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Louisiana Supreme Court Holds Asbestos Causes of Action Arise at Time of Exposure

Austin v. Abney Mills, Inc.,
2001-C-1598 (La. 9/4/02), rehearing denied 9/23/02, ___ So. 2d ___

Deciding that all causes of action related to asbestos exposure arise at the first significant exposure, the Louisiana Supreme Court's pro-plaintiff holding in *Austin v. Abney Mills, Inc.*, 2001-C-1598 (La. 9/4/02), rehearing denied 9/23/02, creates many legal anomalies in long latency injury cases.

History Exposure to an environmental toxin can cause a number of differing diseases some of which appear only after a long latent period. The Louisiana Supreme Court first addressed the issue of when a cause of action for long latency disease arises in *Cole v. Celotex Corporation*, 599 So.2d 1058 (La. 1992). *Cole* involved an asbestosis case where defendants sought to take advantage of the Comparative Negligence principles enacted in 1983. Defendants argued that the post-1983 law effective at the time plaintiff was diagnosed with asbestosis governed the case. Plaintiff contended that his cause of action arose prior to 1983, and that the comparative negligence principles could not be applied retroactively. Reviewing the language of the enacting legislation, the Court noted that the act specifically prohibited its application to actions arising from "events" occurring prior to its enactment. The Court held that the "events" giving rise to a cause of action for asbestosis were the significant exposures to asbestos. Since the initial significant exposures occurred before 1983, comparative negligence principles could not be applied.

The Court's decision was based on the interpretation of specific statutory language requiring a determination of when the "events" giving rise to a later cause of action occurred. Under the Court's rationale the cause of action and the events giving rise to it were neither synonymous nor coterminous. However, most lower courts adopted *Cole* as authority for holding that a cause of action for asbestosis accrues at the time of the first significant exposure to asbestos even though the disease may not develop or become manifest for decades.

The Court avoided further clarification of its holding until 1999 when it appeared ready to limit *Cole* to its original scope. In *Walls v. American Optical Corporation*, 98-0455 (La. 09/08/99), 740 So.2d 1262, plaintiffs asserted a wrongful death action claiming that their decedent died from silicosis, another long latency disease. Because the death occurred after 1976, employer defendants argued that 1976 amendments to the Workers' Compensation Act limited plaintiffs to a compensation claim. Plaintiffs argued that under *Cole*, the substantive law effective at the time of the decedent's first exposure to silica governed the case. With no statutory language to guide it, the Court was required to determine when the cause of action arose. The Court rejected plaintiffs' argument that its holding in *Cole* mandated application of pre-1976 law stating that the decision could not be read to "require all long latency occupational lung disease cases to be governed by the law in effect on the date the victim was exposed to the disease causing agent" and emphasized that the *Cole* decision "turned on unique language of the comparative fault statute." The Court held that the cause of action accrued after 1976 because the decedent's death was essential to the existence of the cause of action.

Austin In *Austin*, plaintiff Alton Hogue contracted mesothelioma, an aggressive malignancy of the pleura, as a result of his occupational exposure to asbestos occurring before 1975. He sued numerous parties including his employer International Paper and several IP officers and directors (collectively "IP"). IP filed a motion for summary judgment seeking dismissal of the claims based on the 1975 amendments to the Workers' Compensation Act. Plaintiff argued that pre-1975 law applied because his initial exposure to asbestos occurred before 1975, and, therefore, his cause of action accrued prior to the 1975 amendments. IP relied on two arguments: 1) that a cause of action in compensation is based on disability and plaintiff did not become disabled until after 1975, and 2) that plaintiff's injury, mesothelioma, did not occur until after 1975.

The trial court accepted the first IP argument. Causes of action under the compensation act do not arise until the employee becomes disabled. The court reasoned that because Mr. Hogue did not become disabled until the 1990's, the cause of action accrued after 1975 and the 1975 amendments were applicable.

The Second Circuit Court of Appeal rejected this rationale but upheld the result using a traditional tort analysis for determining when plaintiff's cause of action arose. Considering IP's second argument, the court was required to determine when plaintiff's injury occurred. Acknowledging the difficulties associated with this determination in a long latency cancer case, the court relied strongly on the fact that the disease had not manifested itself until the 1990's, and, therefore, it was unlikely that it existed prior to 1975.

A divided Supreme Court (4 - 3) rejected all of these arguments, reversed the lower courts and held that ALL causes of action related to asbestos exposure arise at the time of the plaintiff's first significant exposure. The Court considered three theories for determining when a cause of action arises in long latency cases: the exposure theory (the cause of action accrues on exposure), the contraction theory (the cause of action accrues when a disease is contracted) and the manifestation theory (the cause of action accrues when the disease progresses to the point it becomes manifest).

The Court rejected the manifestation theory as *myopic* concluding that plaintiff's injury must certainly have preexisted its discovery. It then embarked on an analysis that caused it to conclude that the exposure and contraction theories were actually one and the same. Where the Court of Appeal determined that exposure does not necessarily lead to injury, the Court specifically equated exposure with injury. According to the Court, any significant exposure to asbestos causes injury at a cellular level that may ultimately lead to the development of disease after a lengthy latent period. Therefore, all asbestos-related diseases are contracted and the plaintiff's cause of action accrues at the moment of the first significant exposure.

Cole Unbound The Court's intent to create a broad rule that all potential causes of action that may subsequently arise from exposure to asbestos arise at the time of first significant exposure is highlighted by its reinterpretation of *Cole*. Sweeping aside its own language in *Walls* that *Cole* was based on "unique" statutory language, the Court removed any limitation on its holding that exposure = damage = the accrual of the cause of action.

Myopia v. Speculation The Court's assumption that any "significant" exposure causes damage at a cellular level that may ultimately lead to the recognized asbestos-related diseases lacks scientific and logical support. The biological mechanisms by which asbestos causes any disease remain unknown. Medical science has not yet decided whether minute cellular damage that occurs from exposure to asbestos (and almost every other foreign substance) represents an initial step in each disease process or simply an incidental finding.

Moreover, only a small percentage of people exposed to asbestos develop asbestosis, and only a minuscule percentage develop lung cancer or mesothelioma. The Court's rule causes actions for all asbestos-related diseases to accrue at the time of initial significant exposure even though the chances of the plaintiff developing any of these diseases are highly remote and speculative.

Because there is no scientific basis for determining when the "injury" occurs, the decision of when the cause of action arises must ultimately be based on public policy. In adopting its exposure/contraction theory, the Louisiana Supreme Court placed the accrual of the cause of action at the earliest possible moment. While it chided the court of appeal for being myopic in its reliance on the manifestation theory, manifestation reduces the level of speculation and uncertainty. Louisiana jurisprudence has previously recognized that *actual* and *appreciable* damage is necessary to support a cause of action. Requiring manifestation of a disease is more consistent with this principle than searching for cellular and molecular precursors that may or may not develop into a disease decades

later. Moreover, no substantial prejudice is created by delaying the accrual of the cause of action until the disease can actually be detected.

Legal Anomalies The Court's holding is likely to create a number of legal anomalies, only some of which are discussed in Justice Victory's dissent.

Number of Causes of Action Louisiana courts have recognized three separate causes of action arising from asbestos exposure: non-malignant conditions, lung cancer and mesothelioma. To this point it has been assumed that these causes of action are independent and arise at separate times. However, under the Court's rationale, all three causes of action are based on the same cellular damage and arise at the same time. There no longer appears to be a basis for considering them as separate causes of action.

Prescription According to the Court, exposure to asbestos equals damage. Therefore, a plaintiff who knows that he has been exposed may have actual or constructive knowledge that he has been injured. Prescription begins to run if plaintiff has knowledge of any actionable harm, even if he is ignorant of the possible extent of that harm. *Guitreau v. Kucharchuk*, 763 So.2d 575 (La. 2000). Logically, a defendant could argue that prescription on all asbestos-related causes of action begins at the first exposure at least shifting to plaintiff the burden of proving that his claim is not prescribed.

Res Judicata Many asbestos plaintiffs file suit for non-malignant conditions such as asbestosis or pleural plaques. Frequently, the petitions are vague and assert that plaintiff has sustained any or all of the asbestos-related diseases. After these claims are tried or settled, the unfortunate few who develop lung cancer or mesothelioma file subsequent suits for those injuries. With all causes of action arising at the initial exposure, plaintiffs possessed a cause of action for the subsequent malignancy at the time they settled or tried their claim the non-malignant conditions. Since plaintiffs are required to assert all existing causes of action in a single suit, the Court's holding may preclude multiple asbestos suits.

Causation Often, asbestos plaintiffs are exposed at a series of work sites over a number of years. Plaintiffs argue that all defendants from every work site contributed to the injury and are, therefore, solidarily liable. However, if a cause of action for all asbestos-related injuries is complete once a plaintiff is significantly exposed at his first work site, defendants associated with subsequent sites might argue that their conduct is insignificant and not a legal cause of plaintiff's injury.

Solidary Liability One of asbestos plaintiffs' main benefits derived from older substantive law is the application of pure solidary liability to joint tortfeasors. This allows plaintiffs to strong arm settlements from minor defendants through the threat that they may be compelled to pay the shares of other defendants. The Court's rationale may provide defendants with an argument against application of solidary liability in certain situations. As discussed above, when multiple work sites are involved, defendants associated with each site might argue that a separate cause of action arises at the time of the first significant exposure at each site. Because solidary liability is based on the theory that there is only one cause of action, only those defendants common to a work site could be held solidarily liable.

Settlements Prior to 1985, a plaintiff settling with one solidary debtor was conclusively presumed to be releasing the entire debt unless he reserved his rights against the remaining solidary debtors. In *Hebert v. ANCO*, 2000-1929 (La.App. 1 Cir. 7/31/02), ___ So.2d ___, the First Circuit Court of Appeal applied *Cole* to hold that such reservations were required in post-1985 settlements where plaintiffs' exposure occurred pre-1985. While a rehearing has been requested, the Court's rationale supports the First Circuit's decision.

Conclusion The Court's equation of exposure and damages places the accrual of a cause of action for long latency diseases at the earliest possible moment when the existence and extent of damages are the most speculative. This situation in which the plaintiff possesses a cause of action to sue for diseases that may never develop creates numerous legal and practical problems only a few of which have been discussed here.

- William L. Schuette, Jr.

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Louisiana Third Circuit Certifies Crawfish Farmer Class Against Insecticide Manufacturer

West v. G & H Seed Co.,
2001-1453 (La.App. 3 Cir. 8/28/02), ___ So.2d ___

In a lengthy opinion the Third Circuit has affirmed a district court's certification of three subclasses against the manufacturer of an insecticide which allegedly devastated crawfish harvests throughout the state in 1999 and 2000.

The defendants were the manufacturer and various distributors of the insecticide ICON. ICON is applied to rice seed prior to planting to combat rice water weevil. Rice and crawfish are often farmed in the same location or close to one another. Plaintiffs alleged that the ICON treated seed and tailwater from rice fields treated with ICON caused the death of their crawfish crops. ICON's manufacturer on the other hand contended that the damage to the crawfish was caused either by misapplication of ICON or a severe drought in 1998.

The trial court in a somewhat unusual approach certified three "subclasses" while not certifying an umbrella main class. The subclasses included: 1) purchasers of ICON-treated seed who alleged loss to their crawfish crops; 2) farmers who alleged loss to their crawfish crops; and 3) sharecroppers who alleged loss to their crawfish crops. Defendants took an interlocutory appeal challenging the certification on many grounds.

Addressing the numerosity requirement first, the Third Circuit upheld the trial court's admission of evidence from a variety of witnesses that each was aware of numbers of other unnamed crawfishermen who complained that their crawfish production was reduced due to ICON. The Third Circuit held that the witnesses' testimony was competent and was not hearsay because the evidence was not offered for the truth of the claims – that ICON had in fact damaged the crawfish crop – but merely for the purpose of demonstrating that a number of people *alleged* that ICON had damaged their crawfish crops. The court held that the issue of what actually caused crawfish mortality was a question for a later day, and that the merit of that issue was not to be considered at the class certification stage.

The court also rejected the defendants' contention that individual questions as to what caused each particular crawfish farmer's damage defeated the commonality requirement for class certification. The defendants argued that each class member would have to prove that ICON caused his loss rather than other potential factors such as the drought or individual farming practices. The court found that despite the need to sort out the cause of each plaintiff's crawfish loss, commonality existed commenting: "A contrary finding would leave us wondering how any negligence class action suit could ever be certified, since every negligence analysis requires a determination of causation, including the potential presence of intervening or superceding causes." This statement by the court turns a blind eye to the widely held view that negligence cases are not well suited for class certification. Indeed, as long ago as 1966, the Advisory Committee for the revision of Federal Rule 23, noted that "mass accident" cases are likely to present "significant questions, not only of damages but of liability and defenses of liability, ... affecting the individuals in different ways," and that such cases are "ordinarily not appropriate" for class treatment.

Similarly, the court found that the plaintiffs' fraud claims did not defeat the commonality requirement. Even though each fraud claim would require individualized evidence on the question of whether the particular plaintiff relied upon the supposedly fraudulent misrepresentations of the

defendants, the court found that because common questions also existed commonality was present. This aspect of the court's opinion seems to directly contradict prior Louisiana Supreme Court precedent where that court has stated, "A fraud class action cannot be certified when individual reliance will be an issue." *Banks v. New York Life*, 98-551 (La. 1999), 737 So.2d 1275, cert. denied, 528 U.S. 1158, 120 S.Ct. 1168 (2000).

Lastly, the court refused to remand the case for determination of a more precise geographic boundary for the class – as opposed to simply the entire state of Louisiana. Defendants argued that the evidence only established injured parties in three parishes and further pointed to expert testimony from an environmental engineer and a hydrogeologist that the Red River, the Mississippi River and the Atchafalaya Basin acted as natural barriers against the flow of ICON. The court rejected this testimony, even though there was apparently nothing in the record to refute it adopting the view that "it is objectively reasonable for the geographic area to be defined broadly so as to encompass all potential class members." One wonders how a geographic definition drawn simply to include everyone who wants to be in the class can be objective.

In this opinion the Third Circuit continues to demonstrate that it is the most liberal of the five circuits in its treatment of torts and class actions. The defendants raised a number of very credible challenges to the trial court ruling without a single success. We will follow the case to see if it is reviewed by the Louisiana Supreme Court.

- Madeleine Fischer

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Third Circuit Dismisses Spine Cage Manufacturer Holding Suit Untimely

Baker v. Williams,
2002-67 (La.App. 3 Cir. 8/28/02), ___ So.2d ___

Baker underwent spinal fusion surgery to correct a back injury on March 5, 1997. The next day, Baker discovered that implants had been used to stabilize his spine. Weeks after the surgery, Baker experienced pain in his back and legs. Baker was eventually diagnosed with "failed back" syndrome. On November 23, 1998, Baker sued, among others, Spine Tech, the manufacturer of BAK cages, alleging a claim under the Louisiana Products Liability Act.

Spine Tech filed an exception of prescription, contending the products liability claim was prescribed on its face. Baker argued that he did not know Spine Tech was the manufacturer of BAK cages until November 24, 1997, when he inspected the hospital records. The court held that Baker signed a consent form that specifically mentioned the BAK cages and that Baker admitted he found out about the use of the BAK cages the day after his surgery; therefore, Baker had enough information to investigate the BAK cages as early as March 6, 1997.

The court further rejected Baker's argument that prescription did not begin to run until he discovered the harm caused by the BAK cages. Alternatively, the court found that Spine Tech's motion for summary judgment should have been granted because the medical evidence and testimony established that the BAK cages did not move or break and that the cause of the fusion failure was unknown.

- Stacie M. Hollis

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Roof Jack Manufacturer's Warning Not Strong Enough For Summary Judgment In Eastern District

Chambers v. AJC Tools & Equipment, Inc.,
2002 WL 31015600 (E.D.La. 9/9/2002)

Grace Chambers, a roofer, was injured when she fell from the roof of a house to the ground. Roof jacks supporting a platform upon which she was standing allegedly failed. She brought suit in state court against AJC Tools & Equipment, Inc. ("AJC"), the manufacturer of the roof jacks, under the Louisiana Products Liability Act. The case was then removed to the Eastern District of Louisiana where it was assigned to Judge Zainey. AJC moved for summary judgment asserting that it had no liability as a matter of law. Warnings on the roof jacks' label cautioned against placing excessive weight on the roof jacks: "Capacity of four feet of platform space shall be one man per plus maximum of forty pounds." AJC argued that despite reading these explicit warnings, Chambers placed in excess of 200 pounds on the jacks.

AJC relied on *Kampen v. American Isuzu Motors, Inc.*, 157 F.3d 306 (5th Cir. 1998), in which the Fifth Circuit held that a plaintiff's failure to adhere to explicit warnings was not a "reasonably foreseeable use" of a product under the Louisiana Products Liability Act. *Kampen* involved an allegedly defective automobile jack that failed while the plaintiff was underneath the vehicle, an act clearly warned against by the manufacturer. AJC argued that Chambers's use of the roof jacks fell outside of a "reasonably anticipated use" of the product as it was contrary to clear warnings. Additionally, AJC argued that Chambers's use of overlapping planks – also contrary to a clear warning – and her violation of applicable OSHA regulations by failing to use a fall arrest system also precluded liability.

In denying AJC's motion for summary judgment, the district court held that *Kampen* did not mandate judgment as a matter of law under these facts. In opposition to AJC's motion, Chambers submitted the affidavit of an expert who attested that Chambers's use did not violate the warnings. Further, in her deposition Chambers testified that she did not understand exactly what "use" of the jacks AJC intended to prevent by the warnings. Therefore, the court concluded that the warnings were not nearly as express nor clear as the warnings in *Kampen*. Thus, an issue of fact existed as to whether Chambers did indeed act contrary to the product warnings. With this key factual dispute, summary judgment was denied.

- L. Etienne Balart

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Louisiana Fourth Circuit Expands Limits of Recoverable Expert Costs

Saden v. Kirby,
2001-2253 (La. App. 4 Cir. 8/7/02), 2002 WL 1870486, ___ So. 2d ___.

Every product liability case involves expert testimony. Normally at the end of trial the winner is entitled to get back certain of his costs from the loser. This includes costs of experts. In this case the Fourth Circuit explained its view of what type of expert charges may properly be taxed as costs.

The plaintiffs prevailed in this class action and were awarded damages against several state and local government bodies for damages sustained from a flood. Following a previous Fourth Circuit opinion which reversed in part and amended in part the trial court's award of damages, the plaintiffs filed a Motion to Tax Costs and for Interest on Costs.

The district court granted the motion and awarded costs against one of the defendants' insurance company, including expert costs. The insurer appealed stating among other grounds that it

was cast with expert costs not authorized under La. R.S. 13:3666(A). As factual grounds for its contention, the insurer contended that, first, the experts did not testify at trial; second, some of the experts only assisted in trial consultation and litigation and, lastly, the findings of some of the expert witnesses did not satisfy *Daubert* criteria of reliability. Finding no error, the Fourth Circuit upheld the district court's award.

First, the court ruled that expert witnesses may be compensated under La. R.S. 13:3666(A) even though they do not participate at trial. It reasoned that a facial reading of La. R.S. 13:3666(A) supported its interpretation:

Witnesses called to testify in court only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations, and to state the results thereof, shall receive **additional compensation**, to be fixed by the court, with reference to the value of time employed and the degree of learning or skill required.

La. R.S. 13:3666(A) (emphasis added). (In contrast, the court maintained the old rule on deposition transcripts: only those used at trial may be taxed as costs.)

Second, distinguishing earlier jurisprudence (*Baker v. Marcello*, 533 So. 2d 1057 (La. App. 4. Cir. 1988)) the court concluded that although it is inequitable to cast a party for the costs of the opponent's conferences with his or her experts, a party can tax as costs the reasonable cost of time spent by the expert witness in gathering facts necessary for testimony. The court concluded that the record did not reveal which instances of their time the experts devoted purely for consultation. Therefore, it upheld the award of the entire expert fee.

Lastly, the appeal court stated, in effect, that a trial court has the discretion to assess costs for the testimony of an expert witness that does not satisfy *Daubert* standards if the court finds it to be of some value. It reasoned that the trial court did not reject the particular expert's testimony in this case, but used it in considering its reasons for judgment.

In conclusion, the Fourth Circuit in *Saden* dissipated whatever doubts remained of the wide discretion district courts have to tax expenses of experts as costs of litigation.

- *Andrew M. Obi*

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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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