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IN THIS ISSUE:

Asbestos Medical Monitoring Class Action Continues

Bourgeois v. A.P. Green Industries,
02-CA-713 (La. App. 5 Cir. 2/25/03) ___ So. 2d ___

This decision from the Louisiana Fifth Circuit Court of Appeal is the latest round in the *Bourgeois* class action brought by current and former Avondale employees seeking a judicially-administered medical monitoring fund and counseling program due to alleged occupational exposure to asbestos. In the district court, Avondale and the executive-officer defendants raised exceptions that (1) the claims were barred by the 1999 Act 989 amended to Louisiana Civil Code article 2315 (excluding medical monitoring damages where there is no physical injury); (2) the medical monitoring claims were barred by the exclusive remedy limitations of workers' compensation; and (3) the claims fell exclusively under the Longshore and Harbor Workers' Compensation Act ("LHWCA"). The district court overruled the exceptions, finding Act 989 unconstitutional as applied to the *Bourgeois* claims. In *Bourgeois v. A.P. Green Indus., Inc.,* 97-3188 (La. 4/3/01), 783 So.2d 1251, the Supreme Court of Louisiana declared Act 989 (excluding medical monitoring costs from article 2315 where there is no physical injury) unconstitutional as retroactively applied in the case and remanded the remaining workers' compensation and LHWCA issues to the Fifth Circuit for resolution.

In framing its analysis, the Fifth Circuit held that "the law in effect at the time of the tortious exposures will apply if the evidence proves that the exposures were significant AND resulted in the later manifestation of damages." Following *Cole v. Celotex* and its progeny, the appellate court held that, "in resolving latent long-term toxic torts[,] courts must apply the law that was in effect at the time of the significant causative exposure." The Fifth Circuit noted that the Louisiana Workers' Compensation Law ("LWCL") first recognized asbestosis as an occupational disease in 1952 and that the LWCL extended tort immunity to the employer's executive officers in 1976. The court then held that plaintiffs with significant asbestos exposure before 1958 have an assertable negligence claim against Avondale and its executive officers, plaintiffs with significant exposure after 1958 but before 1976 have an assertable negligence action only against the Avondale executive officers, and that plaintiffs with no significant exposure before 1976 have no negligence action against Avondale or its executive officers. (Given the court's recognition of 1952 as the date asbestosis was first covered by the LWCL, it appears that the references to 1958 are typographical errors that should be 1952.)

Plaintiffs with no significant pre-1976 exposure contended that their claims fell within the intentional tort exception to workers' compensation immunity. Finding that it could not ascertain at this stage of the proceeding whether the alleged "willful misconduct" constituted "an intentional act," the Fifth Circuit affirmed the district court's denial of the exception of no cause of action as to the "willful misconduct" allegation.

As to the LHWCA exception, the appellate court followed the decisions in *Poche v. Avondale Shipyards, Inc.,* 339 So.2d 1212 (La. 1976) and in *Abadie v. Metropolitan Life Insurance Co.,* 00-244

(La. App. 5 Cir. 3/28/01), 784 So.2d 46, and found that plaintiffs with significant pre-1976 exposure could pursue the executive officers in tort, a remedy not available under the LHWCA.

This latest *Bourgeois* decision demonstrates that many medical monitoring claims remain viable despite the Act 989 legislative amendment limiting such damages in tort cases.

- Judith V. Windhorst

back to top

La. 4 Cir. Reverses Asbestos Product Mfgrs' Summary Judgment Citing Fact Issues on Exposure

Berthelot v. Avondale Indus., Inc.,
2002-CA-1779 (La App. 4 Cir. 2/26/03), ___ So.2d ___

Raymond Berthelot and his wife filed suit against Avondale Industries, Inc., and several manufacturers, producers, and suppliers of asbestos-containing products claiming he contracted asbestosis from performing his duties at Avondale. Foster Wheeler, L.L.C. and Benjamin Foster, manufacturers of asbestos-containing products, moved for summary judgment which the trial court granted. The Fourth Circuit reviewed and reversed concluding that genuine issues of material fact existed.

Foster Wheeler manufactured asbestos-containing boilers used in the construction of ships. The court found that Mr. Berthelot and Avondale employees testified in their depositions that Mr. Berthelot inspected and cleaned the inside of or otherwise worked on or around Foster Wheeler boilers at Avondale both during new ship construction and the repair of existing ships. These contentions created a question as to whether Mr. Berthelot was exposed to asbestos from Foster Wheeler boilers at Avondale – a question that could not be resolved summarily.

Benjamin Foster admitted to manufacturing mastics, sealants, and water coatings, some of which contained asbestos, but contended that all of the asbestos fibers were fully encapsulated by binder material compounds. It also argued that Mr. Berthelot could not specify its products with which he allegedly came in contact. It further contended that even if he could identify the products, the contact he might have had carrying them to job sites would not have exposed him to asbestos. The court cited Berthelot's deposition in which he testified that he recalled the name "Foster" in connection with his inspection of pipe joints; he recalled seeing cement applied to pipes for the purpose of sealing joints and cracks in pipe insulation; he removed the hardened cement when he x-rayed pipes as part of his inspection duties; and when the cement fell to the floor and was stepped upon, dust was emitted from the cement. Berthelot also pointed to the testimony of an industrial hygienist, which he argued confirmed that Benjamin Foster fibrous adhesives were not encapsulated products. A former Avondale employee who worked closely with Berthelot offered further contradictory deposition testimony that Benjamin Foster products were used at Avondale during the period that Berthelot worked there. Based on this testimony the court concluded that genuine issues of material fact existed regarding whether Berthelot was exposed during his employment at Avondale to Benjamin Foster products containing asbestos that was not encapsulated and that summary judgment was inappropriate.

- Andrew M. Obi

back to top

US Sup. Ct. Holds Physically Injured Asbestos Workers May Recover for Fear of Cancer Under

FELA

Norfolk & Western R. Co. v. Ayers,
___ U.S. ___ (No. 01-963 decided 3/10/03)

The United States Supreme Court has ruled that railroad workers who sue their employer for asbestosis under the Federal Employers' Liability Act (FELA) may recover damages for fear of developing cancer in the future, provided they show a current physical injury. The Court had previously held in another case (*Metro-North Commuter R. Co. v. Buckley,* 521 U.S. 424, 117 S.Ct. 2113, 138 L.Ed.2d 560 (1997)) that a railroad worker who does not have a present diagnosed injury, but was merely exposed to a hazardous substance cannot recover for a fear of future illness.

The Court's holding does not come as a surprise as it follows the rule in the vast majority of jurisdictions concerning fear of future illness in the case of a presently physically injured plaintiff. As discussed in February's e-zine, Louisiana goes a step further and not only allows a plaintiff who is injured by a toxic substance to recover for fear of future illness, it also allows a plaintiff who is not presently injured, but is merely exposed to a toxic substance to recover for fear of future illness if the court finds that the fear is justified and real. *See* LA SUPREME COURT ADDRESSES INCREASED RISK, FEAR, PUNITIVES AND STIGMA CLAIMS IN ASBESTOS CASE (Feb. 2003 issue).

You can read more about the *Norfolk & Western* case in the upcoming issue of Jones, Walker's Environmental E-zine in Andrew Obi's article entitled US SUPREME COURT ALLOWS MENTAL ANGUISH DAMAGES UNDER FELA.

- Madeleine Fischer

back to top

Propulsid Drug Case to Proceed on Warnings Claim; Restricted Use Program Evidence Excluded

In Re Propulsid Products Liability Litigation,
2003 WL1090235 (E.D. La. 3/11/03) and
2003 WL 1090236 (E.D. La. 3/11/03)

In two recent decisions, Judge Fallon of Louisiana's Eastern District excluded evidence of defendants' subsequent remedial measures under Federal Rule of Evidence 407, and granted defendants' Motion for Partial Summary Judgment relating to express warranty and defective composition claims under the Louisiana Product Liability Act ("LPLA").

Defendants in these cases are the manufacturers of Propulsid, a drug used to control various gastrointestinal problems. Upon discovering certain side effects of the drug, defendants removed Propulsid from the general market and placed it on a restricted use program called the Limited Access Program ("LAP"). The LAP restricted the use of Propulsid to only those patients with life threatening diseases, who demonstrated that Propulsid, "due to its unique prokinetic mechanism," was their only source of treatment. Additionally, those patients were required to meet certain health and safety criteria.

Plaintiff filed suit for wrongful death damages after her husband died as a result of treatment with Propulsid. Plaintiff's husband was deceased by the time the LAP was implemented. Plaintiff contended that if the LAP had been in effect at the time the decedent was using Propulsid, his death could have been avoided. Defendants asserted that while it might have been feasible to implement the program earlier, their knowledge of the product at that time did not require such measures. Thus, defendants contended that evidence relating to the LAP was inadmissible under Fed. R. Evid. 407. The district court agreed.

Federal Rule of Evidence 407 provides:

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent remedial measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

To admit evidence of a subsequent remedial measure, there must be a dispute as to ownership, control, or feasibility of precautionary measures. The purpose of this rule was to encourage people to take, or at least not discourage them from taking, steps in furtherance of added safety. Accordingly, courts generally exclude evidence of a manufacturer's subsequent measures that would have made the harm less likely to occur.

In reasons for judgment, Judge Fallon relying upon a prior decision noted that a recall campaign qualifies as a subsequent remedial measure under Rule 407. While the recall here merely restricted access to Propulsid, the court held that total recall was not necessary as long as restricting use made the harm less likely to occur.

The court also granted partial summary judgment as to plaintiffs' theories of defect in construction/composition and breach of express warranty. Plaintiffs admitted they had no cause of action on those theories. The court reserved ruling on plaintiffs' theory of defective design and whether such a theory can be asserted in a prescription drug case. The court then severed plaintiffs' design and warnings theories for purposes of trial and ordered the trial to proceed on the warnings claim alone.

For more on these interesting cases *see* HEARTBURN MEDICINE NOT SHOWN TO BE DEFECTIVELY DESIGNED PER LA. EASTERN DISTRICT COURT (March 2003); LPLA CLAIMS AGAINST PHARMACISTS IN PROPULSID DRUG LITIGATION DISMISSED (August 2002); FED. COURT REFUSES TO CERTIFY NATIONAL MEDICAL MONITORING CLASS IN PROPULSID DRUG LITIGATION (July 2002).

- Mary Mitchell Felton

back to top

Premature Claim Against Doctor Defendant Does Not Create Fraudulent Joinder in Drug Case

Ochoa v. Bristol-Myers Squib Co.,
2003 WL 446821 (E.D. La. 2/19/03)

This personal injury/products liability case is related to the prescription drug Serzone. The plaintiff, Shawn Ochoa, filed suit in state court against Bristol-Myers Squib, her pharmacy and her physician, alleging that, as a result of her use of Serzone, she sustained, among various injuries, serious damage to her liver. Bristol-Myers Squib removed the case to federal court on the basis of diversity jurisdiction claiming that, although the doctor defendant was admittedly a Louisiana resident, she had been fraudulently joined by the plaintiff. In federal court the case fell to Judge Livaudais of Louisiana's Eastern District.

In support of its fraudulent joinder argument, Bristol-Myers Squib relied upon the fact that, at the time the suit was filed, Plaintiff had not complied with the Louisiana Medical Malpractice Act, La. R.S. § 40:1299.47(B)(a)(1), which prohibits any action against a covered health care provider until the claimant's proposed complaint has been presented to a medical review panel. One of the plaintiff's most compelling rebuttal arguments was that "in its answer(s) in Serzone cases pending in other

jurisdictions, Squib has pointed the finger at the prescribing physicians by invoking the 'learned intermediary doctrine' as an affirmative defense." Plaintiff contended that the drug manufacturer could not claim that the prescribing physician was fraudulently joined in one matter, while contemporaneously alleging that the prescribing physician was the cause of the harm in another identical suit.

Despite the fact that Bristol-Myers Squib cited many cases in which federal courts in Louisiana, and other states across the country, had "deferred to MDL courts in actions against drug manufacturers," Judge Livaudais remanded this matter to state court, holding that "[a]s a general rule, federal courts in this district have held that even if a plaintiff's suit against a defendant doctor is procedurally premature, it nevertheless states a potentially viable claim against those defendants in state court, [and] thus survives defendant's allegation of fraudulent joinder."

- Meredith Prechter Young

back to top

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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