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Punitive Damages Do Not Apply to Conduct Before Effective Date of Statute

Anderson v. Avondale Industries,
00-CC-2799 (La. 10/16/01), ___ So.2d ___

Anderson was a suit for the wrongful death of a worker who was allegedly exposed to asbestos before the effective date of former Louisiana Civil Code article 2315.3. That statute which was in effect from 1984 until 1996 provided for the recovery of punitive damages for "injuries ... caused by the defendant's wanton or reckless disregard for public safety in the storage, handling or transportation of hazardous or toxic substances." The worker's heirs asserted a claim for punitive damages on basis that the wrongful death cause of action arose during the period the punitive damage statute was in effect. Reversing the Court of Appeal, the Louisiana Supreme Court held that the application of former Code article 2315.3 to acts before its effective date would be an impermissible retroactive application of that statute. (See prior report of Court of Appeal decision in February issue, [PUNITIVE DAMAGES NOT QUITE DEAD IN LOUISIANA.](#))

The *Anderson* court distinguished the landmark case on retroactivity of laws of *Walls v. American Optical Corp.*, 98-0455 (La. 9/8/99), 740 So. 2d 1262. *Walls* ruled that "executive officer immunity" made part of the Louisiana Worker's Compensation Act in 1976 barred a wrongful death action against executive officers when the death occurred after the effective date of the Act even though the wrongful act (alleged occupational exposure to silica) occurred before the effective date of the Act. *Walls* reasoned that the wrongful death cause of action arose after the effective date of the 1976 amendment and therefore the application of the 1976 amendment did not divest a party of a vested right.

In *Anderson* the Louisiana Supreme Court rejected the plaintiffs' argument that *Walls* mandated application of former article 2315.3 to a wrongful death cause of action which arose during the time when article 2315.3 was in effect. The Court agreed that the wrongful death cause of action did not arise until after the effective date of the statute and that thus the application of article 2315.3 to the instant facts would not "modify or suppress vested rights." However, unlike the Worker's Compensation Act in *Walls* -- a statute granting immunity based on "status" -- article 2315.3 is a "law governing conduct." Applying article 2315.3 would require an evaluation of the conditions of the legality of the defendant's conduct by standards which were not in effect at the time the conduct occurred. This in turn would violate Louisiana's law on retroactivity embodied in Civil Code article 6.

Anderson is actually a logical extension of the rules of retroactivity discussed in detail in the *Walls* case. Under Louisiana's civilian principles the critical issue in determining whether a statute is impermissibly retroactive is not whether it changes the consequences of acts committed prior to its effective date -- that in fact is permissible. Rather, a law is only impermissibly retroactive if it "goes back to the past either to evaluate the conditions of the legality of an act, or to modify or suppress the effects of a right already acquired. Outside of those conditions, there is no retroactivity." Planiol as quoted in *Walls*, at 1267.

3rd Cir. Treats Punitives & Intangibles: Fear, Risk & Stigma of Asbestos Exposure

Bonnette v. Conoco, Inc., 01-0297
(La.App. 3 Cir. 9/12/01), ___ So.2d ___

The Third Circuit has affirmed awards to plaintiffs who sustained no physical injury, but claimed various types of "intangible" injuries. The plaintiffs, who were exposed to minimal amounts of asbestos fibers contained in dirt, recovered damages for fear of contracting a disease in the future, increased risk of contracting a disease in the future, stigma to their property as a result of clean-up of the contaminated soil, and punitive damages.

The defendant Conoco arranged for the demolition of some abandoned houses on its property in order to make way for a new hydrocracker unit. Before beginning excavations, Conoco's environmental coordinator visually inspected the property and performed an analysis to comply with environmental regulations. Although the inspection revealed asbestos transite tiles on the exterior of two of the abandoned houses on the site, the Conoco coordinator did not notify the Louisiana Department of Environmental Quality of this finding. A contractor hired to haul off soil from the site sold the soil to various residents of the area.

When one resident discovered that the soil contained small chunks of asbestos, word spread and Conoco received a number of calls about the problem. A certified asbestos inspector from the Department of Environmental Quality testified that there was only a small amount of asbestos in the soil and because of this the DEQ concluded the soil was not "regulated material" and could be disposed of in a regular landfill. Conoco set up a hotline and agreed to remove and remediate the soil from the yards of any resident who asked. Despite the remediation 143 residents filed suit and the claims were set for trial in a series of flights. The Third Circuit's opinion in this case addresses the trial of the first group of 12 plaintiffs.

Punitive damages: The court affirmed an award of \$7,500 in punitive damages for each of the 12 plaintiffs, noting that the remediation measures Conoco took after the asbestos was discovered were irrelevant to whether Conoco was reckless or wanton in the first place. The court faulted Conoco because it used an environmental coordinator on the project who had little experience with asbestos contamination, and then allowed the soil to be distributed without consideration or notification of the potential hazard to anyone "even though transite tiles were visible on the houses at the site." The court also found that the trial court's characterization of Conoco's conduct as "reckless in some degree", while lukewarm, was legally sufficient to support an award of punitive damages for "wanton or reckless conduct" under the extant Civil Code article 2315.3 (repealed in 1996). The court even went so far as to suggest that \$7,500 might not be enough to "constitute[] serious punishment or a deterrent to a company as large as Conoco" but noted that the plaintiffs had not appealed the award as inadequate.

Fear of future illness: The court also affirmed an award of \$12,500 to each adult plaintiff and \$20,000 to each child plaintiff in the general category of "mental anguish" which was attributed to the theory of "fear of contraction of a future disease". The general rule in most jurisdictions is that to recover on this type of claim the plaintiff must prove both that he has a particular fear and that the fear is reasonable. However, Louisiana case law on this point is not clearly developed. Here the court agreed that the "particular fear" element was required, but was fuzzy on the "reasonableness" element. The court analyzed the facts under the Louisiana Supreme Court case of *Moresi v. State, Through Department of Wildlife and Fisheries*, 567 So.2d 1081 (La. 1990), which established that emotional injury without accompanying physical injury is compensable provided there is "the especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious." Because plaintiffs' experts testified that even "one fiber of asbestos could theoretically result in cancer" and because each had been psychologically evaluated for fear, the court found that the *Moresi* special circumstances rule was satisfied and that the plaintiffs were entitled to recover for fear of contracting a future disease. The Third Circuit appears to have eviscerated the "reasonableness" requirement of other jurisdictions by holding that any possibility of contracting a disease, even though remote, is compensable. Note: bad law for defendants on the issue of "reasonableness" appears to be developing largely in the Third Circuit, but is also supported by some language in a 1974 Louisiana Supreme Court case. Hopefully the Louisiana Supreme Court will

take the opportunity shortly to clarify the law on fear claims and bring Louisiana back into line with established law in most other jurisdictions.

Increased risk of future illness: The court affirmed awards of \$10,000 to each plaintiff for "increased risk". Here the Third Circuit moved into radical new territory. The court did not dispute Conoco's argument that as a matter of law damages can only be awarded for increased risk when the plaintiff has a present actionable physical injury. The court reasoned instead that the plaintiffs were in fact physically injured because plaintiffs' expert testified that inhaling one fiber of asbestos causes cellular change which is in itself an actionable harm. The court supported this leap of reasoning by reference to *Cole v. Celotex Corp.*, 599 So.2d 1058 (La. 1992) in which the Louisiana Supreme Court held in an asbestosis case that insurance coverage was triggered by dates of exposure to (read: "inhalation of") asbestos fibers. In *Cole* the Supreme Court bolstered its decision that exposure equaled "bodily injury" by medical evidence that in asbestosis cases injury occurs "shortly after the initial inhalation ... with each additional inhalation ... resulting in the build-up of additional scar tissue...." The Third Circuit failed to address the obvious factual distinction that in *Cole* each plaintiff suffered from a current manifest and diagnosed physical illness: asbestosis; whereas here none of the plaintiffs was actually sick. Further *Cole* did not address increased risk, but focused only on a question of insurance policy interpretation.

Before the decision here there was little case law directly addressing the standard for proving increased risk in Louisiana. Federal Fifth Circuit cases decided under Louisiana law, however, required a plaintiff to prove either (1) that he had been diagnosed with an illness, or (2) that there was a medical probability that he would be diagnosed with an illness. The Third Circuit's decision here if allowed to stand would considerably diminish the required proof for an increased risk claim, particularly in any asbestos case.

Stigma: The court affirmed awards ranging from \$700 to \$3,600 to plaintiffs for decreased value to their properties as a result of the stigma of the previous asbestos contamination. The court found that public perceptions of the health effects of asbestos are very serious. Whether the perception is justified or merely "public hysteria" was, in the court's view, irrelevant because, "The stigma is real for purposes of the market value of the property."

The court cited no legal authority for its stigma holding. Previous cases on stigma held that an ongoing physical invasion and illegal conduct were critical factors and a slew of cases denied recovery for stigma damages on one or the other ground. One significant case to the contrary was a 1984 Third Circuit case, *Acadian Heritage Realty, Inc. v. City of Lafayette*, 446 So. 2d 375 (La. App. 3d Cir. 1984), *writ denied*, 447 So. 2d 1076 (La. 1984). In that case the court awarded stigma damages without an ongoing physical invasion and without illegal conduct. In this case, however, the Third Circuit discussed neither the *Acadian Heritage* case nor contrary precedent, deciding the stigma issue on the facts alone with no citation of authority.

In conclusion, the Third Circuit seems intent on expanding the boundaries of recoverable damages and lessening standards of proof required to collect. We understand that writs are being sought in this case from the Louisiana Supreme Court. We will follow this issue there and in the other intermediate courts of appeal and report on Louisiana's law of "intangible" damages as it develops.

- [Madeleine Fischer](#)

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U.S. Fifth Holds La. Manufacturer Subject to La. Prescription in Tenn. Accident

Marchesani v. Pellerin-Milnor Corp.,
___ F.3d ___ (5th Cir. 10/3/01)

Wrestling with a question which the Louisiana Supreme Court declined to answer, the Fifth Circuit has held that, in a suit filed in Louisiana, the Louisiana manufacturer of a pressurized apparel dye machine may be sued by a Tennessee plaintiff who was injured when the machine supposedly malfunctioned at his Tennessee worksite, despite the fact that Tennessee law would have barred the

claim under its statute of repose.

The plaintiff, Dennis Marchesani, employed at a hosiery mill in Tennessee, claimed he was injured at the mill when the door of a dye machine suddenly blew open releasing hot caustic chemicals and steam into the vicinity. The machine was manufactured in Louisiana by Pellerin-Milnor which sought the protection of Tennessee's statute of repose restricting products liability suits to claims brought within ten years following the date the product was first purchased for use. Marchesani argued that the viability of his suit should be governed by Louisiana's law of prescription – one year from the date of the injury, without regard to when the machine was manufactured or sold.

The district court held that Tennessee law applied and dismissed the suit on summary judgment. The Fifth Circuit didn't find the issue quite so clear-cut and asked the Louisiana Supreme Court to accept certification of the issue, but the Louisiana Supreme Court declined. (See July issue, [LOUISIANA MANUFACTURER, TENNESSEE ACCIDENT – WHICH STATE'S PRESCRIPTION RULES APPLY?](#))

The Fifth Circuit applied the choice of law rules of the forum, Louisiana, to determine which law applied. The court concluded that Tennessee and Louisiana had an equal number of contacts because the plaintiff was domiciled in Tennessee and the accident happened in Tennessee, but the defendant was domiciled in Louisiana and the place of the "alleged events giving rise to the accident" was Louisiana. Finding that the policies of deterring wrongful conduct and repairing the consequences of injurious acts were the most pertinent to the choice of law analysis, the court concluded that the law of Tennessee, "with its more comprehensive approach to product liability claims", should apply to the merits of the action, but that Louisiana law should apply to the question of whether the plaintiff's claim had prescribed. The court based this decision on Louisiana's choice of law article 3549 which specifically addresses application of the prescription and peremption laws of Louisiana when the substantive law of another state governs the merits. Article 3549 imparts a high presumption in favor of Louisiana prescription when an action would be deemed timely filed under Louisiana law.

The result was that summary judgment in favor of the defendant manufacturer on the ground of prescription was reversed and the case was remanded for further proceedings. The court implied that the case would have been decided differently if no party had been domiciled in Louisiana, if the Louisiana court had been an inconvenient forum for the plaintiff, or if plaintiff had "slept on his rights". Because the defendant manufacturer was from Louisiana the court dismissed charges of opportunistic forum shopping as unwarranted.

- [Madeleine Fischer](#)

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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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