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SUPREME COURT CURBS CIGARETTE MAKERS' PRE-EMPTION DEFENSE TO STATE FRAUD CLAIMS

***Altria Group, Inc. v. Good*, 2008 WL 5204477 (2008)**

On December 15, 2008, the United States Supreme Court handed down a landmark 5-4 decision which may substantially affect future tobacco litigation.

A group of long-time cigarette smokers filed suit against cigarette manufacturers Altria Group, Inc. and Phillip Morris USA, Inc. The plaintiffs alleged that the manufacturers' representations that their cigarettes were "light" and had "lowered tar and nicotine" constituted fraudulent advertising under the Maine Unfair Trade Practices Act ("MUTPA"), which forbids "unfair or deceptive acts or practices in the conduct of any trade or commerce." The plaintiffs specifically argued that these cigarettes delivered the same quantity of tar and nicotine to smokers as do regular cigarettes because smokers unconsciously cover filter ventilation holes with their lips or fingers, take larger or more frequent puffs, and hold the smoke in their lungs for a longer period of time.

The United States District Court for the District of Maine ruled in favor of the manufacturers, holding that the plaintiffs' state-law fraud claim was pre-empted by the Federal Cigarette Labeling and Advertising Act ("Labeling Act"). Because the Labeling Act requires certain precise warnings to be placed on cigarettes, the Labeling Act expressly disallows state requirements or prohibitions "based on smoking and health" with respect to the advertising or promotion of cigarettes that could create conflict with the federal warnings. The District Court reasoned that the plaintiffs' state-law claim was in essence a "failure-to-warn" or "warning neutralization" claim and was therefore pre-empted by the Labeling Act.

The United States Court of Appeals for the First Circuit, however, disagreed. Characterizing the plaintiffs' grievance as a regular "common-law" fraud claim, the First Circuit held that their claim was not pre-empted by the Labeling Act.

In the majority opinion written by Justice Stephens and joined by Justices Kennedy, Souter, Ginsburg, and Breyer, the Supreme Court affirmed the First Circuit's holding that the plaintiffs' state law claims were not preempted. The Court reasoned that the plaintiffs were in fact alleging that the manufacturers violated a "duty not to deceive" imposed by Maine state law, as codified in the MUTPA. Because this duty imposed by the Maine statute "ha[d] nothing to do with smoking and health" and did not encompass the more general duty not to make fraudulent statements, the majority held that the plaintiffs' claims were not pre-empted by the Labeling Act.

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In the dissenting opinion, Justice Thomas, joined by Justices Scalia, Alito, and Chief Justice Roberts, argued that the plaintiffs' claim was premised on the allegation that the manufacturers misled them into believing smoking light cigarettes was healthier than smoking regular cigarettes. Therefore, a judgment in the plaintiffs' favor would result in a "requirement" that cigarette manufacturers represent the effects of smoking on health in a particular way when advertising and promoting light cigarettes. Consequently, the dissent reasoned that because the question of liability in the case would be "premised on the effect of smoking on health," the plaintiffs' state-law claim was expressly pre-empted by the Labeling Act.

Significantly, under this Supreme Court decision, state-law claims against cigarette manufacturers which are predicated on a state-law "duty not to deceive" may not be pre-empted by the Labeling Act. State law claims such as the one brought by these plaintiffs may now survive pre-emption challenges and be decided at trial.

– *Tarak Anada*

WIDOW'S CLAIM OF DEFECTIVE HELICOPTER ROTOR BLADE "CRASHES AND BURNS" AT TRIAL

***Kramer v. Petroleum Helicopters, Inc.*, 2008-133 (La. App. 3 Cir. 11/26/08); 2008 WL 4998719**

On March 14, 1997, plaintiff's husband, Don McLaud, died in a helicopter crash near Lena, Louisiana. Plaintiff filed suit against the helicopter's manufacturer, Eurocopter Deutschland GmbH ("Eurocopter"), alleging that the crash occurred when the pendulum weight mount for one of the four rotor blades detached due to internal composite material fatigue. Plaintiff claimed that the rotor blade was unreasonably dangerous in construction and design. At trial, Eurocopter moved for involuntary dismissal. The trial judge granted the motion upon finding that the plaintiff failed to establish either claim. On appeal, the Third Circuit Court of Appeal, in a two to one decision, affirmed the lower court decision.

A motion for involuntary dismissal, if granted, results in the dismissal of a case being tried before a judge. In order to succeed on such a motion, the moving party must show that the plaintiff has no right to relief upon the facts and the law.

Since the trial court granted Eurocopter's motion for involuntary dismissal, plaintiff needed to show on appeal that the trial judge's findings were manifestly erroneous. That is, plaintiff had to prove that the record did not support the trial court's findings.

Plaintiff claimed that the trial court erred in granting Eurocopter's motion in several ways, including:

- by not accepting the location of the wreckage as evidence that the rotor blade separated in mid-air rather than after ground impact;

- by rejecting plaintiff's expert witness, Dr. Agarwal, who testified that the failure and separation of the rotor blade resulted from fatigue rather than overload; and

- by rejecting eyewitness testimony that an orange flash and sudden movement occurred immediately before the crash, which, according to plaintiff, proved that the weight mount attached to the rotor blade separated during flight.

Judge Amy, writing for the majority, was not persuaded that the trial court's findings were manifestly erroneous. First, Judge Amy highlighted the speculative nature of the factors used in supporting the conclusion that the location of the wreckage demonstrated the rotor blade's in-air separation. Since this testimony relied upon hypothetical scenarios involving various altitudes, rotations per minute of the rotor blade, and the location of the weight mount part, the evidence, according to Judge Amy, could equally support an alternative conclusion. As such, the trial court's findings were not manifestly erroneous.

Moreover, Judge Amy wrote that the trial court did not erroneously reject Dr. Agarwal's testimony. In deciding to reject the expert's testimony, the trial court pointed to Dr. Agarwal's inability to describe any reliable methodology used in reaching his conclusions. Instead, Dr. Agarwal's methodology consisted of the following: "[H]e knew what he was looking for and he would know it when he found it." Judge Amy concluded that given Dr. Agarwal's inability to describe a reliable method for arriving at his determinations, the trial court acted completely within its role as "gatekeeper" in excluding the testimony. Although plaintiff contended that the trial court rejected Dr. Agarwal's testimony because of his distinct Indian accent, the trial court's comments on Dr. Agarwal's accent did not support plaintiff's argument. The trial court merely noted that Dr. Agarwal's accent apparently led to difficulties in communication between Dr. Agarwal and the examining attorney.

Since plaintiff's product liability claims hinged upon proof of mid-air rotor blade separation, the exclusion of Dr. Agarwal's testimony and the speculative nature of the separation based solely upon the location of the wreckage hindered plaintiff's success on the unreasonably dangerous composition or design claims. Plaintiff's failure to prove the mid-air separation, coupled with the fact that the flight occurred at night, at low altitude, and in an area of rolling terrain, supported the trial court's conclusion that the accident did not result from an unreasonably dangerous condition.

Judge Saunders dissented on the issue of the trial court's exclusion of Dr. Agarwal. Judge Saunders wrote that the record supported the reliability of Dr. Agarwal's methodology and theory on fatigue failure, which had been tested and subjected to peer review in the United States, India, and the United Kingdom. Indeed, according to Judge Saunders, the engineering community widely accepted Dr. Agarwal's methodology, as evidenced by the use of his textbook to teach engineering students. Dr. Agarwal's testimony, had it not been excluded, would have precluded dismissal of the case.

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The key to the trial court's decision and the affirmance on appeal was the trial court's rejection of Dr. Agarwal's testimony. Trial courts, as "gatekeepers" of expert testimony, have broad discretion. Once the trial court excluded that testimony, plaintiff was unable to prove that the helicopter rotor blade was defective.

– *Eric Michael Liddick*

COURT DISMISSES SUICIDE CASE AGAINST GENERIC ANTIDEPRESSANT MANUFACTURER

***Smith v. GlaxoSmithKline Corp.*, No. 05-2728, 2008 WL 4938426 (E.D. La. 11/17/08)**

Patricia Smith filed suit in the United States District Court for the Eastern District of Louisiana alleging that Brian Smith, her late husband, committed suicide as a result of taking the generic prescription antidepressant, paroxetine hydrocholoride. Smith filed suit against Apotex Inc. and Apotex Corp. ("Apotex") under the Louisiana Products Liability Act ("LPLA"), alleging that Apotex failed to warn consumers of the risks of possible suicidal reactions in patients taking the drug. Following discovery, Apotex filed a motion for summary judgment arguing that Smith failed to identify an expert or produce expert reports to testify that paroxetine hydrochloride caused Brian Smith's suicide.

Judge Jay Zainey agreed that Smith's burden required expert testimony to establish causation. Under the LPLA, a plaintiff must establish that the product was unreasonably dangerous, the resulting injury was caused by the manufacturer's product, and that the condition rendering the product unreasonably dangerous existed at the time the product left the manufacturer's control. In a pharmaceutical products liability action, plaintiff must establish both that the drug is capable of producing the complained-of injury or condition (general causation) and that the injury or condition of the particular person was in fact caused by the drug (specific causation). Judge Zainey confirmed that Smith's "case involves extremely complex issues of medical causation that are not within the knowledge and understanding of the lay juror. The product involved in this case was available by prescription only and can hardly be characterized as uncomplicated… Even a cursory review of the literature demonstrates the lack of agreement over whether certain antidepressants increase the risk of suicide in adults like Smith as opposed to children and adolescents… Without medical expert testimony plaintiffs cannot establish that Apotex's product, as opposed to depression and despair, was more likely than not the cause of Smith's unfortunate death." Smith failed to identify an expert witness and failed to produce expert reports within the time designated by the court. Therefore, Judge Zainey concluded that "there is a complete absence of medical causation evidence in this case." Thus, Smith's complaint was dismissed with prejudice.

– *Amy W. Truett*

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WAS IT TRIAL STRATEGY OR CONFUSION? 4TH CIRCUIT SIDES WITH ASBESTOS DEFENDANT

***Benard v. Eagle, Inc.*, 2008-0262 (La. App. 4 Cir. 12/3/08), 2008 WL 5192204**

What started out as a typical asbestos suit – a former employee contracts mesothelioma and sues numerous defendants – ended in a surprising manner in a split decision with a lengthy and sometimes scathing dissent.

Willie Benard worked as a maintenance mechanic at the Celotex plant in Westwego, Louisiana from 1968 to 1978. He later contracted mesothelioma. Benard sued various defendants, including Eagle Asbestos & Packing Company ("Eagle"). Benard alleged that Eagle sold asbestos products to Celotex during the time he worked at the facility. Benard asserted various theories of recovery including negligence, strict liability, unreasonably dangerous per se, unreasonably dangerous for failure to warn, unreasonably dangerous for design defect and fraud.

Three defendants, including Eagle, moved for summary judgment on two bases: First, that Benard could not prove that he had "significant exposure" to their products; and, second, that Eagle had no duty to warn Celotex, a sophisticated user, or its employee, Benard, of the hazards of asbestos exposure. The trial court denied the motion for summary judgment, and Eagle appealed.

On appeal, the Fourth Circuit reversed the portion of the trial court's judgment that denied Eagle's motion for summary judgment and granted summary judgment in favor of Eagle, dismissing the Benard's claims with prejudice. Benard did not seek rehearing with the Fourth Circuit or file an application for writs with the Louisiana Supreme Court.

One month later, Benard filed a motion for status conference seeking to reset the case for trial on the merits against Eagle and the other remaining defendants. Eagle responded by filing an exception of *res judicata* (meaning the matter had already been finally decided), seeking to have the trial court enforce the Fourth Circuit's ruling granting summary judgment in favor of Eagle. The trial court sustained Eagle's exception. Benard appealed to the Fourth Circuit.

Back in the Fourth Circuit for a second time, a battle ensued focused on the issue of whether the Fourth Circuit's grant of summary judgment dismissed *only* Benard's claims against Eagle that pertained to an alleged failure to warn and left untouched the remaining negligence and strict liability claims *or* whether the grant of summary judgment dismissed all claims against Eagle. Specifically, Benard contended that the Fourth Circuit's disposition did not address or dismiss his unreasonably dangerous, negligence, and strict liability claims. It is important to note that due to the date of the alleged exposure to asbestos (1968–1978), Benard's claims were not governed by the Louisiana Products Liability Act, but instead were controlled by the Louisiana Supreme Court's decision in *Halphen v. Johns-Manville Sales Corp.*, 484 So.2d 110 (La. 1986). In *Hal-*

phen, the court articulated various theories of recovery of strict liability including unreasonably dangerous per se, a theory that is no longer recognized since the advent of the LPLA.

On appeal, Benard argued that the Fourth Circuit's decision did not address or dismiss Benard's unreasonably dangerous, negligence, and strict liability claims under *Halphen.* Additionally, Benard argued that even if res judicata applied, as determined by the trial court, application of the doctrine would be a miscarriage of justice and that exceptional circumstances were present that warranted not barring another action by Benard. The Fourth Circuit rejected Benard's arguments. First, the Court concluded that its previous ruling granting Eagle's motion for summary judgment, disposed of *all* of Benard's claims against Eagle and not just Benard's failure to warn claim. In reaching its decision, the Court noted that an identification of the issues actually litigated comes from an examination of the entire record and not just the motion for summary judgment filed by Eagle. The Court's ruling implied that it had reviewed and rejected all of Benard's *Halphen* claims of negligence, unreasonable dangers per se, and strict liability. Finally, the Court found that the exception to the *res judicata* doctrine, requiring exceptional circumstances, did not apply. The Court found it crucial that Benard failed to seek rehearing or appeal to the Louisiana Supreme Court of the Fourth Circuit's ruling on Eagle's motion for summary judgment. The Court commented:

> In the case at bar, the plaintiffs effectively, through a desire to retain a trial date, because they wanted their dying client to be able to testify, failed to seek appropriate further review of this court's granting of supervisory writs… this was a strategic decision on the part of plaintiff's counsel and cannot not be the basis for finding exceptional circumstances…

Interestingly, only two of the three judges on the panel agreed with this conclusion. In a nine page dissent, Judge Bonin concluded that Eagle was still subject to liability for all claims with the exception of those claims relative to failure to warn. He focused on the difference between the law of the case doctrine and res judicata and found that law of the case was the proper procedural principle to apply to the case, and not res judicata. Of particular interest is Judge Bonin's discussion regarding the Fourth Circuit's ruling. He found that Benard was confused as to what was actually litigated – thinking only the failure to warn claim was dismissed – and, thus, did not seek rehearing or appeal the grant of Eagle's motion for summary judgment. He pinned the blame on the Fourth Circuit's initial decision granting Eagle's motion for summary judgment and found that the initial ruling did not comport with the requirements of a judgment of dismissal as it did not state that the dismissal was for all claims or causes of action and did not state that the dismissal was with prejudice. Judge Bonin found that the Fourth Circuit's carelessness in drafting the initial judgment caused Benard's confusion resulting in their failure to seek rehearing or appeal, and was not trial strategy in an attempt to keep a trial date.

– *Olivia S. Regard*

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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