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Current Settlements of Pre-1985 Asbestos Exposure May Require Special Reservation of Rights

Hebert v. ANCO Insulation, Inc.,
2000-1929 (La.App. 1 Cir. 7/31/02), ____ So.2d ____

As a result of overly broad interpretations of the Louisiana Supreme Court's holding in *Cole v. Celotex Corporation*, 599 So.2d 1058 (La. 1992), asbestos litigation is generally governed by antiquated legal principles that were modified or overruled decades ago. While this situation generally favors asbestos claimants, this case demonstrates how it can eliminate plaintiffs' cause of action and create a potential malpractice trap.

Plaintiffs sued 38 defendants contending that Alvin Hebert had developed mesothelioma as a result of exposure to asbestos. Due to pretrial settlements and defendant bankruptcies, plaintiffs proceeded to trial against only Dow Chemical and the McCarty Corporation. The claim against Dow was based on the presence of asbestos-containing insulation at its Plaquemine facility. At the conclusion of the trial, the jury absolved McCarty, but found that Dow was strictly liable as the custodian of a defective thing (Civil Code article 2317, since modified by article 2317.1). Dow's appeal was heard by a five judge panel. Both the majority opinion and the concurring/dissenting opinion by Judge Whipple raise interesting issues.

The Trap In *Cole v. Celotex*, supra, the Louisiana Supreme Court held that Act 431 of 1979 adopting comparative negligence could not be applied to asbestos cases when the plaintiff was exposed to asbestos prior to 1979. The decision was based on language in the act stating that it would not apply "to claims arising from events" that occurred prior to the act's effective date. The Court reasoned that in an asbestosis case the requisite "events" are significant exposures to asbestos. When those exposures occur prior to 1979, the language of the act precludes application of comparative negligence principles. While the *Cole* holding is limited to the application of comparative negligence, most trial courts have relied on it as authority for applying all substantive law in effect at the time of the plaintiffs' initial exposure.

Shortly before trial, Dow served a subpoena duces tecum on plaintiffs seeking production of all settlement agreements. Dow argued that prior to 1985 the release of one solidary obligor released all other solidary obligors unless the plaintiff reserved his rights. Since plaintiff's exposure occurred prior to 1985, the failure to specifically reserve rights against Dow in the settlement agreement would release it from any liability to plaintiffs. Because of plaintiffs' objections to the subpoena, the trial judge ordered an *in camera* inspection of the settlement agreements so that he could report on the presence or absence of the reservation. Apparently, the trial judge failed to review the settlement agreements, and the appellate record was devoid of any information concerning the presence or absence of reservations in the settlement agreements.

Four of the five appellate judges agreed with Dow. Based on the reasoning of *Cole*, they concluded that the pre-1985 version of Louisiana Civil Code article 2203 governed the effect of the settlements, and that the release of a solidary obligor would release the entire debt absent a reservation of rights. However, the judges failed to address whether the 1985 act abolishing requirement of a reservation contained language similar to the language relied on by the Supreme

Court in *Cole*. The majority then found that the trial judge's failure to determine whether the settlement agreements contained the requisite reservation required them to vacate the judgment and remand for resolution of this issue.

While the majority's decision seems in a simple and logical manner to correct a record defect caused by a failure on the part of the trial judge, Judge Whipple, in dissent, castigated the majority for "judicial overreaching" and blamed Dow for failing to object in the trial court. Judge Whipple ultimately concluded that Dow bore the burden of proving the lack of any reservation, and since the record was silent on the issue, that it had failed to satisfy its burden of proof.

The appellate record will be supplemented with information concerning the presence or absence of reservations in plaintiffs' settlement agreements, and the majority is poised to dismiss plaintiffs' claims if even one agreement lacks the requisite reservation. While such reservations were standard provisions prior to 1985, they have become superfluous since the abrogation of Louisiana Civil Code article 2203, and are no longer standard in current settlement forms. Thus, the use of a settlement form appropriate for current law may constitute malpractice where the attorney fails to take into account the possibility that pre-1985 substantive law may apply.

- *William L. Schuette*

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Default Judgment Vacated 2 Years Later after Foreign Company Denies it Made Product

Jackson V. Fie Corporation,
___ F.3d, ___ (5th Cir. 8/20/02)

In a case involving a products liability claim against a foreign company, the United States Fifth Circuit Court of Appeals vacated a district court's denial of a motion for relief from a judgment allegedly entered in the absence of personal jurisdiction. The plaintiff-appellee, Arnold Jackson, accidentally dropped an envelope containing a loaded .25 caliber pistol. The pistol discharged, lodging a bullet in Jackson's neck, severing his spinal cord and rendering him a quadriplegic. Jackson, his wife and son, brought suit in Louisiana state court against a number of defendants, including Fratelli Tanfoglio di Tanfoglio Bortolo & C. S.n.c., an Italian products manufacturer, and two Italian firearms firms, Fabbrica D'Armi di Tanfoglio Giuseppe, S.r.l. and Giuseppe Tanfoglio, Spa. The case was removed to federal court and other defendants who had been named were eventually dismissed. The only remaining defendants were the three absent "Tanfoglio" firms, none of whom ever made an appearance.

The Jacksons filed for a default judgment, which the district court entered in favor of the plaintiffs, concluding that the Tanfoglio firms were liable under Louisiana's product liability law. The district court's ruling was predicated on the finding that it had personal jurisdiction over the Tanfoglio firms based on proper service under both the Louisiana Long-Arm Statute and the Hague Service Convention. The court did not engage in an analysis of whether the exercise of personal jurisdiction comported with due process. The district court awarded the Jacksons \$11.2 million plus interest and costs.

In October of 2000 -- some two years after the district court's entry of judgment -- Fratelli Tanfoglio filed a Rule 60(b)(4) motion to vacate the judgment. Fratelli Tanfoglio argued that the default judgment was void for lack of personal jurisdiction and presented evidence in support of its motion that it did not manufacture the pistol and therefore lacked minimum contact with Louisiana to support the exercise of personal jurisdiction. The court denied Fratelli Tanfoglio's motion, finding that the defense that it did not manufacture the offending pistol was not meritorious and further that other contacts with the United States firearms market and Louisiana in particular supported personal jurisdiction. An appeal followed.

In overruling the district court's judgment, the United States Fifth Circuit held that a party's right to contest personal jurisdiction is not waived by his failure to appear at all. The plaintiffs also argued that Fratelli Tanfoglio's "unreasonable delay" of two years prevented the Rule 60(b)(4) motion. The court summarily dismissed this argument, holding that there is no time limit for the bringing of a Rule 60(b)(4) motion.

Next, the plaintiffs argued that the default judgment conclusively established the identity of the pistol's manufacturer and consequently personal jurisdiction over Fratelli Tanfoglio. The court was presented with a conflict "because the identity of the pistol's manufacturer ha[d] ramifications for both jurisdiction and the merits." *Id.* at *5. Thus, the "foundational principle" embodied in Rule 60(b)(4) for establishing the grounds for relief conflicted with a well-established rule of claim preclusion that a default judgment is unassailable on the merits. The court held that due to the constitutional implications, "the protections of personal jurisdiction must trump the doctrine of claim preclusion." *Id.* at *5. Thus, the district court should have heard Fratelli Tanfoglio's "evidence" that it did not manufacture the pistol and did not have "contacts" with Louisiana. The court remanded the case to the district court for a ruling on the 60(b)(4) motion, including whether Fratelli Tanfoglio had "continuous and systematic" contacts to support the exercise of general personal jurisdiction.

– [*Etienne Balart*](#)

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Manufacturer and Seller of Van Held Liable for Fire Which Destroyed Home

Safeco Insurance Company of America, v. Chrysler Corporation,
2001-1641 (La.App. 3 Cir. 7/31/02), ____ So.2d ____

Louisiana's Third Circuit affirmed a successful Daubert challenge against a defense expert and elaborated on the availability of attorney's fees in a redhibition suit in this van fire case.

Plaintiffs Michael and Sue Mioton sued DaimlerChrysler and Southern Chrysler for damages sustained when their home was destroyed by a fire allegedly caused by their Plymouth mini-van manufactured by DaimlerChrysler and purchased from Southern Chrysler. Plaintiffs alleged the van was unreasonably dangerous in construction or composition, or, alternatively, was unreasonably dangerous in design. The Miotons further alleged Southern Chrysler failed to repair the van and that they were entitled to rescission of the sale of the van. Their suit was consolidated with a similar suit by their subrogated insurer Safeco Insurance Company.

The jury found that there was a defect in the manufacture of the van when it left DaimlerChrysler's control and that the defect was the cause of the fire and awarded the Miotons damages. The trial court entered judgment on the jury verdict and also awarded the Miotons and Safeco attorney fees which are available in a redhibition suit.

On appeal DaimlerChrysler argued the trial court abused its discretion in excluding the opinions of its electrical engineering expert that the fire was caused by something other than the van. The proposed expert testified that he identified four photographs as representative of other causes of the fire. He contended that one cause was an electrical short emanating from the kitchen. However, he identified pine straw in the photograph as the electrical component that shorted out. This mistake called into question the factual basis of the expert's testimony. Because the cause and origin of the fire was the central issue, the Third Circuit held that the trial court did not abuse its discretion in excluding the expert as unreliable under *Daubert*.

DaimlerChrysler and Southern Chrysler also argued that the trial court erred in finding a redhibitory defect because the jury did not find a redhibitory defect, and further argued that the plaintiffs waived their claim in redhibition by failing to object to the verdict form which omitted the claim. Finding that a manufacturing defect and a redhibitory defect are not necessarily one and the same, the appellate court held that because it could not determine from the verdict form whether the jury found a manufacturing defect under the LPLA, a redhibitory defect, or both, the form was vague and overly

broad, and was insufficient as a matter of law. The court then reviewed the record to determine whether the elements under the LPLA, redhibition, or both had been satisfied.

The court noted the differences in remedies for claims under the LPLA and under redhibition, with the major practical difference being the availability of attorney's fees under redhibition. Although the LPLA is the exclusive remedy against a manufacturer for "damages" caused by its product, claims in redhibition against a manufacturer for economic loss survive the LPLA. To the extent the damage is compensable in redhibition, it is not "damage" as defined under the LPLA.

Based on its review of the record and evidence, the court held that the van was unreasonably dangerous in construction or composition under the LPLA. It also found that a redhibitory defect existed in the van which rendered it useless from the time it caught fire and was completely destroyed. Accordingly, the court held that both DaimlerChrysler and Southern Chrysler were liable in solido for the return of the purchase price of the van. However, because Southern Chrysler did not know of the defect and therefore was a seller in good faith under La.Civ.Code art. 2531, it was not liable for attorney's fees. DaimlerChrysler, presumed as the manufacturer to know of the defect, was liable only for those attorney fees that related to the recovery of purely economic loss under the redhibition claim – not for fees related to the products liability claim. The court therefore lowered the plaintiffs' award of attorney's fees from \$40,000 to \$25,000.

The court dismissed Safeco's claim for attorney fees because Safeco did not plead redhibition nor the right to attorneys' fees. The court held that attorneys fees are special damages and must be specifically alleged; therefore, Safeco could not "piggy-back" onto the Miotons' pleadings.

- Stacie M. Hollis

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Suit Against Hospital for Injection of Allegedly Defective Vaccine Held Prescribed

Case v. Merck & Co.,
2002 WL 1897048 (E.D. La. 8/15/02)

Judge Sarah Vance has dismissed a local hospital from a suit alleging the plaintiff's son was injured by the injection of childhood vaccines. The dismissal of this Louisiana defendant allowed the case to stay in federal court on grounds of diversity jurisdiction.

The plaintiffs asserted their son was injured when he was injected with vaccines containing the ingredient thimersal, a chemical preservative containing mercury. The plaintiffs sued a number of drug manufacturers, manufacturers of thimersal, and Tenet, the medical center where the child was injected with a vaccine allegedly containing thimersal.

The defendants removed the case to federal court asserting that Tenet, the only Louisiana defendant, had been fraudulently joined. (State suits in which all defendants are diverse in citizenship from all plaintiffs may be originally filed in or removed to federal court.) To succeed in proving fraudulent joinder, a defendant must show that there is no reasonable basis to predict that plaintiffs could establish a claim against the in-state defendant.

The Louisiana Medical Malpractice Act applies to unintentional torts arising from defects in drugs. As pointed out by Judge Vance, the Louisiana Products Liability Act does not apply to a nonmanufacturer such as a hospital. Judge Vance agreed that the plaintiffs' claims against Tenet fell under the Medical Malpractice Act which establishes a three year prescription/peremption period. Since more than three years had passed since the child's last vaccination at Tenet, the plaintiffs' claims against Tenet were prescribed. With the dismissal of Tenet, complete diversity was attained and the plaintiffs' motion to send the case back to state court was denied.

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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