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IN THIS ISSUE:

- LA Supreme Court Addresses Increased Risk, Fear, Punitives and Stigma Claims in Asbestos Case
- $3M Verdict Affirmed With Broad Asbestos Causation Analysis
- Plaintiff Amends Products Pleadings to Add Other Theories Avoiding Federal Jurisdiction
- Louisiana Second Circuit Affirms Expert Engineer Qualified by Education and Experience

LA Supreme Court Addresses Increased Risk, Fear, Punitives and Stigma Claims in Asbestos Case

Bonnette v. Conoco, Inc.,
01-C-2767 (La. 1/28/02), ___ So. 2d ___

The Louisiana Supreme Court provides needed guidance in the area of "intangible damages" in this case which arises out of exposure to soil containing small amounts of asbestos. The opinion was written by Justice Kimball and was subscribed to by all other members of the court save Justice Johnson who provided the lone dissent and Justice Knoll who did not sit on the case.

Conoco arranged for the demolition of some abandoned houses on its property in order to make way for a new hydrocracker unit. Following demolition, contractors removed soil from the project site and sold it in turn to plaintiffs who spread the soil on their lawns. Eventually it was discovered that the soil contained pieces of asbestos-containing transite from the demolition debris. Upon learning about the problem Conoco set up a hotline and offered to remediate lawns containing the soil.

143 individuals sued Conoco, and trial was held for four families whose lawns had been remediated. No person had sustained an immediate physical injury. Instead plaintiffs sought recovery for their claimed increased risk of contracting asbestos-related diseases in the future and fear of such diseases. Plaintiffs also asked for damages due to the alleged devaluation of their remediated properties. Last, plaintiffs asked for punitive damages.

The trial court awarded damages in all categories and the Third Circuit Court of Appeal affirmed. The Third Circuit's opinion was previously noted in the November 2001 issue of this e-zine (3RD CIR. TREATS PUNITIVES & INTANGIBLES: FEAR, RISK & STIGMA OF ASBESTOS EXPOSURE). At that time we remarked, "The Third Circuit seems intent on expanding the boundaries of recoverable damages and lessening standards of proof required to collect." We expressed the hope, for the most part realized in this decision, that the Louisiana Supreme Court would review the case and take the opportunity to bring Louisiana law back into line with jurisprudence on these issues in other jurisdictions.

Increased risk of future injury. The Supreme Court accepted the trial court's finding "that plaintiffs were exposed to an asbestos fiber count that slightly exceeded that of normal ambient air and that it is more probable than not that plaintiffs have suffered a slightly increased risk of developing an asbestos-related disease." However the Supreme Court found that this proof was insufficient to entitle plaintiffs to damages for increased risk.

The Court approached the issue in the context of its landmark decision in *Bourgeois v. A.P. Green Industries, Inc.,* 97-3188 (La. 7/8/98), 716 So.2d 355 – the case in which it recognized a cause of action for medical monitoring in absence of a present manifest physical injury. Having established a seven part test for medical monitoring recovery in *Bourgeois,* the Court here declared that "it would be

nonsensical to allow a plaintiff to recover compensatory damages for an increased risk of developing an asbestos-related disease upon less proof than that required for recovery of medical monitoring expenses." While the Court did not affirmatively state the test that it would apply in future increased risk cases, it cited the majority view that when occurrence of future injury is "speculative" or "merely possible", there can be no compensation for increased risk. Based upon the court's discussion of *Bourgeois* we can also assume that the criteria for establishing a compensable increased future risk will be no lower than the *Bourgeois* criteria and may well be higher.

Fear of future disease. The court also reversed the award for fear of contracting an asbestos-related disease. The Court finally addressed and disposed of a problematic 1974 case in which it had found that a fear of cancer was compensable even though the possibility of contracting cancer was minimal. The court distinguished that case, *Anderson v. Welding Testing Laboratory, Inc.,* 304 So.2d 351 (La. 1974), on the ground that the fear there accompanied a manifest physical injury.

In case of a fear claim due to mere exposure without physical injury, the Court stated it would apply the rule of *Moresi v. State, Dept. of Wildlife & Fisheries,* 567 So.2d 1081 (La. 1990): the plaintiff must prove his claim is "not spurious by showing a particular likelihood of genuine and serious mental distress arising from special circumstances." Noting that there are particular problems in awarding mental distress damages where a plaintiff is exposed to asbestos, the Court held that the *Moresi* rule "must be stringently applied in asbestos cases due to their inherently speculative nature."

The Court cited cases from the U.S. Supreme Court and the Texas Supreme Court for the propositions that contacts with serious carcinogens are common in modern life; the evaluation of whether emotional problems are reasonable and serious is difficult; and suits for mental anguish that has not resulted from physical disease compete for resources with suits for current physical injuries. Interestingly, the Court once again drew medical monitoring into the analysis by relying on *Metro-North Commuter Railroad Co. v. Buckley,* 521 U.S. 424, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997), a case in which the United States Supreme Court refused to recognize a cause of action for monetary damages for asbestos medical monitoring under FELA.

The Court concluded by finding that neither the plaintiffs' generalized fear of contracting an asbestos-related disease nor their visits to a psychiatrist arranged by counsel in anticipation of trial demonstrated genuine and serious mental distress caused by the placement of asbestos-containing soil on their properties.

Punitive damages. The Court also reversed the award of punitive damages. The Court applied a *de novo* standard of review of punitive damages. Reviewing the evidence the Court found that while some of Conoco's actions left "much to be desired", Conoco did not violate DEQ regulations. "Because Conoco acted in compliance with DEQ regulations ... we cannot say that defendant's conduct was highly unreasonable or that it involved an extreme departure from ordinary care."

Stigma. After such a thoughtful analysis of these emerging issues of intangible damages, the final portion of the Court's opinion on property damages due to "stigma" comes as a disappointment. The Court affirmed an award of 10% property devaluation on the basis of the testimony of plaintiff's real estate appraisal expert. The expert termed the 10% diminution in value a "stigma adjustment" which he assessed even though he assumed as a predicate for his opinion that *all asbestos fibers had been cleaned from the properties.* He argued that even though the properties were remediated, potential buyers would be concerned because "the word 'asbestos' is frightening to people."

The Supreme Court found that the trial court's credibility call – accepting the testimony of plaintiffs' real estate appraiser and rejecting that of defendants' expert – was determinative and affirmed the property damage award. In so doing, the Supreme Court side-stepped the policy issue of whether "stigma" is compensable in the first place, and if so, under what circumstances. For example, should property owners be permitted stigma damages due to the existence of an adjoining hazardous waste facility – even when the facility is properly licensed and safely operated – merely because potential buyers might be less likely to buy in the area?

The Court's handling of the stigma claim is at odds with its analysis of the increased risk and fear claims. In the context of increased risk and fear in absence of current physical injury, the court essentially cautioned against giving in to asbestos hysteria in absence of hard evidence of significant risk and specific reasonable fear. Yet in the property damage arena, the Court allowed an award based upon public perception of a hazard which did not in fact exist in the remediated properties.

Conclusion. In sum, this important opinion by the Louisiana Supreme Court sets limits for

recovery of increased risk and fear damages when the plaintiff has been exposed to a hazardous substance but has sustained no physical injury. The case also affirms a *de novo* review standard for awards of punitive damages and suggests that they should not be awarded when no regulation has been violated. However, the portion of the opinion on stigma lends legitimacy to a heretofore uncertain cause of action and opens a Pandora's box for future litigation.

- Madeleine Fischer

back to top

$3M Verdict Affirmed With Broad Asbestos Causation Analysis

Hennegan v. Cooper/T.Smith Stevedoring Co.,
No. 2002-0282 (La. App. 4 Cir. 12/30/02), ___ So.2d ___

The Louisiana Fourth Circuit Court of Appeal recently affirmed a $3,000,000+ verdict in this asbestos maritime products liability case. In this wrongful death action, the plaintiff claimed that her late husband contracted, and later died from, mesothelioma caused by exposure to asbestos during his work as a seaman/deckhand. Plaintiff sued numerous asbestos manufacturers. After several dismissals and settlements, Garlock, Inc., was the only defendant left to face trial. Garlock appealed the verdict primarily on the ground that plaintiff failed to prove that the decedent was exposed to asbestos from Garlock products or that any such exposure was a substantial factor in causing his disease. The Fourth Circuit, however, disagreed and used broad standards to find sufficient causation to affirm the verdict against Garlock. The appellate court held that Hennegan's "small exposure" to friable asbestos fibers from Garlock product was sufficient to constitute a "substantial factor" in causing his mesothelioma over time.

The *Hennegan* decision also includes an important holding on solidary liability. Garlock contended that the trial court erred in holding it liable for all of Plaintiff's damages and failing to apportion an appropriate share of fault to the remaining defendants. The appellate court disagreed and held that, under maritime law, a tortfeasor can be held liable for more than its degree of fault. The trial court had found Garlock liable for all of Plaintiff's damages, but only reduced Plaintiff's recovery by the 20% of fault attributed to Cooper/T.Smith, the settling defendant. The solidary obligation thus puts the risk of the inability to collect from joint tortfeasors (e.g., bankrupt parties) with the defendant. As a result, a trial judgment against a non-settling defendant in a maritime products liability case may include any fault attributable to immune or absent parties.

- Judith V. Windhorst

back to top

Plaintiff Amends Products Pleadings to Add Other Theories Avoiding Federal Jurisdiction

Jade Marine, Inc. v. Detroit Diesel Corp.,
2002 WL 31886726 (E.D.La. 12/20/02)

Plaintiff, Jade Marine, Inc., bought engines for its vessel from Stewart & Stevenson Services, Inc. ("S&S"), on the recommendation of Marquette, an S&S salesman. The engines were manufactured by Detroit Diesel Corp. The engines allegedly wore out quickly once the vessel was put to sea. Plaintiff filed suit in state court against Detroit Diesel, S&S, and Marquette. The state court dismissed the

claims against Marquette, and the remaining defendants removed the case based on diversity. Plaintiff sought to amend its complaint to assert a claim for intentional fraudulent misrepresentation against the defendants and against Marquette, a Louisiana resident. Plaintiff was a Louisiana resident, and the amendment would defeat diversity.

In its determination of whether to allow the amendment, the court held that the cause of action asserted against Marquette concerned a common question of fact with plaintiff's claims against S&S and Detroit Diesel. Joinder therefore was permissible under Fed. R. Civ. Pro. 20. The court further held that although the case involved products liability claims, the case also concerned whether the defendants, including Marquette, represented to Jade that the engines would meet the plaintiff's particular needs and specifications despite defendants' knowledge that defects and problems with the engines might prevent them from doing so. The court also held that plaintiff would be injured by having to fight a two-front war – this suit in federal court and the state court suit against Marquette. The court allowed the amendment.

Of interest is the court's characterization that this case against defendants, including Detroit Diesel, concerns not only products liability claims, but also whether defendants knowingly misrepresented the characteristics of the engines. Indeed, it appears that the court is allowing plaintiff to amend to assert claims for intentional fraudulent misrepresentation against all defendants. This suggests that the court is allowing plaintiff to bring claims outside of the Louisiana Products Liability Act, which was enacted to provide the exclusive theory of liability against manufacturers for damage caused by their products, with the exception of redhibition.

- Stacie M. Hollis

back to top

Louisiana Second Circuit Affirms Expert Engineer Qualified by Education and Experience

Solito v. Horseshoe Entertainment,
36,667(La. App. 2 Cir. 12/18/02), ___ So. 2d ___

Affirming a district court's admission of expert testimony, the Second Circuit demonstrates that it continues to give trial courts broad latitude in ruling on expert testimony particularly in bench trial settings.

Alicia Solito tripped and fell on a temporary concrete walkway linking Horseshoe's parking garage to its hotel. She sued the hotel for her injuries, alleging that the walkway presented an unreasonable risk of danger. At trial, she introduced the testimony of an engineering expert to explain the danger posed by the peculiar construction of the walkway. Horseshoe moved to exclude the testimony on the ground that it failed to comply with article 702 of the Louisiana Code of Evidence and did not satisfy the *Daubert* criteria. Specifically, Horseshoe argued that the expert was not qualified by experience, training or education, and that the methodology used by the expert was unsound. The trial court disagreed and the Second Circuit affirmed.

The Second Circuit opined that the expert's assessment of the unique makeshift walkway could be of some value to the trier of fact. Furthermore, the Second Circuit stated that even had the trial court improperly admitted the expert evidence, reversal was unwarranted under the abuse-of-discretion standard of review and the harmless error analysis. It ruled that in a bench trial "reversal is only warranted if all of the competent evidence is insufficient to support the judgment, or if it affirmatively appears that the incompetent evidence induced the [trial] court to make an essential finding which it otherwise would not have made."

- Andrew M. Obi

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:

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