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Multidistrict Panel Sends Celebrex And Bextra Cases To California

In re Bextra and Celebrex Products Liability Litigation,
___ F.Supp.2d ___ (Jud.Pan.Mult.Lit. 9/6/05)

Readers may recall that in our March 2005 issue we reported that the Vioxx cases had been sent to Judge Eldon Fallon in the Eastern District of Louisiana. (VIOXX CASES CENTRALIZED BEFORE JUDGE FALLON IN LOUISIANA'S EASTERN DISTRICT, March 2005.) In this opinion, the Judicial Panel on Multidistrict Litigation determined to send all cases involving Bextra and Celebrex (both anti-inflammatory medications manufactured by Pfizer) to Judge Charles R. Breyer in the Northern District of California.

Different large groups of plaintiffs argued for centralization of the claims in the Eastern District of Louisiana, the District of Connecticut, or the Southern District of New York. Some smaller plaintiff groups argued for the Northern District of California, the District of Delaware, the Southern District of Florida, the District of New Jersey or the Southern District of Texas. Pfizer, the defendant, argued for the Southern District of New York, but only for the claims of improper marketing and sales practices, arguing that products liability actions should be tried individually. Some of the plaintiffs also favored splitting the products claims from the marketing/sales claims, although all plaintiffs favored centralization in either one forum or two.

The Multidistrict Panel lumped both products and marketing/sales claims together, stating, "All actions focus on i) alleged increased health risks from taking Celebrex and/or Bextra, anti-inflammatory prescription medications, and ii) whether Pfizer, as the manufacturer of both medications, knew of these increased risks and failed to disclose them to the medical community and consumers and/or improperly marketed these medications to both of these groups." Thus, the court found that centralization in one forum was appropriate.

The court did not mention the effects of Hurricane Katrina on the courthouse for the Eastern District of Louisiana. That courthouse is temporarily closed and its judges are operating out of other courthouses in Louisiana. Thus, whether Hurricane Katrina played any part in the court's decision not to send these cases to the Eastern District is unknown.

- Madeleine Fischer

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Manufacturing A Manufacturer: Vendor May Be Strictly Liable In Asbestos Case

Adams v. Owens-Corning Fiberglas Corp.,
2004-1589 (La.App. 1 Cir. 9/23/05), ___ So.2d ___

The hallmark of strict products liability cause of action is that liability is based on the nature of the product and not the conduct of the manufacturer. If a product is unreasonably dangerous, the manufacturer is liable for resulting injuries even if it used all due care in producing the product. This is a significant advantage to products liability plaintiffs who are not required to establish the manufacturer's negligence by proving it knew or should have known of the unreasonable risk of harm. However, this advantage has a significant limitation; it applies only against *manufacturers*.

Petitions in asbestos cases typically assert an amalgam of causes of action sounding in negligence, intentional tort, products liability and contract. However, as presented in court, the asbestos case is generally a traditional strict products liability case. Because the product itself is on trial, much of the asbestos case is transportable from one plaintiff to another, reducing the time and monetary expenditures of asbestos plaintiff attorneys. This factor allows asbestos plaintiff attorneys to schedule numerous trials every year or to cumulate the claims of hundreds or even thousands of plaintiffs.

As a result of the numerous bankruptcies among traditional asbestos manufacturers, the population of asbestos defendants increasingly consists of contractors, distributors, sellers and other defendants against whom plaintiffs would be required to prove actual or constructive knowledge, *i.e.* negligence. Although these parties would not commonly be thought of as manufacturers, asbestos plaintiff attorneys seek to have them *deemed* manufacturers for the purpose of imposing strict liability.

In *Adams*, C.V. Harold Rubber Company (CVH) filed a motion for summary judgment seeking the dismissal of a number of asbestos claims on the grounds that it was a non-manufacturer seller and plaintiffs had produced no evidence of actual or constructive knowledge of the danger of asbestos in some of the products it sold. As a non-manufacturer seller, CVH could be held liable only if it knew of the product's danger and failed to declare it. Plaintiffs argued that CVH was a *professional vendor* and, therefore, liable as a manufacturer. The trial court held that plaintiffs had failed to demonstrate that they could meet their burden of proving CVH was a professional vendor and granted CVH's motion for summary judgment.

The First Circuit Court of Appeal reviewed the granting of the summary judgment *de novo.* Reviewing the evidence submitted by plaintiffs, the court found significant that CVH cut asbestos containing gaskets to the size and shape specified by its customers from sheet gasket material and that its invoices did not identify the actual manufacturer or brand name of the product. Even though CVH did not determine the composition of the gasket material, the court found that this evidence was sufficient to create a triable issue concerning whether it was a professional vendor, and, therefore, subject to strict products liability.

- William L. Schuette

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Motorcycle Recall Case Shows Strict Limits Of LPLA'S Exclusivity Provision

Stroderd v Yamaha Motor Corporation, U.S.A.,
2005 WL 2037419 (E.D. La. 8/4/05)

Plaintiffs purchased Yamaha Road Star Warrior motorcycles. Shortly thereafter, defendant Yamaha Motor Corporation U.S.A. issued a "Safety Recall Notice" to all owners of 2002 and 2003 Yamaha Road Star Warrior motorcycles. Defendant intended to use the recall to repair potential transmission failure in the motorcycles due to excessive wear. The recall instructed Yamaha Road Star Warrior owners to stop using their motorcycles and to bring them in to an authorized dealer for repair at Yamaha's expense. The recall notice advised that the motorcycles would be kept in the repair shop for at least two days. Plaintiffs alleged that the repairs took four to six months.

Plaintiffs filed suit seeking actual, consequential, and incidental damages relating to the cost of alternative transportation, loss of use, inconvenience, and diminution of value due to the defect and delay in repair. Plaintiffs based their complaint on four legal theories: redhibition, breach of contract, negligent repair, and the Louisiana Products Liability Act.

Defendant moved to dismiss plaintiffs' products liability claim, alleging that plaintiffs had failed to satisfy either prong of the two-prong LPLA test required under Louisiana law. Moreover, defendant moved to dismiss plaintiffs' negligent repair and breach of contract claims. The core of defendant's argument was that the LPLA subsumes all possible causes of action, with the exception of redhibition, against a manufacturer for damage caused by the manufacturer's products.

Judge Fallon held that the LPLA "establishes the exclusive theories of liability for manufacturers for damage caused by their products." La.R.S. § 9:2800.52. The LPLA defines "damage" as "damage to the product itself and economic loss arising from a deficiency in or loss of use of the product only to the extent that [a redhibition cause of action] does not allow recovery for such damage or economic loss." La.R.S. § 9:2800.53(5). A "manufacturer" is defined as a "person or entity that is in the business of manufacturing a product for placement into trade or commerce." La.R.S. § 9:2800.53(1).

Under the LPLA, a manufacturer is liable for damages caused by an unreasonably dangerous product. The four kinds of unreasonably dangerous products are: 1) in construction or composition; 2) in design; 3) because an adequate warning about the product has not been provided; and 4) because it does not conform to an express warranty of the manufacturer about the product. La.R.S. § 9:2800.55-58. The sole exception to the exclusivity provisions under the LPLA is redhibition, which the Act expressly preserved.

Judge Fallon held that the LPLA and Louisiana redhibition law are the sole vehicles for a suit against a manufacturer for damages arising from a defective product. In *In re Air Bag Products Liability Litigation*, 7 F.Supp.2d 792 (E.D.La.1998), Judge Feldman held that plaintiffs, who brought "redhibition, breach of implied warranty of fitness for use, negligence *per se* ... and 'other contract-related' theories" against automobile manufacturers, were barred by the LPLA's exclusivity provisions from asserting all but their redhibition claims. *Id*. at 800. In *Jefferson v. Lead Industries Ass'n, Inc.*, 930 F.Supp. 241 (E.D.La.1996), Judge Vance held that plaintiffs, who alleged "negligence, fraud by misrepresentation, market share liability, breach of implied warranty of fitness and civil conspiracy" against lead paint manufacturers, had failed to state a claim because of the LPLA's exclusivity provisions. *Id*. at 244. The court expansively read the LPLA's exclusivity provisions to hold that "[a] plaintiff may not recover from a manufacturer for damage caused by a product on the basis of any theory of liability not set forth in the LPLA." *Id*. at 244-45 citing *Brown v. R.J. Reynolds Tobacco Co.*, 52 F.3d 524, 526 (5th Cir.1995). Judge Fallon found the reasoning of those cases persuasive.

Judge Fallon ultimately agreed with the defendant's contention that the plaintiffs' claim failed to satisfy either of the necessary elements required by the LPLA. First, defendant asserted that plaintiffs failed to demonstrate that their damages were proximately caused by an unreasonably dangerous characteristic of the motorcycles. Second, defendant asserted that plaintiffs' damages did not arise from reasonably anticipated use of the motorcycles.

A plaintiff bears a two-tiered burden in pleading a LPLA claim. The plaintiff must show that: "(1) his damages were proximately caused by a characteristic of the product that renders it unreasonably dangerous, and (2) his damages arose from a reasonably anticipated use of the product." *Kampen v. American Isuzu Motors, Inc.*, 157 F.3d 306, 309 (5th Cir.1998) citing La.R.S. § 9:2800.54(D). A product can be "unreasonably dangerous" in four ways: "(1) in construction or composition; (2) in design; (3) because of an inadequate warning; or, (4) because of nonconformity to an express warranty." *Kampen*, 157 F.3d at 309 citing La.R.S. § 9:2800.54(B).

In this case, Judge Fallon found flaws in plaintiffs' argument that their harms were caused either: 1) by the motorcycle's defect; or 2) by the tardiness of the recall. Under the first approach, plaintiffs' damages (loss of use) were neither proximately caused by a characteristic of the product nor arose from a reasonably anticipated use of the product. The defect may have been a cause in fact of the plaintiffs damages, but the damages themselves were proximately caused by the alleged delay in the return of the motorcycles to their owners. The damages also did not arise from reasonably anticipated

use of the product; rather, the damages arose from non-use of the product. The second approach failed even more fundamentally: nothing about the recall's defect was unreasonably dangerous.

The legislative history of the LPLA and the jurisprudence of Louisiana courts with regard to products liability against manufacturers further undermined plaintiffs' LPLA claim. The legislative history of the LPLA demonstrates a legislative intent to clearly outline the elements of a products liability cause of action against a manufacturer. Moreover, courts have demonstrated that actions involving a latent defect sound in redhibition rather than in products liability.

- Don A. Rouzan

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Corporate Affiliates May Be Jointly Liable For Claims Under Single Business Enterprise Theory

Miller v. Entergy Services, Inc.,
2004-1370 (La.App. 4 Cir. 7/13/05), ___ So.2d ___.

Entergy Services, on behalf of Entergy Louisiana and Entergy New Orleans, contracted with Tower Inspection, Inc. to provide ongoing maintenance work pursuant to a number of contract orders. Under one specific contract order, Tower Inspection was to perform maintenance and painting work on a 431-foot electrical transmission tower. Tower Inspection engaged a subcontractor, National Steel Erectors Corporation, to conduct some of the work. Plaintiff Justin Miller, a National Steel painter, was injured by an energized surge arrestor on the electrical transmission tower.

Miller and his family filed suit against Entergy Corporation, Entergy Louisiana, Entergy New Orleans, and Entergy Services, alleging that the Entergy defendants were negligent or otherwise at fault for failing to protect Miller from electrical contact. The Millers alleged that the Entergy defendants acted as a single business enterprise and, therefore, each Entergy defendant was liable for the acts of the other Entergy defendants. The trial court granted summary judgment in favor of Entergy New Orleans and Entergy Corporation because they asserted they did not own the electrical transmission tower. The appellate court reversed, finding that enough evidence existed that could allow a judge or jury to find Entergy New Orleans and Entergy Corporation liable for the acts of its subsidiaries under the single business enterprise theory.

Although courts generally respect corporate forms, in some instances they will ignore those legal structures where multiple, affiliated corporations are wholly organized and controlled by a single corporation. Numerous factors are considered to determine whether a single business enterprise exists. Here, according to the plaintiff the Entergy defendants shared identity of ownership, utilized identical logo and colors, had common directors and officers, shared employees, co-mingled funds, engaged in business fragmentation, were undercapitalized, centralized their accounting, had common employees, and unified administrative control. Therefore, the court thought that there was a question of fact to be decided at trial as to whether the Entergy defendants constituted a single business enterprise.

If a plaintiff proves that a single business enterprise exists, then corporate parents or affiliates can be held liable for a related corporation's negligent acts, including those involving product's liability. This creates a gaping hole in the protection traditionally provided by the corporate form. As an example of interest to product manufacturers, a group of affiliated corporations might include a manufacturing corporation. Even though the affiliated corporations do not engage in any manufacturing activities, they could each be held liable for the manufacturing corporation's negligence if the single business enterprise theory is proven. Therefore, it is important to maintain delineation between affiliated corporations to limit each corporation's potential exposure to liability incurred by an affiliate.

– Sarah B. Belter

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Significant Exposure Test Determines LHWCA Exclusivity For Asbestosis Claim

***Adams v. Owens-Corning Fiberglas Corp.*,**
2004-1296 (La.App. 1 Cir. 9/23/05), ___ So. 2d ___.

This decision from the Louisiana First Circuit Court of Appeal clarifies the limits of the exclusivity provision of the Longshore and Harbor Workers' Compensation Act (LHWCA). Thomas Jefferson, his wife, and several hundred other plaintiffs filed suit against multiple defendant seeking damages allegedly arising from occupational exposure to asbestos. Jefferson claimed that he was employed by defendant Cooper/T. Smith Stevedoring Company, Inc. (Cooper), as a longshoreman in 1965 and at various times between 1970 and 1983 and that his loading and off-loading duties exposed him to asbestos dust from ship cargo of contained raw asbestos and/or asbestos-containing products. Jefferson asserted that he was exposed to asbestos dust, which caused him to develop both asbestosis and colon cancer. The district court sustained Cooper's peremptory exception of no cause of action to the Jefferson claims, dismissed all of the Jefferson's' tort claims against Cooper, and designated that judgment as final and immediately appealable. On appeal, the First Circuit affirmed in part, reversed in part, and remanded the case.

The appellate court affirmed the dismissal of Jefferson's claims against Cooper only insofar as they arose out of occupational asbestosis and let stand those claims related to colon cancer. This decision was based on the court's analysis of the exclusivity established by the LHWCA and under Louisiana workers' compensation law. Before 1972, the LHWCA did not provide coverage to traditional maritime workers who worked landward beyond the shoreline of U.S. navigable waters. In 1972, the LHWCA was amended to expand coverage to injured longshoremen, like Jefferson. Finding that Jefferson sufficiently alleged "significant exposure" before 1972, the court held that Jefferson was not covered by the LHWCA, because Jefferson was not covered by LHWCA at all times during which "continuous exposure" allegedly occurred while he was employed by Cooper. The court then determined what causes of action had accrued to Jefferson under Louisiana law before the 1972 LHWCA amendment.

Under Louisiana workers' compensation law, asbestosis, but not cancer, is a covered occupational disease subject to employer tort immunity. The First Circuit found that Jefferson had no cause of action against Cooper for asbestosis-related disease and affirmed the dismissal only as it related to claims arising from asbestosis. However, the court found that Jefferson had sufficiently stated a cause of action based on his claims related to colon cancer, reversed the remainder of the judgment, and remanded the case for further proceedings.

The *Adams* decision demonstrates the broad reach of the "significant exposure" test when applied in determining when a cause of action accrues for purposes of LHWCA exclusivity. The First Circuit used Louisiana law to determine when Jefferson's action accrued. Finding that Jefferson's alleged "significant exposure" occurred before the 1972 LHWCA coverage to longshoremen, the court then applied only Louisiana law to determine what causes of action Jefferson had against Cooper after 1972.

– *Judith V. Windhorst* back to top

Lack Of Expert Testimony Results In Summary Judgment For Chainsaw Manufacturer

Riley v. Stihl,
2005 WL 2304464 (W.D.La. 8/22/05)

John Henry Lee suffered injuries and eventually died as a result of a fire that ignited while he operated a chainsaw. His children filed a wrongful death and survival action against the manufacturer and distributor of the chainsaw, Stihl Incorporated (Stihl) and Andreas Stihl AG & Co. KG (Andreas Stihl).

The plaintiffs filed their claim under the Louisiana Product's Liability Act. The LPLA allows plaintiffs to maintain an action against a manufacturer of a product if the product was used in a reasonably anticipated manner, the product was unreasonably dangerous because of some defect in its design or manufacturing, or because of an inadequate warning. Furthermore, the defect must exist at the time the product left the manufacturer's control and it must be the cause of the injured person's damages.

In this case, Magistrate Hayes set deadlines to supply expert reports to opposing counsel. However, the plaintiffs did not submit their reports by the deadline. The defendants subsequently filed a motion for summary judgment arguing that plaintiffs' failure to provide a timely expert report prevented them from proving that the chainsaw Lee used contained a defect that caused the fire.

In their opposition, plaintiffs asserted that they were entitled to application of the doctrine of *res ipsa loquitur. Res ipsa loquitur* permits the inference of negligence on the part of the defendants in certain limited cases when no direct evidence exists.

Magistrate Hayes listed three elements that the plaintiffs needed to demonstrate to successfully argue *res ipsa loquitur*: first, the injury was of a kind that ordinarily does not occur in the absence of negligence; second, the conduct of the plaintiffs or of a third person must be sufficiently eliminated by the evidence as a more probable cause of the injury; and third, the claimed negligence was within the scope of the defendants' duty to the plaintiffs.

While the court agreed that the defendants had a duty to the plaintiffs, it determined that the plaintiffs failed to show that Lee's injuries were of a type that would not have occurred but for the defendants' negligence in producing a defective product. Additionally, plaintiffs failed to eliminate other causes of the fire that injured Lee.

Furthermore, the court explained that when the particular cause of harm is not apparent, the plaintiffs must set forth expert testimony to show that the harm could only have been caused by the negligence of the defendants. Plaintiffs, in their opposition, tried to submit expert testimony from a different case involving different facts and parties. However, because the plaintiffs failed to submit the report timely, the court did not consider the testimony.

Finally, the court noted that the plaintiffs had not produced evidence to show that the defect existed at the time the chainsaw left the manufacturer's control. This is an important element of the LPLA.

Accordingly, the defendants' motion for summary judgment was granted.

– *Michelle D. Craig* back to top

Circumstantial Evidence Insufficient To Prove Tire Defect

Gladney v. Milam,
39,982 (La.App. 2 Cir. 9/21/05), ___ So.2d ___

In February 2002, Bobbie Jean Alexander, while driving a rented van containing numerous passengers, lost control of the vehicle and sustained a roll-over accident. Alexander and the van's passengers filed suit naming numerous defendants, including Bridgestone/Firestone, Inc. and Bridgestone Corporation. Plaintiffs alleged a products liability claim against Firestone, asserting that the van's front right tire was defective and caused the roll-over accident. The trial court dismissed plaintiffs' claims on summary judgment, and the appellate court affirmed.

Firestone moved for summary judgment, arguing that plaintiffs could not meet their burden of proving a defective condition without producing the tire at issue. Plaintiffs countered Firestone's argument by producing a variety of circumstantial evidence, including photographs of the damaged tire, a copy of the state police report listing tire failure as the cause of accident, an affidavit of a tire expert, and correspondence regarding the tire's location. Plaintiffs further argued that they could not produce the defective tire due to defendants' actions in spoiling the evidence, alleging that the missing tire was last in the control of one of the defendants. Because defendants adequately explained their inability to produce the tire, however, plaintiffs were not entitled to a presumption that the tire would have been detrimental to defendants' case.

Plaintiffs argued that the circumstantial evidence they submitted established a factual issue for trial under *res ipsa loquitur*, which allows an inference of negligence when the incident would not ordinarily occur in the absence of negligence. Where there is more than one equally plausible explanation for the occurrence, however, the doctrine of *res ipsa loquitur* is inapplicable. Here, neither party's expert could conclusively state an opinion as to the specific cause of tire failure. Although the court recognized that sometimes circumstantial evidence may establish a defect for purposes of liability under the Louisiana Products Liability Act, the experts in this case were unable to physically examine the allegedly defective tire and, therefore, unable to render an opinion as to the exact cause of the tire failure. Because the record did not contain sufficient evidence that would allow a reasonable juror to conclude that more probably than not the accident was caused by a defective condition of the tire, the plaintiffs could not meet their burden of proof on summary judgment

This case demonstrates that in some instances plaintiffs cannot rely on circumstantial evidence alone and must produce for physical examination the allegedly defective product to survive summary judgment. Here, plaintiffs were not excused from their burden of proof simply because the tire was formerly in the defendants' possession. This case may have had a different outcome, however, if the court had determined that defendants had purposely destroyed the evidence. Under those circumstances, plaintiffs would have been entitled to a presumption that physical examination of the tire would have had a negative impact on defendants' case, and plaintiffs may have survived summary judgment under a theory of *res ipsa loquitur*.

– *Sarah B. Belter* back to top

Manufacturer's Attempt To Pull "Rug" Out From Under Rear-Ending Plaintiff Fails

Campo v. John Fayyad Fast Freight,
2005 WL 2066210 (E.D. La 8/5/05)

Mandated by Federal law, "RUGS" (Rear Underride Guards) extend down from the rear of trailers and are supposed to keep following vehicles from sliding under the trailer. The plaintiff, who suffered catastrophic injuries when his car rear-ended a trailer whose RUG allegedly failed to keep plaintiff's vehicle from riding under the trailer, sued Lufkin, the manufacturer of the RUG, claiming that the "RUG" was unreasonably dangerous for the purposes of the Louisiana Products Liability Act (LPLA).

Lufkin filed a motion for summary judgment, seeking dismissal of the defective design, composition, and failure to warn claims. As no alternative design was offered by the plaintiff, the court dismissed the design claim.

The court rejected Lufkin's arguments that the warning claim should be dismissed because Lufkin's duty to warn was only owed to the owner of the trailer as opposed to a following motorist and that the danger of rear-ending a trailer was "open and obvious" In finding that a material issue of fact existed, the court noted that Lufkin failed to include federally mandated installation instructions to its customers.

Regarding the defective composition claim, the court also found that a material issue of fact

precluded summary dismissal of that claim. The court noted that Lufkin's own engineer admitted that the RUG at issue did not perform as expected and that a factual dispute existed over whether any alterations, modifications or repairs were made on the RUG after it left Lufkin's control.

– *Robert L. Walsh*

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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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