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Western District Judge Refuses To Certify Class Against CCA Treated Wood Defendants

Ardoin v. Stine Lumber Co.,
2004 U.S. Dist. LEXIS 4670 (E.D. La. 3/17/04)

Recently appointed United States District Judge Patricia Minaldi has ruled that a purported class action filed against CCA treated wood defendants will not be certified as a class.

The plaintiffs filed this suit on the basis that wood they had purchased from various retailers contained CCA – a product containing chromium and arsenic as active ingredients. Plaintiffs claimed that these chemicals would leach from the treated wood and contaminate nearby surfaces and users of the wood products. The defendants denied these claims, arguing that the risks of CCA treated wood are minimal, especially when compared to its benefits. At issue in this opinion was whether the plaintiffs' case should be certified as a class of all Louisiana purchasers of CCA treated wood.

In a carefully reasoned opinion, Judge Minaldi found that plaintiffs satisfied only one of five factors necessary for class certification. The proposed class met the test of numerosity, but failed the tests of commonality, typicality, adequacy of representation, and predominance/superiority.

Numerosity. The first requirement for class certification under Rule 23 of the Federal Rules of Civil Procedure is numerosity: the number of potential class members must be so numerous as to make joinder of all these persons impractical. Judge Minaldi agreed that the number of Louisiana purchasers of CCA treated wood was "substantial" and found that the plaintiffs had met their burden on the numerosity requirement.

Commonality. The commonality requirement is met when there is at least one issue whose resolution will affect all or a significant number of the putative class members. Although this requirement is a generalized one, and the burden of proof is "light," the court found that the plaintiffs had failed to meet the requirement. The court found that variations in wood, soil, usage, and environmental conditions prevented a common resolution of any large number of claims, "because some pieces of wood may pose more of a potential threat than other pieces." Further, the defendants had individualized defenses against each plaintiff depending upon whether the plaintiff installed the wood himself or worked through a contractor raising further individualized issues of comparative fault. Lastly, differences in the compensation sought raised additional individual questions. "As the potential class members' claims are examined closely, the common links between them dissipate into many distinctive categories."

Typicality. This factor requires that the representative plaintiffs possess claims which are typical of the class. Judge Minaldi found that the plaintiffs failed to show that the class representatives' circumstances and the degree of exposure they received were typical. Here the court examined the testimony of scientific experts in detail. The court found that the defendants had shown that the plaintiffs' complaints were individualized based on at least 17 variables. For example, soil has significant variations in the naturally occurring background chemicals found in treated wood.

Additionally, many other human activities have resulted in deposits of arsenic in the soil. Further, significant variations between neighbors and even within a single yard may be due to “varying landscaping habits of homeowners 50 years ago, when they applied arsenic-based pesticides to their yards.” As one expert put it, “No simple theoretical model will allow prediction of expected concentrations of these constituents in soil associated with CCA-treated wood structures.” Even assuming uniform distribution of CCA, individual human exposure will depend upon a further set of detailed criteria including amount of time spent outdoors, type of clothing, work performed, etc. Additionally many individual variables affect whether CCA will leach from treated wood: “no two pieces of CCA treated wood are identical and no two structures are the same.” Finally, the court rejected plaintiffs’ argument that the EPA had banned CCA treated wood, thus treating all CCA wood as one category of product. To the contrary, the court noted that EPA did not ban treated wood, but rather wood treaters voluntarily stopped producing CCA wood, because there was a new treatment available. “Thus, a class of products were not singled out for regulatory sanctions.” The court noted that EPA had specifically advised consumers not to replace or remove existing structures made with CCA-treated wood and had not concluded that CCA treated wood posed any unreasonable risk to the public or the environment. The court concluded that it could not be said that all of the wood belonging to class members was defective and therefore the claim of each member was significantly different from other members.

Adequate representation. Although the court found that plaintiffs’ counsel were capable, the court expressed concern that they would not fairly and adequately represent the class members under the present litigation arrangement. By waiving all tort claims including personal injury claims, they exposed certain class members to the argument that any of these potential claims would be forever barred under the doctrine of *res judicata*. The disparity of claims that prevented the plaintiffs from satisfying commonality also had consequences preventing the class members from adequately representing the class.

Predominance/superiority. For the reasons discussed in the commonality and typicality sections the court concluded that common questions did not predominate over individual ones, and a class action would not be “the superior method for adjudicating this dispute.”

The denial of class action status in this case was in keeping with a previous denial of class certification in the *Jacobs* case in the Southern District of Florida.

- [Madeleine Fischer](#)

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Manufacturer And Seller Of Product Solidarily Liable In Redhibition Actions

LeGros v. ARC Services, Inc.,
2003-0918 (La. App. 3 Cir. 2/25/04), 2004 WL 344152

On March 24, 1995, Mike LeGros purchased from ARC Services, Inc. an 855 cubic inch 400 horsepower continuous heavy-duty engine for use on his commercial shrimping vessel. The product he received, however, was a rebuilt 855 cubic inch 400 horsepower continuous medium-duty engine. The engine was manufactured by Cummins Engine Co. Soon after his purchase, the engine began to have problems. After only a few nights of use, it overheated and the manifold burst. ARC overhauled the engine; however, problems continued and ARC was forced to perform two additional overhauls by July 1995. In September, 1995, both the engine’s manifold and turbo had to be replaced again. Since ARC did not have certain replacement parts, Mr. LeGros took the engine to a different repair shop. Given that the engine had continued to run hot, he asked the repair shop try to solve the problem. It discovered that the wrong cam shaft had previously been installed in the engine. Though replacing it solved a number of problems, the prior overheating of the engine had already severely damaged the

engine to the point that it was unusable.

On August 28, 1997, Mr. LeGros then filed a redhibitory action against ARC, asserting that the engine contained redhibitory defects. On June 11, 1999, he also filed a redhibitory action against Cummins. A redhibitory defect occurs when a product is either rendered useless by a defect in the item, or the use is so inconvenient that the buyer would not have purchased the product at all had he known of the defect. In such case, the buyer's remedy is rescission of the sale. Additionally, a defect is redhibitory when the product's usefulness is diminished but the consumer would have still purchased the item for a lesser price. A buyer's remedy would be limited to a reduction of the purchase price. Any waivers of warranties against redhibitory defects must be clear, unambiguous, and written.

The trial court ultimately granted an Exception of Prescription, filed by Cummins, stating that prescription had run as Cummins is not a solidary obligor with ARC. The crux of this case, therefore, is whether a seller and a manufacturer are solidarily liable to a buyer for redhibitory defects in a thing sold.

Applying Louisiana jurisprudence, the Third Circuit Court of Appeals majority indicated that consumers are strongly protected. A consumer is entitled to two warranty obligations in every sale—that of merchantable title and reasonable fitness for the product's intended use. This is true despite the lack of privity. Consequently, a buyer can recover from not only the seller of a product, but also the manufacturer, even though there is no direct relationship between the two. This rationale holds true whether the suit is in tort or warranty (either express or implied). This jurisprudence, in addition to Louisiana statutory authority, has created a presumption of solidary liability between manufacturers and sellers in redhibition actions. A seller must merely show a defect in the product sold. When there are solidary obligors, the filing of a suit against one interrupts prescription as to all. Consequently, the majority decided that Mr. LeGros had indeed timely filed a redhibition suit against ARC, which interrupted prescription as to Cummins; ARC and Cummins are solidary obligors as both seller and manufacturer, respectively.

The dissenting Judge in this case, however, disagreed with the majority's rationale, stating that the critical question in determining solidary liability in a redhibition claim is whether the plaintiff can prove that the defect related back to the original manufacture of the product. Here, Mr. LeGros did not specifically allege when the defect occurred and the facts tend to show that ARC may have caused the defect through its multiple overhauls of the engine.

- [Sarah B. Belter](#)

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Prior Blood Shield Laws Are Applicable To Distributors Of Blood Products

Christiana v. Southern Baptist Hosp.,
2003-1880 (La.App. 4 Cir. 2/4/04), 2004 WL 308115

The Fourth Circuit held that the blood shield laws were applicable to distributors of blood products.

In 1984, Melinda Christiana received contaminated blood from a blood transfusion while receiving treatment for acute leukemia at Tulane Medical Center. The blood was drawn, screened and tested by Tulane Medical Center and Southern Baptist Hospital. Subsequently, in 1988, she was diagnosed with the HIV virus. In 1992, the Christianas filed suit against Tulane Medical Center, Tulane Medical Review Board, and Southern Baptist Hospital. They asserted claims in strict liability and negligence against both parties arguing that the tainted blood was manufactured, distributed, and/or supplied by Tulane and/or Baptist.

The Blood Shield Statute was first enacted in 1968. The present Blood Shield Statute is codified at La. R.S. 9:2797 and La. C.C. 2322.1. Although the law has been repeatedly revised over the years, it's purpose from the onset was to prohibit the imposition of strict liability in cases involving the inadvertent use by healthcare providers of defective blood products.

The trial court, in a previous ruling, had already concluded that Baptist was a distributor of blood. Additionally, the parties stipulated that the Blood Shield Statute in effect in 1984 was the law applicable to this case. In their motion for partial summary judgment, the Christianas argued that, at the time of the blood transfusion, the Blood Shield Statutes did not include distributors in the class of health care providers protected by the law. They argued that because the word "distributor" was not included in La. R.S. 9:2797 or La. C.C. 2322.1 until 1990, the statute did not cover the distributor of defective blood products prior to that time. Therefore, they reasoned, the statute did not apply to their strict liability claims against Baptist for the distribution of defective blood products.

Applying rules of statutory construction the court determined that the legislature's intent as to the 1982 statute then in effect was to shield all hospitals and all blood banks from strict liability. According to the court, a holding that the statute did not apply to distributors would be absurd. Under this line of reasoning, Tulane, the hospital who performed the transfusion and supplied the most amount of blood, would be protected, while Baptist, who supplied Tulane with a small portion of blood, would not be protected. The court determined that since the legislature did not expressly make a distinction between hospitals that actually provided blood from their own blood banks and hospitals that obtained blood needed for the transfusions from other hospital's blood banks, it would not make such a distinction. Accordingly, the Fourth Circuit vacated the trial court's judgment and found in favor of Baptist.

- *Michelle D. Craig*

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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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