Jones Walker E*Zine

Products Liability
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Plaintiff's Claim of Addiction to Over-The-Counter Drug Dismissed

Green V. BDI Pharmaceuticals,
35,291 (La.App. 2 Cir. 10/31/01) ___ So.2d ___

BDI manufactured and sold "Mini Thins," an over-the-counter drug containing ephedrine. Labeled for use as a broncodilator and an expectorant, Mini Thins' recommended dosage was one-half to one tablet every four hours. The plaintiff claimed he became addicted while using Mini Thins for increased energy, eventually consuming 250-tablet bottles in two days.

The Second Circuit affirmed the granting of the summary judgment dismissing plaintiff's defective design and failure to warn claims against BDI under the Louisiana Products Liability Act ("LPLA"). Regarding the design claim the Second Circuit ruled that the plaintiff failed to demonstrate "that an alternative design might exist that would have prevented the plaintiff's damage." Regarding the failure to warn claim the Court held that the National Uniformity for Nonprescription Drugs Act (21 U.S.C. § 379r) preempted LPLA's failure to warn provision and that the plaintiff failed to provide any evidence that the drug was labeled in a manner inconsistent with applicable law.

Finally, the court addressed whether the plaintiff's abuse of the drug constituted a "reasonably anticipated use" which is defined under the LPLA as "a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances." Ruling that LPLA's "reasonably anticipated use" is much narrower than the jurisprudential concept of "normal use" and does not "include uses clearly contrary to warnings," the Court found that the plaintiff's conduct of blatantly exceeding the recommended dosage and taking the drug for its other than its intended purposes was not "reasonably anticipated use" "as a matter of law."

- *Robert L.Walsh*

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Jury Award of $780,000 to Asbestosis Victim Affirmed by First Circuit

Emery v. Owens-Corning Corp.,
2000-2144 (La.App. 1 Cir. 11/9/01), ___ So.2d ___

The First Circuit recently affirmed a jury award of $780,000 to a plaintiff who contracted asbestosis allegedly as a result of exposures to asbestos-containing materials while working as an insulator at an Exxon refinery in the 1960's. An award of $75,000 to his wife on her loss of consortium claim was also affirmed. Exxon, the only defendant to actually go to trial, was granted a credit for the

fault of three other companies found to be at fault and was eventually cast in judgment for 25 % of the verdict.

The most interesting aspect of the case concerned the jury's allocation of fault to Exxon and various other companies it found to be at fault. In addition to Exxon, the jury found that six other companies contributed to the plaintiff's injury. After tossing out the jury's allocation of specific percentages of fault on the part of Exxon and the six non-parties (on the ground that virile share applied requiring equal distribution of damages among all those at fault), the First Circuit went on to consider whether there was adequate proof that actions of each of the entities had actually caused the plaintiff's injury.

The First Circuit reversed the jury's findings against Riley Stoker, Combustion Engineering and FlintKote Company. Exxon asserted those findings should stand based upon the testimony of Dr. Arnold Brody who asserted that "every time a person is exposed to asbestos, that exposure contributes to any asbestos-related injury from which he is subsequently diagnosed to suffer." The First Circuit held that Dr. Brody's testimony was insufficient to support a causal connection "because all the experts who testified agreed the duration and intensity of the asbestos exposure were the key factors in determining the effect asbestos has on an individual." *There being no evidence of intensity and duration of plaintiff's exposure to the products of Riley Stoker, Combustion Engineering and FlintKote Company, the jury's findings of fault on these companies was reversed as clearly wrong.* This left a total of four companies found to be at fault and resulted in the 25 % liability of Exxon, after Exxon received a credit for the other three who had settled prior to trial.

- *Madeleine Fischer*

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Phantom Tortfeasor's Fault Reapportioned Between Plaintiff and Defendant

Trahan v. Asphalt Associates, Inc.,
2001-0311 (La.App. 3 Cir. 10/17/01) ___ So.2d ___

Considering the facts of a 1992 automobile accident Louisiana's Third Circuit holds that the percentage of fault attributed to an unidentified tortfeasor should be proportionately divided between the plaintiff and defendant in relation to their respective degrees of fault.

The plaintiff in this case was injured when she drove her car into an unmarked parked tractor being used by a road construction contractor to block access to a road being repaved. The Third Circuit assessed 20 % fault to the plaintiff for speeding and being inattentive in the foggy weather, 20 % to unknown vandals who removed signs and barricades from the area and 60 % to the contractor for its placement of the unmarked tractor.

The court then reallocated the 20 % of fault assigned to the "phantom" tortfeasor by applying a ratio approach. The contractor wound up being allocated 75 % of the fault and the plaintiff 25 %. The Court reasoned that reallocation of the unknown vandals' fault was justified ‘[b]ecause La. Civ. Code art. 2323(C) provides a plaintiff's claim for recovery of damages cannot be reduced because of the fault of an intentional tortfeasor...." However, the Court does not clearly explain how this rationale applies to this situation: how does 2323(C) justify reallocation of fault of an intentional tortfeasor to others who are merely negligent?

The opinion is further confusing because it leaves the reader to sort out which version of the law of joint and solidary obligations applies out of the many amendments to these Civil Code articles over the past several decades. It is unlikely the result would stand under current law which provides explicitly that a tortfeasor shall not be liable for more than his own degree of fault. Current law also states that a tortfeasor shall not be solidarily liable with any other person, including a person whose "identity is not known or reasonably ascertainable." Art. 2324(B), La. Civ. Code. However, the Court in its opinion makes no reference to differences between the law in effect in 1992 and that currently in effect. Indeed, the opinion simply fails to specify which law applies.

Although not a products liability case, the principle applied here as it relates to the fault of absent or "phantom" tortfeasors would certainly apply to products cases. Moreover, the peculiarities of the changing law of solidary liability are especially pertinent in cases where plaintiffs sue for long latency diseases as the result of exposure to allegedly hazardous products, since the law of a variety of time periods over the length of the exposure must be considered.

- *Madeleine Fischer* 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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