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January 2007 Vol. 72

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IN THIS ISSUE:

PLAINTIFFS SEEKING MEDICAL MONITORING FOR ASBESTOS DENIED CLASS ACTION STATUS

Bourgeois v. A.P. Green Industries, Inc., 2006-2159 (La. 12/8/06), ___ So.2d ____ (denial of writs)

Jones,Walker's litigation team of Leon Gary, Madeleine Fischer, and William Schuette successfully concluded a long battle for client CBS Corporation when the Louisiana Supreme Court recently refused to consider overturning a denial of class certification in an asbestos medical monitoring action. The *Bourgeois* case was first filed in 1996 and became a landmark decision several years later when the Supreme Court used the case to recognize a cause of action for medical monitoring for exposure to a hazardous substance without physical injury. Back at the trial court level, the plaintiffs then moved to certify a class of all people who had worked at Avondale Shipyard and been exposed to an undetermined level of asbestos before 1976. After a full hearing at which witnesses testified and following extensive briefing, the trial judge denied class certification. Plaintiffs appealed the denial to the Louisiana Fifth Circuit Court of Appeals which affirmed in an extensive opinion. Plaintiffs then sought review from the Louisiana Supreme Court. However, the Louisiana Supreme Court refused to hear the case. Thus, the denial of class certification stands as a significant victory for Jones Walker's client and as solid precedent for future attempted medical monitoring class actions.

—*Madeleine Fischer*

VIOXX PLAINTIFFS MUST SUE INDIVIDUALLY FOR INJURY AND DEATH; CLASS STATUS DENIED

***In re Vioxx Products*, ___ F.Supp.2d ____, 2006 WL 3391432 (E.D.La. 11/22/06)**

Since February, 2005, all Vioxx lawsuits filed in federal courts around the country have been transferred to the docket of Judge Eldon Fallon of Louisiana's Eastern District for pretrial handling.

JONES WALKER

E*ZINES
January 2007 Vol. 72

Products Liability
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(See articles appearing in past E*Zines:

- Vioxx Cases Centralized Before Judge Fallon in Louisiana's Eastern District, March, 2005
- Vioxx Trial Judge Bars Plaintiffs' Expert from Testifying as to Cause of Death, February, 2006
- Vioxx Foreign Class Actions Dismissed, October, 2006
- 50 Million Dollar Vioxx Award Deemed Excessive, October, 2006.)

At last count, Judge Fallon was handling over 7000 Vioxx cases. In this new decision, Judge Fallon refused to certify personal injury and wrongful death Vioxx cases as a class action.

Vioxx, a pain reliever and anti-inflammatory drug manufactured by Merck, was withdrawn from the market voluntarily on September 30, 2004 when clinical trials indicated an increased risk of heart attacks and ischemic strokes. Plaintiffs here sought to certify a class of "All persons residing in the United States who took Vioxx in any dose … and who claim personal injuries or assert wrongful death claims arising from ingestion of Vioxx."

The initial question presented to Judge Fallon was what law would apply to the plaintiffs' claims. Plaintiffs argued that the law of New Jersey should apply because Merck's corporate headquarters are in New Jersey and New Jersey has a unique interest in regulating the conduct of its corporate citizens. Merck argued that the laws of the individual states in which each plaintiff resided should apply. Merck contended that differences in applicable law and differences in factual issues involved in each person's claim should defeat class certification.

Applying a painstaking New Jersey choice of law analysis, Judge Fallon concluded that New Jersey law should not apply to all of the plaintiffs' claims. While it certainly would have been easier for the court to apply the law of a single state, Judge Fallon determined that many other factors weighed in favor of applying the law of each plaintiff's home state. These factors included: 1) each plaintiffs' home jurisdiction had a stronger interest in deterring foreign corporations from injuring its citizens and insuring that its citizens are compensated for injuries than did New Jersey in deterring its corporate citizens' wrongdoing; 2) plaintiffs residing outside New Jersey had no reasonable expectation that New Jersey law would be applied to their claims; 3) the injuries occurred in 51 jurisdictions, 50 of which were not New Jersey; 4) Merck's conduct originated in New Jersey but was effectuated and felt by plaintiffs in 51 jurisdictions, 50 of which were not New Jersey; 5) the relationship between each plaintiff and Merck was centered in each plaintiff's home state.

Judge Fallon next considered the four basic prerequisites of class certification under federal law: numerosity, commonality, typicality, and adequacy of representation. With 20 million Vioxx users in the United States, numerosity was easily met. Judge Fallon also concluded that the requirement of commonality was met because com-

JONES WALKER

E*ZINES
January 2007 Vol. 72

Products Liability
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mon questions of fact existed regarding the development, manufacturing, and testing of Vioxx, as well as Vioxx's effect on the human body. As to the typicality and adequacy of representation requirements, however, Judge Fallon found that the class representatives could *not* satisfy these requirements. The proposed class covered people who took different dosages of Vioxx at different times and in some cases along with various other prescription drugs. Furthermore, Judge Fallon's decision that each plaintiff's home state law applied meant that there was no one law that "typically" would apply to everyone's case. Because the class representatives were not typical, Judge Fallon found that the class representatives could not meet the adequacy of representation requirement, regardless of their zeal and competence.

As a result of the many individual issues of law and fact, Judge Fallon also found that plaintiffs did not meet the special "predominance" and "superiority" requirements of a Rule 23(b)(3) class action—the type of class action that the plaintiffs chose to assert in this case. Plaintiffs attempted to overcome the obstacle of individual damage issues by proposing "bifurcation." That is, plaintiffs suggested trying a first-phase liability trial "designed to obtain a preliminary finding of liability," followed by "a second phase involving individual determination of causation and damages." Judge Fallon found that such an approach would not advance the efficient resolution of the cases because a determination that Vioxx was generally capable of causing certain injuries would still leave for trial each plaintiff's individual proof that Vioxx caused his or her own particular injuries, which would require extensive expert testimony. Judge Fallon quoted a 1989 law review article with approval: "Little or no time and expense will be saved in these individual trials by virtue of the preceding mass trial on general causation." Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. Ill. L.Rev. 69, 79.

As a result of Judge Fallon's decision, each of the plaintiffs' personal injury and wrongful death claims will proceed as an individual case. Judge Fallon has not yet ruled upon the question of whether plaintiffs' claims for medical monitoring and plaintiffs' "purchase claims" should be certified as class actions.
—*Madeleine Fischer*

DEFENDANTS NOT RESPONSIBLE FOR POST-MANUFACTURE ALTERATIONS TO RE-PULPING SYSTEM

***Jenkins v. Int'l Paper Co*., 41,566 (La.App. 2 Cir. 11/15/06), ___ So.2d ____**

Plaintiff, Steve Jenkins, an employee of International Paper Company ("IP"), filed suit against Voith Paper Inc. ("Voith"), James Brinkley Company, Inc. ("Brinkley"), and other defendants under the Louisiana Products Liability Act for injuries sustained while working as an operator in the re-pulping section of IP's plant. In response to the lawsuit asserted against them, Voith and Brinkley filed motions for summary judgment. The trial court granted the motions and Honorable Wilson of the Second Circuit Court of Appeal affirmed the trial court's decision.

JONES WALKER

E*ZINES
January 2007 Vol. 72

Products Liability
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Before discussing the products liability aspect of the case, it is important to note the roles the various parties played in the manufacture and design of the re-pulping system at the plant. In the case at hand, IP designed the re-pulping system layout and contracted with Voith only for the purchase of the machinery. Voith then contracted with Brinkley to manufacture the machinery for the re-pulping system. Brinkley subsequently shipped the machinery to IP, who contracted with another entity for installation.

Once the machinery was installed, the layout left a gap between the staging area, an area where scrap paper was placed on a conveyor belt, and the conveyor. To solve the problem caused by the gap, IP installed a metal plate extending from the edge of the staging area toward the conveyor. The metal plate left a smaller gap of 2 ¼ inches.

On the day of the accident, Jenkins arrived at the plant to find the conveyor jammed. While his co-worker operated the conveyor in reverse so that he could pull out the jammed paper, Jenkins stood on the staging area. Jenkins, however, did not realize that the reverse operation was dragging paper off the staging area and under the machinery. When Jenkins stepped on the moving paper, his feet became tangled in it, and his legs were pulled down into the 2 ¼ inch gap between the staging area and the conveyor. He suffered serious injuries, including crushed ankles and fractured bones in his right leg and knee. As a result, Jenkins filed suit against the defendants alleging that the unguarded gap was unreasonably dangerous in construction and design. He also asserted an inadequate warning claim.

As to the construction claim, the court did not find that the gap was unreasonably dangerous in construction or composition. The court reasoned that none of the specifications included a guard on the conveyor. Furthermore, the Second Circuit found no evidence showing that the conveyor was not manufactured pursuant to the specifications provided. The court also considered the fact that the gap of 2 ¼ inches resulted from IP's installation of the metal plate. Thus, the gap did not result from an act of either Brinkley or Voith.

The Second Circuit also did not find merit in the design claim. The court looked to the fact that IP designed the layout and, sometime after the installation of the re-pulping system, created the 2 ¼ inch gap by attaching a metal plate to the staging area. The Second Circuit noted that there was no evidence that the larger gap designed into the system by IP posed a danger of ensnaring workers and causing injury. Due to this lack of evidence and the fact that the 2 ¼ inch gap resulted solely from IP's attachment of the metal plate, the court ruled in favor of the defendants on the design claim.

The final claim asserted under the Louisiana Products Liability Act was the inadequate warning claim. To prevail on an inadequate warning claim, the plaintiff must show that at the time the product left the manufacturer's control, the product possessed a characteristic that may have caused damage and that the manufacturer failed

JONES WALKER

E*ZINES
January 2007 Vol. 72

Products Liability
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to use reasonable care to provide an adequate warning of such characteristic. After applying this rule to the facts of the case, the court held that the defendants were not liable for an inadequate warning because the unreasonably dangerous condition of the 2 ¼ gap did not exist when the machinery left Brinkley's control or even when Voith representatives were present at IP for the start-up of the system. The Second Circuit also reasoned that the gap was not a quality found in machinery sold by Voith and manufactured by Brinkley. Instead, it was the outcome of IP's layout and later installation of the metal plate. Additionally, the court noted that the evidence did not even suggest that Voith and Brinkley had knowledge of the installation of the metal plate. Thus, the Second Circuit affirmed the grant of the motions for summary judgment because the defendants could not be liable for warning of a characteristic of which they had no knowledge and which did not exist until after the manufacture and installation of the re-pulping system. In short, the defendants were not responsible for the post-manufacture alterations made by the employer.

—*Katie V. McGaw*

INJUNCTIVE CLASS ACTION WON'T BE CERTIFIED AGAINST SHINGLE MANUFACTURER

***Hilton v. Atlas Roofing Corp. of Mississippi*, 2006 WL 3524295 (E.D.La. 12/5/06)**

Judge Lance Africk of Louisiana's Eastern District denied a motion to certify a class of purchasers of allegedly defective roofing shingles.

Plaintiff Amy Hilton filed suit contending that roofing shingles manufactured by the defendant Atlas Roofing contained metal particles that created rust when the shingles came in contact with water. Hilton argued that the rust caused damage to her home, plant life and structures adjacent to her home. She sought to have the case certified as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure—a type of class action available in some instances where injunctive relief is the primary relief sought.

Judge Africk found that plaintiff's suit was not appropriate for class certification for several reasons. First, Judge Africk found that by asserting only injunctive claims on behalf of the class and not seeking monetary relief, plaintiff endangered the survival of the absent class members' monetary claims. By doing this, plaintiff placed herself in potential conflict with absent class members and rendered her inadequate as a class representative.

Second, despite plaintiff's request for injunctive and declaratory relief on behalf of the class, Judge Africk determined that, in fact, the real thrust of the case was for monetary damages. "Plaintiff's requests, while framed in terms of injunctive relief, appear more concerned with recouping the damages that might flow from the injuries suffered by the putative class than with enjoining defendant's actions and preventing future harm." As such, Rule 23(b)(2) class certification was unsuitable.

JONES WALKER

E*ZINES
January 2007 Vol. 72

Products Liability
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Finally, plaintiff could not show that the majority of the proposed class faced a threat of future harm—another requirement for class certification under Rule 23(b)(2). Judge Africk opined that the harm, if any, occurred at the time the shingles were purchased, and noted there were no allegations that the shingles were still being sold.

Judge Africk's denial of class certification in this case develops case law under the relatively rarely used Rule 23(b)(2).
—*Madeleine Fischer*

BURN VICTIM SUIT VS. HEAT WRAP MAKER DISMISSED FOR VIOLATION OF EXPRESS WARNING

***Broussard v. Proctor & Gamble Co.*, ___ F.Supp.2d ____, 2006 WL 3392759 (W.D.La. 11/22/06)**

Rachel Broussard purchased a ThermaCare heat wrap, which is an over-the-counter product used to relieve pain through heat generation. Broussard, who was born with a severe form of spina bifida, intended to use the heat wrap to relieve muscle soreness in her lower back. Because of her medical condition, Broussard had profound, sensory deficits from her lumbar spine down through her waist, buttocks, and lower extremities. She also suffered from severe, chronic back pain and poor circulation. Broussard had used ThermaCare heat wraps on several earlier occasions with no problems, and was familiar with the ThermaCare heat wrap's directions, labeling, and warnings. A few days later, Broussard placed the heat wrap on her lower back and fell asleep. While asleep, the heat wrap slipped down to her buttocks and she awoke four hours later with severe third degree burns on her left buttock. Broussard sued Proctor and Gamble, the maker of the ThermaCare heat wrap, for damages under the Louisiana Products Liability Act ("LPLA"), alleging that the heat wrap was unreasonably dangerous in the design because of nonconformity to an express warranty which she relied on in using the product, and because of inadequate warning to the dangers of product use. Among other things, the product packaging warned consumers not to use the heat wrap on body areas where heat cannot be felt and to consult a physician before use in circumstances of poor circulation. Further, the package warned that some conditions increase the chance that using heat might result in a burn. The court granted Proctor and Gamble's summary judgment motion, finding, among other things, that Broussard's use of the product was not reasonably anticipated under the LPLA.

Before showing that a product is unreasonably dangerous under the LPLA, a plaintiff must first prove that her damages were (1) proximately caused by the characteristic of the product that renders it unreasonably dangerous, and (2) arose from a "reasonably anticipated use of the product." Whether a use is "reasonably anticipated" is objective and requires a determination of what uses of its product the manufacturer should have reasonable expected at the time of manufacture. A "reasonably anticipated" use may include not only the ordinary, intended use of a product, but also some of a user's negligent conduct. Nevertheless, a manufacturer is not respon-

JONES WALKER

E*ZINES
January 2007 Vol. 72

Products Liability
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sible for every conceivable, foreseeable use and "reasonably anticipated" use does not encompass misuses in direct contravention of a warning or where the danger should have been obvious to the experienced as well as the ordinary consumer. In determining whether a use is "reasonably anticipated," courts have considered factors such as: (1) whether the injured party used the product in a manner that was obviously dangerous; (2) what the user was instructed to do and warned not to do with respect to the use of the product; (3) whether the use of the product was expressly warned against in the product's labeling and the language of that warning; and (4) the sophistication/experience of the user-purchaser.

Here, the court found that a reasonable fact-finder could not find that. Broussard's use was either reasonably anticipated or in a manner reasonable for an ordinary person in similar circumstances with a similar medical condition. Broussard's medical conditions were directly relevant to the heat wrap's instructions for use and warnings against product misuse. Despite knowledge of her medical condition, Broussard did not heed the product warnings, did not take any recommended precautions, and did not follow the instructions for use and against misuse. Though the court agreed that Broussard used the heat wrap in accordance with the product's official, intended purpose and general use, and that she did not qualitatively misuse the product, she used the product in contravention to an express warning to consumers against using the heat wrap if they suffer from certain medical conditions. By disregarding the express warnings, her actions increased the risk of injury and moved her outside the realm of reasonably anticipated use.

This case is important because it demonstrates that where a product is used in contravention of an express warning, reasonably anticipated use becomes intertwined with the character, adequacy and effect of a warning. Although an adequate warning will not always be dispositive of a reasonably anticipated use, it is relevant to assessing what uses of a product a manufacturer should reasonably anticipate.

—*Sarah B. Belter*

CHINESE SPORT CYCLE IMPORTER HELD LIABLE FOR DESIGN DEFECT THAT LED TO ACCIDENT

***Wall v. American Products Co.*, 2006 WL 3436059 (W.D.La. 11/27/06)**

Joseph Wall was injured in an accident while riding a "Sport Cycle" on a paved road in a trailer park. Wall sued APC, the company that imported the Sport Cycle from a Chinese manufacturer and distributed it in the United States. In this opinion, Judge Hicks of Louisiana's Western District granted summary judgment in favor of Wall on the issue of liability.

Notably, APC filed no opposition to Wall's summary judgment motion. Thus, Judge Hicks merely had to satisfy himself that Wall had made out a prima facie case under the Louisiana Products Liability Act ("LPLA"). The LPLA provides that the seller of an alien manufacturer's product may assume the liabilities of a manufacturer un-

JONES WALKER

E*ZINES
January 2007 Vol. 72

Products Liability
www.joneswalker.com
productsliability@joneswalker.com

der certain circumstances. APC imported the Sport Cycle, a product made by an alien manufacturer, and distributed the Sport Cycle to vendors such as Pep Boys. Under a vendor agreement, Pep Boys then sold the Sport Cycle as APC's product. Additionally, information in the Owner's Manual, namely warranty information and the order form for replacement parts and accessories, suggested that APC was the alter ego of the alien manufacturer. Based upon these facts, Judge Hicks found that APC was the manufacturer of the Sport Cycle under the LPLA.

Judge Hicks next considered whether Wall was injured during a "reasonably anticipated use" of the Sport Cycle. Wall was riding the Sport Cycle at a slow speed on a paved road within the confines of his trailer park at the time of the accident in contravention of stated warnings in the Owner's Manual not to ride the Sport Cycle on public streets. Judge Hicks held that, despite these warnings, APC should have known that users of the Sport Cycle would at times drive the Sport Cycle on or across paved roads.

Although Wall himself had no memory of the accident, he submitted the affidavit of professional engineer to establish that a defect in the design of the front fork/axle assembly of the Sport Cycle caused the accident. Judge Hicks found Wall's expert's uncontested affidavit persuasive. Accordingly, Walls met his burden of establishing that the Sport Cycle was defective and unreasonably dangerous because a safer and more secure alternative design was readily available that would have prevented the accident and the resulting injuries.

Judge Hicks also granted summary judgment on Wall's redhibition claim – a means to recover economic loss and attorneys fees. Holding that the LPLA "was never intended to eliminate redhibition as a means of recovery against a manufacturer," Judge Hicks ruled that Wall was entitled to recover the amount paid for the Sport Cycle (which was ruined in the accident) and his attorneys' fees.
—*Don A. Rouzan*

PLAINTIFF CAN'T SUE BONE CEMENT MAKER UNDER LA. LAW FOR FAILED KNEE REPLACEMENT

***Rousseau v. Depuy Orthopaedics, Inc.*, 2006 WL 3716061 (W.D.La. 12/13/06)**

In this case Judge Hicks of Louisiana's Western District granted summary judgment in favor of the manufacturer of a bone cement used in the plaintiff's failed knee surgery. Judge Hicks found that most of plaintiff's claims were preempted by federal law, and that, as to the one claim that was not, the manufacturer was entitled to summary judgment because plaintiff could not raise a question of material fact that the bone cement deviated from FDA approved specifications.

Plaintiff Charles David Rousseau underwent knee replacement surgery in 2004. The artificial knee parts implanted were secured using Simplex, a bone cement

JONES WALKER

E*ZINES
January 2007 Vol. 72

Products Liability
www.joneswalker.com
productsliability@joneswalker.com

manufactured by Howmedica. When the knee replacement failed, Rousseau sued both Howmedica and the manufacturer of the knee parts. Here, Judge Hicks considered Howmedica's motion for summary judgment.

Simplex is a medical device regulated by the 1976 Medical Device Amendments to the Food, Drug and Cosmetics Act. Until 2002, Simplex was classified as a Class III device and deemed to have undergone a rigorous pre-market approval ("PMA") process. In 2002, Simplex was re-classified as a Class II device. The Fifth Circuit has held that, as to Class III devices approved under the rigorous PMA process, most state law claims are preempted by federal law.

Rousseau argued that his claims should not be preempted because, when Simplex was reclassified to a Class II device, lesser FDA requirements became applicable than Class III requirements. Judge Hicks rejected this argument stating, "Even though the Fifth Circuit has not ruled on a case in which a PMA-approved product was reclassified to Class II, this court holds that in such case, the approval process is key to the preemption analysis. The court finds that the reclassification of Simplex to Class II in 2002 did not cause Simplex to automatically lose the protection from suit it earned when granted approval through the PMA process." It was undisputed that no changes had been made to Simplex, its manufacturing process, or its labeling since its reclassification to a Class II device, a factor that apparently influenced Judge Hicks' analysis and led to his holding that all of Rousseau's claims were preempted, except for his claim that the Simplex used in his surgery deviated from the FDA-approved specifications.

Howmedica argued that its product did not deviate from specifications and submitted the affidavit of its quality control manager stating that there was no evidence in Howmedica's records showing that FDA-approved procedures were not followed and that there was no evidence that the batch of Simplex did not comply with the FDA's standards. Rousseau failed to come up with any countervailing evidence, and could not adequately explain how he *could*, if given more time, come up with such evidence. Accordingly, Judge Hicks' found there was no dispute of fact concerning Rousseau's allegation of deviation from specifications and granted summary judgment to Howmedica on all claims.

This case is important for its holding that the key to federal preemption of state law tort claims in medical device cases is the FDA approval process to which the product was initially subjected rather than the current classification of the product.
—*Madeleine Fischer*

JONES WALKER

E*ZINES
January 2007 Vol. 72

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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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