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Products Liability
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LPLA Claims Against Pharmacists in Propulsid Drug Litigation Dismissed

In re: Propulsid Products Liability Litigation,
2002 WL 1446714 (E.D. La. 7/2/02)

As discussed in our July, 2002 issue, this multi district litigation involves various tort and product liability claims arising from the prescription heartburn drug Propulsid. Last month's article reported that Judge Fallon had denied certification of a national class action. In Judge Fallon's latest decision, he narrowed the claims against the pharmacy defendants.

The plaintiffs in *Yvonne Adams, et al v. Forshag's Drug Store, Inc., et al* filed suit against the manufacturer of Propulsid, Johnson & Johnson Co., as well as certain Louisiana pharmacies in Louisiana state court in Washington Parish. The action was removed to federal court on the basis of diversity jurisdiction and was subsequently consolidated with the instant multi district litigation.

The *Adams* plaintiffs contend that the pharmacies that dispensed their Propulsid prescriptions: (1) offered objective, professional opinions and advice to physicians, and intentionally and/or negligently misrepresented the effects and side-effects of the drug, and (2) breached an implied warranty that the drug was reasonably safe for the purpose for which it was intended when they sold the drug. Defendant Forshag's Drug Store, Inc. filed a motion to dismiss on the grounds that Plaintiffs failed to state a claim against them upon which relief could be granted.

Judge Fallon found that, since the pharmacy did not manufacture the drug, or have any input into or control over the design of the drug, "the criteria under which a seller may be treated as a manufacturer according to the LPLA" were not satisfied in this case. *In re: Propulsid Products Liability Litigation,* 2002 WL 1446714 at *2. Accordingly, Plaintiffs' LPLA claim was dismissed. However, because the court is required to accept all of the plaintiffs' allegations as true when deciding a motion to dismiss, the judge could not grant the motion on the intentional and/or negligent misrepresentation claims, which he held could give rise to liability under the Civil Code articles on redhibition. *Id.* at *3. Nonetheless, the defendant pharmacy can derive some comfort from the court's statement that Plaintiffs may "encounter a significant challenge in sustaining a subsequent motion for summary judgment" on the remaining claims. *Id.*

- Meredith Prechter Young

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Seat Belt Installed in Powered Parachute Not in Reasonably Anticipated Use

Sturlese v. Six Chuter, Inc.,
2001-1634 (La. App. 3 Cir. 6/26/02), ___ So.2d ___

Plaintiff sustained spinal injuries resulting in paralysis to his lower body when he fell from a powered parachute, known as an Aerochute. Plaintiff alleged his fall was caused by a failure in the seatbelt installed in the Aerochute. According to plaintiff, as he was trying to gain altitude, the parachute became ensnared in a tree, and the Aerochute came to a jarring halt. The Plaintiff contended that the sudden halt caused the seatbelt to fail due to a condition referred to as inertial release, which depressed the button on the seatbelt. Plaintiff filed suit against Six Chuter, Inc., the manufacturer of the Aerochute; James McInnis, the owner of the Aerochute; LaVanture Products Company, the distributor of the seatbelts; and Allied Signal, the seatbelt manufacturer.

The jury found Honeywell International (successor to Allied Signal, the seatbelt manufacturer), solely liable for plaintiff's injuries. Honeywell moved for a JNOV, claiming plaintiff failed to prove his injuries arose from a "reasonably anticipated use" of the seatbelt as required under the Louisiana Products Liability Act. The trial court granted Honeywell's JNOV. The court found that the use of the seatbelt in the Aerochute was not a "reasonably anticipated use." The court reasoned that different types of seatbelts are used in aircrafts than in cars; seatbelts in aircrafts require a lift-lever for release in contrast to seatbelts in cars, which have a button release. The trial court held that the plaintiff failed to show that the seatbelt manufacturer knew or should have known that its seatbelt would end up in an aircraft such as the Aerochute. Plaintiff appealed.

The court of appeal found that, due to the inertial release of the seatbelt, the seatbelt was unreasonably dangerous. The court noted, however, that under the LPLA, the manufacturer of an unreasonably dangerous product will not be held liable if the damage does not arise from a "reasonably anticipated use" of the product. The court of appeal agreed with the trial court and found that the button-released seatbelt was not the type of seatbelt designed for aircrafts. In support of this, the court noted the label on the seatbelt, which indicated it was manufactured in compliance with Federal Motor Vehicle Safety Standards. Further, Allied sold its belts to LaVanture, who features the seatbelt on a page in its catalog captioned "Belt Assemblies [-] Van, Truck, Recreational Vehicles," along with other descriptions suggesting the belt was meant for use in cars. The court held that, despite the fact that the seatbelt was being used as a seatbelt, it was not being used as an automotive seatbelt.

Additionally, the court found that the plaintiff did not produce evidence that the manufacturer should have anticipated the seatbelt would be used in the Aerochute. Allied sold the product to LaVanture which marketed the belt for cars, vans, and recreational vehicles. LaVanture never asked Allied whether the belt could be used in the Aerochute.

Finally, the court also found that the belt, which was originally sixty inches long, had about two feet of length removed from it. This resulted in a different placement of the belt on the body of the occupant, not anticipated by the manufacturer. Based on these reasons, the court held that the use of the seatbelt in the Aerochute was not a "reasonably anticipated use."

– Stacie M. Hollis

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Third Circuit Affirms Application Of General Maritime Law To Products Claim

Bertrand v. Air Logistics, Inc.,
2001-1655 (La.App. 3 Cir. 6/19/02), ___ So.2d ___

Steven Bertrand worked as a drilling supervisor for Coastal Oil and Gas Corporation, a job that

required him to travel among several fixed platforms in the Gulf of Mexico. On November 1, 1997, Bertrand was a passenger in a helicopter operated by Air Logistics, Inc. The helicopter experienced a loss of power, but the pilot completed a successful auto-rotated landing in the Gulf. Bertrand claimed to have injured his back while escaping from the helicopter into a life raft. A doctor eventually performed a surgery to repair a herniated disc in Bertrand's lumbar spine. Bertrand also claimed to have suffered depression and post-traumatic stress disorder as a result of the accident. He committed suicide on September 30, 1999, during the pendency of his lawsuit.

What began as an action by Bertrand against the helicopter's operator and the manufacturer of the engine was transformed into a survival action and wrongful death claim by Bertrand's wife and two children. Prior to trial, the court granted summary judgment to the defendants dismissing the claim for wrongful death. The remainder of the case proceeded to trial, and a jury awarded the plaintiffs damages in the amount of $400,000.00 for Bertrand's physical and mental suffering prior to death. All parties appealed on a number of assignments of error. The plaintiffs appealed the trial court's dismissal of the wrongful death portion of the claim. The defendants appealed, *inter alia,* the trial court's application of general maritime law rather than the Louisiana Products Liability Act ("LPLA") and the giving of jury instructions based on the Restatement (Second) of Torts.

The plaintiffs unsuccessfully sought to reverse the trial court's dismissal of the wrongful death claim. The Third Circuit affirmed the trial court's grant of summary judgment agreeing with the trial court that Bertrand's decision to commit suicide was a superseding and intervening cause for which the defendants could not be held liable. Bertrand left a detailed suicide note which the court -- in an admittedly difficult analysis -- concluded showed a rational state of mind. The court essentially found as a matter of law that Bertrand decided to commit suicide not in the throes of a psychotic episode or momentary insanity, but in a planned and deliberate manner. That Bertrand knew what he was doing when he committed suicide constituted a superseding cause.

On the choice-of-law issue, the court of appeal affirmed the trial court's application of general maritime law, finding no error in not instructing the jury on the LPLA. The engine manufacturer-defendant argued that *Green v. Industrial Helicopter,* 593 So.2d 634 (La. 1992), was controlling. In *Green,* the Louisiana Supreme Court applied Louisiana Civil Code article 2317 to the claims of a worker allegedly injured in the crash of a helicopter 150 miles off of the Louisiana shore. The Supreme Court held that "[s]tate law and regulations may also supplement federal maritime law when there is no conflict between the two systems of law, and the need for uniformity of decision does not bar state action", and that a Louisiana state court should respect Louisiana law unless there is some federal impediment to application of that law. Using *Green* as a springboard, the engine manufacturer-defendant argued that the trial court's utilization of the Restatement (Second) of Torts on the products liability issue resulted in the reading of "six legal pages of potentially confusing language, whereas the plain language of the LPLA would have properly instructed the jury."

The Third Circuit found that the defendant did not show any prejudice in the use of general maritime law as a basis for jury instructions. The court noted that the defendant did not identify any conflicts between the Restatement and the LPLA as they pertained to the case. Thus, the court dismissed this assignment as without merit.

This decision does not in any way limit the holding of the Louisiana Supreme Court in *Green* with respect to the interplay between Louisiana law and general maritime law. In fact, recognizing that the LPLA is essentially consistent with the principles of product liability law as found in the Restatement (Second) of Torts, federal courts have concluded that application of the LPLA to a claim subject to admiralty jurisdiction, and consequently the general maritime law, is warranted unless that law conflicts with the Restatement principles. *See, e.g. Transco Syndicate #1 v. Bollinger Shipyards,* 1 F.Supp.2d 608 (E.D. La. 1998). Unable to cite conflicts between the Restatement principles and the LPLA, the engine manufacturer-defendant's argument that the jury was misled failed to convince the Third Circuit.

- Etienne Balart

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Breast Implant Claim Dismissed in Middle District

Hinson v. Mentor Corporation, Inc.,

___ F.Supp.2d ___ (M.D. La. 6/7/02)

Judge Parker of the U.S. District Court for the Middle District of Louisiana has dismissed a breast implant products liability claim, finding that the mere fact that a breast implant ruptures or deflates does not establish that the implant is defective.

Plaintiff had breast augmentation surgery in 1992, at which time she was implanted with two Mentor breast prostheses. In 1996 the left implant was replaced with another Mentor prosthesis. In 2000 both implants were removed. At that time one of the implants was found to be intact while the other was deflated.

The court found that plaintiff's claim arising from the right implant was barred by a court-approved settlement of a class action by Mentor in 1993. That settlement covered all claims arising from implantations prior to June 1, 1993. Plaintiff's right prosthesis had been implanted in 1992 and thus was included in the settlement.

As for the left implant which was put in place in 1996, the court found that the plaintiff had failed to come forward with any evidence to show that the implant was defective. Under Louisiana law, mere proof that an injury occurred does not permit an inference that a product was defective. Plaintiff failed to demonstrate that there was an alternative design which would have prevented her injuries or that the implant failed to meet Mentor's design specifications and performance standards.

- *Madeleine Fischer*

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