had used Metabolife 356, a weight-loss product alleged to have caused health problems, filed a class-action in Louisiana state court. The defendants removed the class action to federal court. The federal court denied class certification on January 25, 2003. At a subsequent status conference, the magistrate ordered the plaintiffs to dismiss, without prejudice, those claims that did not meet the $75,000 jurisdictional amount. Rather than dismiss these claims, plaintiffs filed a motion to remand, arguing that the court lacked subject matter jurisdiction in light of the Supreme Court's ruling in *Syngenta Crop Protection, Inc. v. Henson,* 537 U.S. 28 (2002). In *Syngenta,* the Court held that the All Writs Act, 28 U.S.C. § 1651(a) could not confer removal jurisdiction, and commented that removal jurisdiction and the statutory procedures for removal are strictly construed.

Judge Berrigan easily dismissed the argument that subject matter jurisdiction did not exist. At the time of removal all of the class representatives were residents of Louisiana, and the defendants were residents of California. With respect to the amount in controversy, only one class member is required to claim in excess of $75,000. *Free v. Abbott Laboratories, Inc.,* 176 F.3d 298 (5th Cir. 1995). Noting that Louisiana Code of Civil Procedure article 595(A) entitles the class representatives to recover attorneys' fees, Judge Berrigan opined that class actions filed in Louisiana state court would "virtually always be removable." Plaintiffs argued that *Syngenta* invalidated the Louisiana legislature's attempt to create subject matter jurisdiction. Judge Berrigan disagreed, concluding that article 595(A) is a matter of substantive law governing the amount recoverable by class representatives in a class action. Therefore, federal subject matter jurisdiction existed over all the individual plaintiffs' claims.

The fact that class certification had been denied made no difference, since once removal jurisdiction existed (judged by the state of affairs at the time of removal), subsequent events that reduced the jurisdictional amount did not affect the court's jurisdiction.

Judge Berrigan did grant the defendants' motion to sever the claims of 302 plaintiffs – those whose claims did not exceed $75,000 – on the ground that inclusion of all plaintiffs in a single trial would serve to confuse the jury.

- *Etienne L. Balart*

back to top

Deficient Evidence of Specific Causation Justifies Summary Judgment in Favor of Metabolife

Kemp v. Metabolife Int'l, Inc.,
2003 WL 22326560 (E.D. La. 10/7/03)

In this opinion Judge Berrigan dismissed three of the individual plaintiffs' Metabolife claims on summary judgment. (See immediately preceding article.)

Plaintiffs Vera Brooks, Alicia Price and David Brewer claimed that they suffered injury due to their use of the diet supplement Metabolife 356. Specifically they claimed that Metabolife violated the Louisiana Products Liability Act (LPLA) by failing to warn them of an unreasonably dangerous condition in the product, namely the presence of ephedra in Metabolife 356. Metabolife moved for summary judgment arguing that plaintiffs had failed to prove that Metabolife was the specific cause of their injuries, a showing required to prevail under LPLA.

Brooks, Price and Brewer first argued that summary judgment was improper on grounds that sale of Metabolife 356 violates the Louisiana Drug Dealer's Liability Act. The court rejected this argument, noting that while a violation of that statute could give rise to a claim of negligence *per se* under general tort law, it does not serve to establish causation under LPLA. Also, because Brooks, Price and Brewer had failed to plead a claim under the Louisiana Drug Dealer's Liability Act in their complaint, they could not recover on those grounds.

Next, Brooks, Price and Brewer argued that Metabolife was not entitled to summary judgment because plaintiffs had produced evidence showing: 1) that they took Metabolife 356, and 2) that people who take Metabolife 356 are more likely to suffer the types of injuries claimed by plaintiffs. The court also rejected this argument, finding that the evidence presented did not contradict Metabolife's assertion that Metabolife 356 had not specifically harmed Brooks, Price and Brewer.

Finally plaintiffs offered arguments as to why summary judgment was inappropriate for each plaintiff. The court rejected these arguments as well. Regarding Brooks, the court noted that her injuries began before her ingestion of Metabolife 356 and had never been linked to her ingestion of that product. Further, while evidence of Brooks' injuries was relevant to the issue of actual harm, it was not material to the issue of causation. Likewise, the court concluded that evidence of Price's injuries did not link those injures to her ingestion of Metabolife 356. Last, the court concluded that the evidence did not show a convincing link between Brewer's injuries and Metabolife 356. The only evidence purporting to link his injuries with the product, namely testimony from Price's physician that ephedra "could have" aggravated Price's heart condition, was no more than speculation insufficient to support a finding that Metabolife 356 caused the claimed injuries. Accordingly, Metabolife's motions for summary judgment were granted.

- *Diana A. Cross*

back to top

Hip Device Suit Stays in Federal Court Despite Plaintiff's Plans to Add Louisiana Defendants

Oiler v. Biomet Orthopedics, Inc.,
2003 WL 22174285 (E.D. La. 9/17/03)

In a recent case involving a hip replacement device, Louisiana Eastern District Judge Africk denied plaintiff's motion to remand, thereby precluding plaintiff from having his case returned to state court.

Plaintiff, husband of a deceased recipient of a hip replacement device, filed suit against the manufacturer of the device alleging that his wife's death was caused by various infections contracted from materials used in the prosthesis. Plaintiff initially filed the case in state court, but defendants, Biomet Orthopedics and Howmedica Osteonics Corporation had the case removed to the United States Eastern District on the basis of diversity. Biomet and Howmedica, were both foreign corporations, diverse in citizenship from the plaintiff. Although the plaintiff did not dispute the diversity of the named defendants, plaintiff stated that he "intended" to add non-diverse defendants to the action after the state Medical Review Panel process was completed. Under Louisiana law, the plaintiff was

barred from joining non-diverse health care providers in his suit prior to an administrative review of his medical malpractice claim.

Plaintiff proposed to amend his petition to state that a medical review panel had been convened and that at the conclusion of those proceedings he would join non-diverse health care providers. Plaintiff offered a copy of a letter to the Louisiana Commissioner of Administration requesting the medical review panel.

Judge Africk court acknowledged that a later amendment to the petition adding the health care providers could destroy diversity such that remand would be appropriate. However, the court found it improper to consider plaintiff's post-removal motion to amend. Plaintiff did not actually join the non-diverse health care providers, nor did he allege facts sufficient to support a cause of action against them. A possible future destruction of diversity is not a proper ground for a remand.

- *Mary Mitchell Felton*

back to top

Louisiana Fourth Circuit Affirms Plaintiff Verdict in Seat Belt Warning Case

Boutte v. Kelly,
2003 WL 22244932 (La.App. 4 Cir. 9/17/03)

The Fourth Circuit affirmed a jury verdict in the amount of $4,800,000 in favor of a plaintiff left with a severe closed head injury following an automobile accident. Plaintiff, Janet Williams, was riding in a 1982 Oldsmobile Cutlass Supreme, driven by her fiancé, Warres Boutte, when they were struck by a New Orleans police tow truck. Plaintiff sued the City of New Orleans for the negligence of the tow-truck driver and General Motors Corporation ("GM"), alleging the design of the seat belt restraint system – which allegedly could become inadvertently slack – allowed her body to move freely during the crash, causing her to strike her head.

The trial was bifurcated, with the judge determining the City's liability, and a jury determining the private parties' fault. The jury rendered a verdict in the amount of $4,800,000, finding the City forty percent at fault, the driver of the car, Mr. Boutte, forty percent at fault, and GM twenty percent at fault due to an inadequate warning for the seat belt. The trial judge, not bound by the jury verdict as to the City, found the City free from fault. The trial judge redistributed the fault half to Mr. Boutte and half to GM.

On appeal, GM assigned a number of errors, including that plaintiff's damages were not caused by an inadequate warning; the jury was improperly charged with incorrect law that reduced plaintiff's burden on crucial issues and shifted the burden of proof to GM on other issues; and the trial court should have granted a mistrial or new trial due to a prejudicial statement made by plaintiff's lawyer. Plaintiff appealed, alleging the jury erred in failing to find the GM seat belt system unreasonably dangerous in design.

In affirming, the Fourth Circuit held that assuming a warning is proven inadequate, a presumption arises that the plaintiff would have read and heeded an adequate warning.

The Fourth Circuit agreed with GM that the following jury charges were incorrect and should not have been given by the trial court:

> 1) that GM had the burden of proving the comfort feature on Ms. Williams' seat belt was in the same condition on the night of the accident as it was ten years before when it left GM;

2) that GM had the burden to prove that the slack was unreasonably excessive;

3) that the duty to warn encompasses dangers that accompany “normal use” rather than “reasonably anticipated use” of the product; and

4) that warnings must be expressed with an intensity that is proportionate with risk

However, the court found that the giving of each of these charges was harmless error and not cause for reversal.

The Fourth Circuit also felt that improper conduct of plaintiff’s counsel in aggressively questioning GM’s representative about an unrelated lawsuit at trial did not rise to the level of justifying a mistrial. In so holding, the Fourth Circuit relied upon the fact that the trial judge directed the jury to disregard the comment, and the trial had been lengthy.

Addressing plaintiff’s assignment of errors, the court affirmed the jury’s finding that the seat belt design was not unreasonably dangerous in design. Although plaintiff provided testimony that alternative designs existed, the evidence demonstrated that over 100,000,000 cars or trucks produced over a decade had the “comfort feature” for the restraint system. Further, the “comfort feature” was used to encourage people to wear the belts before seat belts were mandatory. Accordingly, the jury’s finding of no design defect was affirmed.

- *Stacie M. Hollis*

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.