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U.S. Supreme Court Opens Door To More Litigation Against Pesticide Manufacturers

Bates v. Dow Agrosciences LLC,
504 U.S. ___ (4/27/05)

29 Texas peanut farmers sued Dow, the manufacturer of the pesticide"Strongarm", claiming the product severely damaged their crops. The federal district court dismissed plaintiffs' claims and the Fifth Circuit affirmed. These courts held that the peanut farmers were pre-empted from filing state law tort claims against Dow, because the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) provides the sole means of regulating labeling and packaging of pesticides. Since an unfavorable state law tort judgment would induce Dow to alter its product label, the courts resolved the conflict between state tort law and FIFRA in favor of Dow, holding that FIFRA was exclusive.

The majority of federal and state appellate courts have been in line with this reasoning for a number of years. However in *Bates,* the Supreme Court held that FIFRA does not pre-empt most state law claims against pesticide manufacturers.

Section 136v(b) of FIFRA says that states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." The Supreme Court held that section 136v(b) applies only to "requirements". For a state law to be preempted, it must be a requirement "for labeling or packaging" and must be "in addition to or different from" the requirements of FIFRA. The court held that an event such as a negative jury verdict against a pesticide manufacturer is not a "requirement". Rather, it is merely an event that may motivate an optional decision by the manufacturer to make some change in its product.

The Court found that in the main, section 136v(b) pre-empts competing state labeling standards as well as statutory or common law rules that would impose a labeling requirement that diverges from those set out in FIFRA. It does not pre-empt state rules that are consistent with FIFRA.

Given this reasoning, the Court revived the peanut farmers' claims on breach of express warranty, violation of the Texas Deceptive Trade Practices-Consumer Protection Act, strict liability (including defective design and defective manufacture), and negligent testing. As to the plaintiffs' claims sounding in fraud and negligent failure to warn, the Court remanded the case to the Fifth Circuit to determine whether Texas laws on these points conflicted with or were equivalent to FIFRA regulations. If the latter, these claims would be allowed as well.

With this decision, the Supreme Court has decisively opened the courthouse doors to a variety of state law tort litigation against pesticide manufacturers.

- Madeleine Fischer

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Unreasonably Dangerous Condition A Disputed Fact In Zip Line Accident

DeBrun v. Tumbleweeds Gymnastics, Inc.,
39,499 (La. App. 2 Cir. 4/6/05), ___ So.2d ___

While on a school outing to an indoor playground, the Fun Factory, eleven year old James de Brun fell from a device called a "zip line" and fractured his left arm and wrist. James' mother filed suit, alleging, among other things, that the zip line system was defective. A motion for summary judgment was filed by several of the defendants asserting that the plaintiffs lacked factual support for their claims that the zip line was unreasonably dangerous. The trial court agreed, and granted the motion. Plaintiffs appealed to the Louisiana Second Circuit Court of Appeal, which reversed the trial court's judgment, and remanded the case for further proceedings.

An important issue was whether or not there was padding underneath the zip line. Defendants' motion for summary judgment was accompanied by affidavits from Kaye Hightower, the owner of the Fun Factory, and Michael J. Frenzel, an expert safety professional. Both affidavits supported defendants' argument that there was nothing wrong with the zip line, James just landed wrong. Ms. Hightower stated that when James fell, the padding was in its proper place, and further the padding could not be rolled up. Mr. Frenzel stated that in his expert opinion, more probably than not, the accident occurred because the boy fell awkwardly on the padded surface.

Plaintiffs filed an opposition to the motion for summary judgment including James' deposition testimony that the padding was rolled up and he actually landed on the carpet. Plaintiffs' opposition was filed too late, a fact defendants argued on appeal. However, the Second Circuit reasoned that trial judges have the discretion to consider even untimely filed and served affidavits opposing summary judgment and upheld the trial judge's decision to consider the opposition.

Whether or not the padding was properly in place, the court reasoned, was an issue crucial to the resolution of the case. Therefore, the conflicting affidavits indicated a disputed issue of material fact. Summary judgment is not appropriate when there are unresolved issues of material fact. Accordingly, the court reversed the trial court's decision.

Of particular note is the fact that the Second Circuit refused to make a credibility determination with respect to the conflicting affidavits. That the defendants had two affidavits, one from an expert, while plaintiffs had only the word of an eleven year old child did not factor in to the decision. A party moving for summary judgment cannot argue that their evidence is "better" or "more credible" than the opposing party's evidence. Rather, the existence of conflicting evidence on the topic will render summary judgment an unsuitable resolution.

- Emily E. Eagan

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Maker Of Manufactured Home Dismissed For Lack Of Proof Of Defect

Daugherty v. Magnolia Estates of Vicksburg, Inc.,
39,587 (La. App. 2 Cir. 4/6/05), ___ So.2d ___

In this decision, the Louisiana Second Circuit Court of Appeal held that a manufacturer of a manufactured home was not liable for leveling problems caused by circumstances arising after the home was delivered to the plaintiff, but that genuine issues of material fact remained as to whether the

seller met its duty to warn about the additional construction of a porch to the home.

Daugherty purchased a manufactured home from Magnolia Estates of Vicksburg, Inc. The home was manufactured by Fleetwood Homes of Mississippi, Inc. Magnolia contracted with Barrett's Mobile Home Service to deliver and install the home. Two weeks after installation of the home, Daugherty hired a third party to construct a porch to run along one side of the home. Daugherty alleged that about three months after the porch was completed, he began having problems with the leveling of the home, specifically doors would not close or would jam. Daugherty further alleged that a few months after two attempts to re-level the home, cracks appeared in the walls and ceiling. Magnolia, through Barrett, attempted to re-level and repair the home, only after Daugherty agreed to detach the porch.

Daugherty sued Fleetwood, Magnolia and Barrett, alleging manufacturing defects in the home, faulty installation, and Magnolia's breach of the implied warranty of fitness. Magnolia asserted a cross-claim against Fleetwood for indemnity of any liability Magnolia might have for redhibition or for breach of the manufactured home warranty set forth in La. R.S. 51:911.25. Under the Uniform Standards Code of Manufactured Housing (the "USCMH"), La. R.S. 51:911.21, *et seq.,* a manufacturer and installer must warrant that the home was manufactured and installed in compliance with the Code. La. R.S. 51:911.21A(1)(2). This warranty is in addition to any other warranty available to the purchaser under any other law. La. R.S. 51:911.21C. The USCMH further provides that the manufacturer, retailer or installer shall not be liable for any defect in the manufactured home caused by improper setup or for defects in the work furnished by persons other than the manufacturer, retailer, or installer. La. R.S. 51:911.21A(3).

Magnolia and Fleetwood answered plaintiffs allegations maintaining that any problems with the home were caused by improper site selection or the addition of the porch in contravention of the manufacturer's owner's manual. The owner's manual recommended that a porch should be freestanding, and support rails should be used. Daugherty then amended his petition to state a products liability claim against Fleetwood, alleging the defects existed in the home at the time Fleetwood delivered it to Magnolia. All three defendants moved for summary judgment. The trial court granted all three, and Daugherty appealed.

The appellate court affirmed the trial court's dismissal of Fleetwood, finding that under Section 911A(3) of the USCMH, Fleetwood was not liable because the defects were caused by circumstances that occurred after the home left Fleetwood's custody. Daugherty failed to identify any defect in the home that resulted from Fleetwood's manufacturing of the home.

The court, however, reversed the judgment in favor of the dealer, Magnolia. Magnolia, as the seller of the home, was contractually obligated to deliver, setup and level the home. Magnolia therefore owed the warranties under the USCMH and the warranty of fitness under the general sales articles, Civil Code. articles. 2524 and 2529. The court found that genuine issues of material fact existed concerning Magnolia's obligation to warn plaintiff about the recommended construction of the porch. Daugherty testified in deposition that he did not receive the manual from Magnolia until after the porch was added. He also testified that the Magnolia sales representative was aware of his plans for the porch, but failed to advise him of the recommendations in the manual. A dispute therefore existed regarding the warranty of fitness claim.

The court affirmed the dismissal of the installer, Barrett. Because Barrett was hired by Magnolia to install the home, Daugherty had no contractual relationship with Barrett. Daugherty's redhibition, products liability and contract claims did not allege that Barrett breached any duty to plaintiff. Nor did Daugherty allege that Barrett breached the installer's warranty in the USCMH. Regardless, the court found that the home became unlevel for reasons unrelated to Barrett's setup of the home.

- Stacie M. Hollis

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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

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