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"FAILURE TO TEST" CLAIM AGAINST FEMA TRAILER MANUFACTURER PASSES THE TEST

***In re FEMA Trailer Formaldehyde Products Liability Litigation*, MDL 07-1873, 2009 WL 2382773 (E.D. La. July 23, 2009)**

In this ongoing multidistrict litigation, one defendant trailer manufacturer, Gulf Stream, recently asked the district court to dismiss some of the plaintiffs' claims against the company. In their complaint, the plaintiffs alleged, among other things, that the trailers were defective due to the defendants' failure to evaluate the level of formaldehyde emissions under the conditions they would be used; that the trailers were unsuitable for their intended use; and that the plaintiffs were entitled to recover money damages for loss of use of a safe trailer or other shelter following their displacement by the hurricanes. Gulf Stream argued that these claims were not recognized under the Louisiana Products Liability Act ("LPLA").

Judge Kurt D. Engelhardt of the Eastern District of Louisiana dismissed plaintiffs' claim that the trailers were unsuitable for use. He also dismissed plaintiffs' loss of use claim. Neither was within the exclusive theories of liability provided for by the LPLA. However, Judge Engelhardt rejected Gulf Stream's argument that plaintiffs' "failure to test" claim was not a recognized claim under the LPLA. He determined that a "failure to test" claim is viable under LPLA, but only when it is alleged that such a failure rendered the product unreasonably dangerous.

—*Wade B. Hammett*

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TRAILER RESIDENTS' CLAIMS AGAINST FEMA OVER FORMALDEHYDE CONTINUE

***In re FEMA Trailer Formaldehyde Products Liability Litigation*, No. MDL 07-1873, 2009 WL 2496570 (E.D. La. Aug. 13, 2009)**

In another recent development, the district court in this multidistrict litigation refused to globally dismiss plaintiffs' claims that FEMA was negligent in responding to complaints and concerns about formaldehyde in trailers provided after Hurricanes Katrina and Rita. Instead, Judge Kurt D. Engelhardt held that such claims would have to be considered individually as to each plaintiff. He observed that each plaintiff would likely have different relevant facts that might or might not afford him a claim against FEMA. He also allowed for the possibility that FEMA's responses to individual plaintiffs could be defensible "as long as it could be demonstrated that the Government's case-by-case reactions were consistent with and in furtherance of its general policy pronouncement of providing disaster victims with safe and habitable housing."

—*Sarah S. Brehm*

SELLER OF DEFECTIVE MAMMOGRAPHY UNIT MUST PAY OPPONENT'S ATTORNEY'S FEES

***Nelson Radiology Assoc., L.L.C. v. Integrity Med. Sys., Inc.*, No. 2008-0443 (La. App. 4 Cir. 7/29/09); 2009 WL 2357007**

In 1999, Ava Nelson took steps to open her own outpatient imaging center. To do so, Nelson required four essential pieces of medical equipment, including a bone densitometer and a mammography unit. Nelson contacted Integrity Medical Services ("Integrity") and agreed to purchase refurbished equipment from Integrity. After refurbishing the units, Integrity shipped the equipment to Nelson. The mammography unit arrived on February 2, 2000; however, because of a shipping snafu, Integrity delivered a replacement densitometer a month later. In early March, Nelson noticed damages to the mammography unit and several parts missing. After several attempts to correct the problems, Nelson filed suit against Integrity on December 26, 2000, seeking to recover the purchase price of the equipment, repair costs, attorney's fees, and other damages. After a two-day trial, the trial court found Integrity liable and awarded damages and attorney's fees to Nelson. Integrity appealed, arguing several errors, including that the trial court erred in awarding attorney's fees. Judge James F. McKay, writing for the Louisiana Fourth Circuit Court of Appeal (the "Fourth Circuit"), upheld the trial court's award of attorney's fees.

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In general, the Louisiana Products Liability Act ("LPLA") represents the exclusive remedy against manufacturers for damages resulting from a defective product. A manufacturer, however, can be held liable under redhibition in certain circumstances. Redhibition is a form of contractual recovery for defects in a thing sold. A defect is redhibitory when it "renders the thing useless, or its use so inconvenient that it must be presumed that the buyer would not have bought the thing had he known of the defect." Significantly, a party prevailing on a redhibition claim against a manufacturer can recover attorney's fees, but only if the seller of the product knew of the defect and failed to reveal it to the buyer. In comparison, a party may not recover attorney's fees under the LPLA.

Here, the trial court determined that Integrity qualified as a "manufacturer" as the term is defined under the LPLA. Under redhibition, a manufacturer is presumed to have knowledge of defects in the object it produces. Thus, the trial court's determination permitted Nelson to recover her attorney's fees without first proving that Integrity knew of the defect. The Fourth Circuit concluded that the trial court mistakenly applied the LPLA's definition of "manufacturer" to a redhibition claim. The trial court, therefore, erred in presuming that Integrity had known about the defects. Notwithstanding this error, the Fourth Circuit concluded that the mammography unit contained a redhibitory defect and found that the evidence supported the conclusion that Integrity knew about the defect and that the defect existed at the time Integrity shipped the unit to Nelson. Therefore, the Fourth Circuit upheld the award of attorney's fees, but for different reasons.

For manufacturers, the line between the LPLA and redhibition is not always clear. With respect to attorney's fees, the Fourth Circuit adopted a practical approach to determining whether Nelson's claim derived from the LPLA or redhibition. Nelson's claim against Integrity arose out of a contract and did not involve personal injury. The Fourth Circuit embraced these facts and concluded that, absent a tort, Nelson's claim did not fall within the LPLA. But this decision, while acceptable under these facts, does little to guide future litigants in evaluating whether a plaintiff's claim arises under the redhibition articles or the LPLA. Absent the same factual scenario, the line separating the application of the LPLA and redhibition to a plaintiff's claim against a seller or manufacturer remains murky.

—*Eric M. Liddick*

PFIZER STILL FACES CLAIMS INVOLVING ITS SMOKING-CESSATION DRUG CHANTIX

***Brennon v. Pfizer, Inc.*, No. 09-1093, 2009 WL 2525180 (W.D. La. Aug. 17, 2009)**

Judy Brennon used the prescription drug Chantix, a prescription drug manufactured and sold by Pfizer aimed to help patients stop smoking. Brennon contended that following her use of Chantix, she began to suffer seizures, one of which happened while she was shopping at a Rite Aid store. Brennon maintained that her use of Chantix caused her to suffer this seizure and that the seizure caused her to fall and sustain injuries. Consequently, Brennon filed suit against Pfizer in Louisiana state court, asserting claims such as strict liability, negligence, gross negligence, and breach of express

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warranty, in addition to claims arising under the Louisiana Products Liability Act ("LPLA"). Pfizer followed by removing the case to federal court.

Pfizer filed a motion to dismiss. The court considered two main issues when deciding the motion: (1) recognizing that the LPLA sets forth the exclusive theories of liability for products liability cases in Louisiana, may a plaintiff support a claim under the LPLA even though the petition uses labels that refer to non-LPLA claims?; and (2) are punitive damages available under the LPLA? Addressing the first question, the court found that even though Brennon's factual allegations did not specifically refer to claims under the LPLA, Brennon was nonetheless able to survive a motion to dismiss where she alleged Chantix was unreasonably dangerous within the meaning of the LPLA. As to the second question, the court granted Pfizer's motion to dismiss punitive damages, holding that exemplary or punitive damages are unavailable unless expressly provided for by statute. In summary, while Pfizer will not face the possibility of punitive damages arising from Brennon's claim, Brennon will be allowed to seek compensatory damages related to her claim arising under the LPLA.

—*Christopher D. Cazenave*

LAMP MANUFACTURER'S FAILURE TO LABEL PRODUCT ENOUGH TO TOLL PRESCRIPTIVE PERIOD

***Allstate Ins. Co. v. Fred's Inc.*, No. 44,508-CA, 2009 WL 2517107 (La. App. 2 Cir. 8/19/2009)**

On September 28, 2003, Lucinda Thornton's home was damaged by a fire allegedly caused by a lamp that she had purchased from Fred's Stores of Tennessee, Inc. ("Fred's"). The lamp bore a sticker stating that Fred's was the distributor of the lamp, but had no other labels. Thornton's homeowner's insurance company, Allstate Insurance Company ("Allstate"), paid for the damage to her home, and then filed suit on March 15, 2004, against Fred's, seeking to recover the amount it had paid Thornton. In the suit, Allstate claimed that Fred's was responsible because it manufactured, and/or marketed, and/or sold the lamp that caused the fire.

On November 22, 2004, Fred's, in response to a discovery request, stated that it did not manufacture the lamp, and it did not know who manufactured the lamp. On April 24, 2004, Fred's first identified Van Troxel International, Inc. as the distributor of the lamp and stated that it believed that the lamp was manufactured by Chain Run, a company in China. After discovering the true manufacturer, Allstate amended its petition to add L & L Import as the manufacturer of the lamp, and two insurance companies as L & L Import's alleged insurers, including Colony Insurance Company ("Colony").

In response, Colony filed an exception of prescription, claiming that Allstate had not sued Colony within one year of the date of the fire, which is required for actions filed under the Louisiana Products Liability Act ("LPLA"), and, as such, the

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lawsuit should be dismissed because it was untimely. The trial court granted Colony's exception and dismissed them from the case.

On appeal, Allstate again argued that the doctrine of *contra non valentem* applied because L & L Import had concealed the fact that it was the manufacturer of the lamp, and, as such, Allstate did not discover the manufacturer's identity until additional discovery was conducted. Allstate argued that once it discovered the identity of L & L Import, it amended its suit in a timely manner to include L&L Import and its insurers as defendants. The doctrine of *contra non valentem* provides that a suit is not untimely, even if it is filed outside of the prescriptive period, when either the defendant himself has done some act to prevent the plaintiff from availing himself of his cause of action or where plaintiff does not know of, nor could reasonably know of, a cause of action against the defendant even though the plaintiff's ignorance is not induced by the defendant.

The Louisiana Second Circuit Court of Appeal held that under both of these categories of *contra non valentem,* Allstate's suit was timely and reversed the trial court's ruling. The court held that Allstate was unable to learn the identity of the manufacturer of the lamp because L & L Import had failed to label the lamp. Although labeling is not required under Louisiana law, the court noted that the failure to label the product was an act of concealment on L & L Import's behalf, and, as such, Allstate was unable to readily ascertain L & L Import's identity. The court further held that Allstate did not know the identity of L & L Import until after the suit was filed, and, once it discovered L & L Import's identity, it amended the suit in a timely manner to include it and its insurers. As a result, the court held that Allstate's suit was timely filed against L & L Import and its insurers, and reversed the trial court's ruling granting Colony's exception of prescription.

—*Sara C. Valentine*

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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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