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BALL JOINT MANUFACTURER STILL ON THE HOOK FOR RUNAWAY TRAILER

***Crotwell v. Wal-Mart Louisiana, LLC,* No. 06-909, 2009 WL 1146612 (M.D. La. Apr. 27, 2009)**

On October 29, 2005, Denver Crotwell was severely injured when the car he was driving was struck head-on by a runaway trailer. The trailer had broken free of a truck driven by Jose Yanez when the ball mount connecting the trailer to the truck inexplicably broke in half. The trailer was also secured by two safety chains that came with the trailer, which also failed. Yanez was cited by the Louisiana State Trooper on the scene at the accident for failing to comply with a statute requiring a driver to attach safety chains sufficiently strong enough to hold the trailer to the tow vehicle.

Crotwell and his wife sued Trimas Corporation ("Trimas"), the manufacturer of the ball mount, for damages under the Louisiana Products Liability Act ("LPLA"), alleging defects in construction, defects in design, and failure to warn of an unreasonably dangerous characteristic of the ball mount. Before trial, Trimas filed motions seeking the dismissal of the Crotwells' LPLA claims and the exclusion of the opinions of the Crotwells' expert witness from evidence. Trimas argued that the Crotwells could not prove that necessary elements of an action under the LPLA that: (1) the alleged damages resulted from a "reasonably anticipated use" of the product; and (2) the product was "unreasonably dangerous." Trimas argued that the expert's opinions should be excluded because they were based on unreliable methodology. The motion to strike was denied because Trimas failed to provide evidence that the expert's methodology was unreliable.

The Court dismissed the design defect claim because the Crotwells failed to offer any evidence that a safer alternative design existed when the ball mount left Trimas' control. But, the remainder of Trimas' motions were denied. The Court found that numerous issues of fact existed regarding whether the issue of "reasonably anticipated use" and whether the ball mount was unreasonably dangerous due to a construction defect or a failure to warn.

Under the LPLA, "reasonably anticipated use" means a use of the product that the manufacturer should reasonably expect of an ordinary person in similar circumstances. Here, the Court was unconvinced by Trimas' efforts to equate the failure of the safety chains with an improper or unanticipated use of the ball mount. The evidence showed that even though the

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chains failed, Yanez: used safety chains, did not overload the trailer, and properly connected the trailer to the ball mount. Further, there was no evidence of any alteration or modification of the ball mount before it inexplicably broke in half, leading to Crotwell's injuries.

Based on these facts, for the purposes of Trimas' motions, the Court was willing to infer that the ball mount had a construction defect that rendered it unreasonably dangerous. Under Louisiana law, a plaintiff can use circumstantial evidence to make an inference that a product was unreasonably dangerous when it left the manufacturer's control, but the circumstantial evidence must exclude other reasonable possible causes of the damage with some amount of certainty. While the inference saved the construction defect claim from dismissal, the Crotwells were cautioned not to construe the ruling as an indication that the Court would reach the same conclusion at trial.

Lastly, the Crotwells offered evidence showing that the warning decals and instruction materials provided with Trimas ball mounts do not contain any warning that the use of a safety chain of a specific strength is crucial for the safe use of the ball mount. The Court found this evidence sufficient to create an issue of fact regarding the failure to warn claim.

– *Wade B. Hammett*

THIRD PARTIES CANNOT CRY OVER DEAD CRAWFISH ABSENT A DIRECT PROPRIETARY INTEREST

***Phillips v. G & H Seed Co.*, 2008-934 (La. App. 3 Cir. 4/8/09); 2009 WL 929849**

In 1999, crawfish farmers began using a product called ICON to prevent rice weevils from destroying rice crop. ICON, however, killed and/or sterilized the crawfish, causing damages to not only the farmers, but also buyers and processors who held output contracts with the farmers. The farmers, as well as the buyers and processors, filed a products liability suit against the manufacturer of ICON, Bayer CropScience L.P. ("Bayer"), various sellers, and Bayer's salesman, Michael Redlich. Bayer settled with the farmers before trial. However, at trial on the buyers' and processors' claims, the trial court and the jury found for the plaintiffs, assigning 94% of the fault to Bayer, 1% to Redlich, and 5% to the drought in southwest Louisiana. Both the defendants and plaintiffs appealed to the Louisiana Third Circuit Court of Appeal. On appeal, the Third Circuit majority, in an opinion written by Judge Pickett, reversed the trial court, holding that neither Bayer nor Redlich owed a duty of care to the buyers and processors.

Under Louisiana law, a plaintiff claiming negligence must prove four things: (1) that the conduct caused the resulting harm; (2) that the defendant owed a duty of care to the plaintiff; (3) that the defendant breached this duty; and (4) that the risk of harm was within the scope of the protection provided by the duty. The Louisiana Products Liability Act does not eliminate this requirement.

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The buyers and processors argued that Bayer owed them a duty of care, because the untimely death of the crawfish had an economic effect on the crawfish industry, in general. The damage to buyers and processors was a foreseeable consequence of harm to the farmers' crawfish crop. Bayer, however, argued that the buyers and processors did not fall within Bayer's duty to the farmers because the buyers and processors had no proprietary interest in the crawfish. Judge Pickett, citing the Louisiana Supreme Court's decision in *PPG Industries*, concluded that negligent damage to property does not necessarily require that the negligent party be held legally liable to *all* persons who may be indirectly damaged by the negligent conduct. Here, the farmers, not the buyers or processors, held a proprietary interest in the crawfish. And, the farmers bore the burden of the loss. The plaintiffs, according to Judge Pickett's reasoning, simply failed to prove that they held a proprietary interest in the crawfish. Accordingly, the buyers and processors suffered only indirect damages from the death of the crawfish and could not recover damages from Bayer or Redlich.

Judge Saunders disagreed with the majority decision. In his dissenting opinion, Judge Saunders argued that the majority had misread *PPG Industries*. The Supreme Court, according to Judge Saunders, left open the possibility that end-line buyers or processors can, in some circumstances, recover from a manufacturer for indirect damages. Here, because the plaintiffs had no other source for crawfish, they lost all of the contractually bargained-for economic value. Thus, without any crawfish to sell or process, the buyers and processors suffered as much loss as the farmers and should be permitted to recover damages.

At the end of the day, this decision reinforces the notion that manufacturers should not be held liable to every third party who, because of a contract with the party who dealt directly with the manufacturer, suffers indirect loss. The buyers' and processors' damages here were indirect. The buyers and processors neither purchased nor used ICON. Indeed, Judge Pickett noted the Louisiana Supreme Court's concern that if manufacturers owed a duty to third parties in the distribution chain who suffer indirect damages, then "the list of possible victims and the extent of economic damages might be expanded indefinitely." The rule enforced by the majority here limits the expansive notion of "duty" and protects manufacturers from unlimited liability to anyone demonstrating a tangential or attenuated loss attributable to the negligent conduct. Judge Saunders may be correct in asserting that the majority went too far by foreclosing *any* possibility for a third party's recovery of indirect damages. But, until a concrete test is established, the majority's approach is both more logical and practical.

– *Eric Michael Liddick*

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CLAIMS AGAINST SMOKING-CESSATION DRUG MAKER NARROWED IN CAR ACCIDENT CASES

***Williams v. Pfizer, Inc.*, No. 08-1222, 2009 WL 1362783 (W.D. La. May 14, 2009)**

***Lofton v. Pfizer, Inc.*, No. 08-1224, 2009 WL 1390829 (W.D. La. May 14, 2009)**

On May 14, 2009, two products liability cases were simultaneously decided in the United States District Court for the Western District of Louisiana.

In July 2007, Daniel Williams suffered a seizure while driving that caused him to lose control of his vehicle and crash. Williams attributed the seizure and resulting accident to his consumption of Chantix, a smoking-cessation prescription drug manufactured by Pfizer, Inc. ("Pfizer"). Melinda Lofton, the passenger riding in Williams' car, suffered injuries during the accident as well. In July 2008, Williams and Lofton brought two separate but identical lawsuits against Pfizer in Louisiana state court, asserting claims such as strict liability, negligence, breach of warranty, misrepresentation, and redhibition, as well as claims arising under the Louisiana Products Liability Act ("LPLA"). These cases were subsequently removed to the United States District Court for the Western District of Louisiana.

Pfizer moved to dismiss all of Williams' and Lofton's claims. Because the LPLA provides "the exclusive theories of liability for manufacturers for damages caused by their products," Judge Robert G. James adopted Magistrate Karen Hayes' recommendations and dismissed all of Williams and Lofton's claims that did not fall under the LPLA or redhibition. Williams and Lofton will be permitted to proceed with their LPLA and redhibition claims.

– *Tarak Anada*

DECISION TO EXCLUDE SOME EVIDENCE OF RIFLE BOLT DEFECT DEFERRED UNTIL TRIAL

***Matthews v. Remington Arms Co.*, No. 07-1392, 2009 WL 1220541 (W.D. La. May 4, 2009)**

Jerry Matthews sued Remington Arms Company, Inc. ("Remington") following a shooting accident. The accident occurred when Matthews was using a Remington Model 710 rifle manufactured by Remington and a bolt contained in the rifle was ejected into his eye and head, causing serious injuries.

Before trial, Remington filed several motions requesting the exclusion of certain expert testimony and other evidence. First, Remington argued that one of Matthews' experts, Dr. Robert Block, should be prevented from testifying because he was not qualified to offer testimony in the field of firearm design, and because his testimony was cumulative of a second

expert being offered by Matthews. Matthews argued that Dr. Block had been qualified and accepted in many courts, including the United States Fifth Circuit Court of Appeals, in the field of firearm design. Matthews further argued that Dr. Block's testimony was not cumulative because the experts had different opinions regarding differing alternative designs. Judge Robert James, of the United States District Court for the Western District of Louisiana, held that Dr. Block was qualified to testify regarding firearm design based on his extensive experience as a consultant in cases involving firearm mechanical failures. Next, Judge James ruled that Dr. Block would be allowed to testify as to the differing alternative designs, but would not be allowed to testify as to the overlapping opinion about the cause of the accident.

Next, Remington argued that evidence alleging any inadequacies in the rifle's owner's manual should not be allowed at trial because it was undisputed that Matthews did not receive or read the manual and, as a result, he could not show any causal connection between the owner's manual and the injuries. Judge James deferred his ruling until trial, but noted that Matthews would be allowed to use the manual to show that an additional warning was needed, even though he could not use it to show his main demand regarding failure to warn. Judge James also noted that Matthews could also use the manual to rebut Remington's defense that the warnings in the manual were adequate. Further, Judge James noted that Matthews could use the manual, or other rifle owner's manuals, to show that the feasibility of alternative designs, and that misassembly was reasonably foreseeable.

Finally, Remington argued that evidence of other incidents involving the Model 710 Rifle and other incidents involving other rifles should not be allowed at trial. Remington argued that the evidence was inadmissible hearsay; that there was no evidence that these incidents were substantially similar to Matthews' incident; and that it would be prejudicial and a waste of time to try to determine whether each incident was caused by a product defect. Judge James again decided to defer his decision on these issues until trial. He noted that with respect to the hearsay objection, incident reports prepared by Remington were admissible under the business records exceptions, but letters or complaints written by customers would be excluded. Next, Judge James noted that if Remington argued that the design of the rifle bolt was safe based upon the similarity to the design of other rifles' bolts, then Matthews could use this evidence. Finally, he noted that if this evidence was allowed during Matthews' case-in-chief, Matthews would have to meet his burden of showing a close degree of similarity between the other incidents and his own accident before he would be allowed to introduce the evidence of other incidents at trial.

– *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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