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FOURTH CIRCUIT EXAMINES MARKET SHARE LIABILITY DOCTRINE IN SMOKE ALARM FIRE CASE

***George v. Housing Authority of New Orleans*, 2004-2167 (La.App. 4 Cir. 6/29/05), ___ So.2d ___**

Three children were injured in an apartment fire. The youngest child, then five months old, died as a result of injuries suffered in the fire. The mother, individually and on behalf of her children, sued two smoke detector manufacturers asserting that the smoke detector in her apartment was defective and that one of the two manufacturers was the maker of the smoke detector. Because the smoke detector was destroyed in the fire, plaintiffs could not produce any evidence tending to show with any certainty which company manufactured the smoke detector. Judge Ledet of New Orleans' Civil District Court granted summary judgment at the request of one of the manufacturers, finding plaintiffs failed to show a causal relationship between that company's smoke detector and the children's injuries. Plaintiffs appealed and, in an opinion written by Judge Michael Kirby, Louisiana's Fourth Circuit Court of Appeal affirmed.

The initial element a plaintiff must establish pursuant to the Louisiana Products Liability Act ("LPLA") is that there is proximate cause, a link between the actions of the manufacturer and the injury-causing product. Any plaintiff asserting liability for damage caused by a product must prove under the LPLA that: 1) the defendant manufactured the product; 2) the product was unreasonably dangerous for reasonably anticipated use; and 3) the dangerous characteristic of the product existed at the time the product left the manufacturer's control.

The Fourth Circuit held that plaintiffs failed to carry their burden of proving who manufactured the smoke alarm in question. Through discovery, plaintiffs managed to narrow the field of potential fire alarm manufacturers to two. Plaintiffs named both manufacturers in their petition and alleged that both their smoke alarms were defective. Because there was only one smoke alarm present in plaintiffs' apartment, it appeared to the Fourth Circuit that plaintiffs were seeking to establish market share liability.

Market share liability imposes pro rata liability in the ratio of the market share of each manufacturer of a fungible product that is so generic that the individual manufacturer cannot be identified. Fungible products are those that are commercially interchangeable with other property of the same kind, such as corn or wheat. *Black's Law Dictionary* (8th Ed. Thomson/West). When market share theory is applied in a fungible products case the burden of proof

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shifts from the plaintiff to the defendant-manufacturers, requiring the defendants to show that they did *not* manufacture the offending product. This shift greatly enhances the plaintiff's chance of winning the case. Here, the Fourth Circuit interpreted plaintiffs' petition to seek a judgment against either or both of the two manufacturer-defendants according to the market share each defendant had in supplying smoke detectors to plaintiffs' apartment complex.

While market share liability is recognized by some jurisdictions, the Fourth Circuit found no Louisiana case law adopting it. Since the adoption of the LPLA, there has been one federal court of appeals case that interpreted the LPLA to exclude the market share liability theory. *Jefferson v. Lead Industries Ass'n, Inc.*, 106 F.3d 1245 (5th Cir. 1997), was a products liability action brought against lead paint manufacturers on behalf of an infant who allegedly suffered lead poisoning resulting from exposure to lead paint pigment. In that case, the Fifth Circuit refused to certify to the Louisiana Supreme Court a question concerning the applicability of market share liability under the LPLA and instead affirmed the trial court's dismissal of plaintiff's case due to plaintiff's inability to identify which of the paint manufacturers actually made the particular lead paint pigment that caused the lead paint poisoning.

In *George*, the Fourth Circuit held that, because different smoke alarms by different manufacturers have different qualities, they cannot be deemed fungible products. Thus, plaintiffs were not allowed to avail themselves of market share liability. Louisiana plaintiffs bear the burden of proving that the defendant manufactured the product, thus proving a connection between the offending product and its manufacturer. Therefore, under these facts, plaintiffs failed to carry their burden of proof.

As an alternative ground supporting summary judgment, the Fourth Circuit also found that the plaintiffs could not prove that the smoke alarm in question was unreasonably dangerous. The only testimony offered by plaintiffs on this point was that of a general contractor and a maintenance employee of HANO. The court found that the testimony of these two men was not scientifically reliable. Lay testimony regarding alleged defects in fire alarms was insufficient to carry plaintiffs' burden of proof of a defect.

The Fourth Circuit's ruling is interesting because it suggests that the market share liability doctrine may not be completely dismissed as potentially applicable in Louisiana. While it made clear that market share liability has not been adopted in Louisiana, the Fourth Circuit discussed in detail why smoke detectors, in particular, cannot be considered fungible products – a requirement for application of market share liability. It leaves open the question as to whether, if the product at issue was, for instance, corn or wheat (generally accepted as fungible products), a Louisiana court would apply the market share liability theory.

—Don A. Rouzan

WESTERN DISTRICT JUDGE GRANTS SUMMARY JUDGMENT TO DOCKING STATION MANUFACTURER

***Ross v. Porthau Industries*, 2005 WL 1907528 (W.D. La. 8/10/05)**

Steven Ross, an aircraft mechanic, was injured when he fell from an aircraft "docking station." The docking station from which he fell was a component part of an overall "docking system" designed to be used with an Airbus 310 aircraft. Ross had been working in the

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lower level of the cargo hold. As he stepped from the aircraft onto the docking station, one of its sliding panels slid out from under him and he fell to the ground, hurting himself.

Ross sued the French docking system manufacturer, Albret Docks, alleging that the docking station was defectively designed and that it lacked adequate warnings. Albret moved for summary judgment contending that its docking station was being improperly used, because the particular docking station from which Ross fell was not designed to be used at the front cargo hold – an area subject to high volume use and excessive weight. Ross admitted that he had been in and out of the cargo hold with equipment five to ten times prior to his accident and that there were five to ten other mechanics working at the time in the same cargo hold. Albret argued that each docking station within the docking system was designed and manufactured to exacting standards for use only at specific, pre-determined locations around the aircraft.

Under the Louisiana Products Liability Act, a manufacturer is liable for damages caused by an unreasonably dangerous condition of its product if the injury arose from a reasonably anticipated use of the product. "Reasonably anticipated use" is defined as "a use or handling of a product that the product's manufacturer should reasonably expect of an ordinary person in the same or similar circumstances." Whether the product is in reasonably anticipated use is determined from the point of view of the manufacturer at the time of manufacture. Judge Patricia Minaldi held that the use of the incorrect docking station at the cargo door was not a reasonably anticipated use. "There is no way that a manufacturer in France could, at the time of manufacture, reasonably anticipate that workers in the United States would use the incorrect docks at various stations around the aircraft." Furthermore, she held that the necessity of using the correct docking station at the corresponding aircraft door should be obvious to the ordinary user. Therefore, she found the docking station manufacturer had no duty to warn of this obvious danger.

This case is a good illustration of the "reasonably anticipated use" principle. Before the advent of the LPLA, a plaintiff had only to prove that the product was in a "reasonably foreseeable use". Judge Minaldi pointed out the difference between the two concepts when she explained, "It is foreseeable that a consumer might use a soft drink bottle for a hammer, might attempt to drive his automobile across water or might pour perfume on a candle to scent it. If he does, however, the manufacturer of the product should not be and under the LPLA is not liable because the uses in the illustrations are not the sort that a manufacturer should reasonably expect of an ordinary consumer." Having found that the use of the wrong docking station was not a reasonably anticipated use, and was further an obvious danger, Judge Minaldi granted summary judgment to the manufacturer.

—Madeleine Fischer

WESTERN DISTRICT JUDGE CERTIFIES NATIONWIDE AIR BAG CLASS ACTION

***Cole v. Gen. Motors Corp.*, 2005 WL 1861960 (W.D. La. 8/4/05)**

In September 2000 General Motors notified owners of 1998 and 1999 Cadillac Devilles that problems existed in the cars' Air Bag Systems and Side Impact Sensing Modules which could cause the air bags to deploy during normal use. Replacement parts in sufficient quantities were allegedly not available for a general recall until May 2001. Plaintiffs filed prod-

uct liability and contract claims and sought to have the case certified as a class action. In amended pleadings, plaintiffs dismissed their product liability claims but continued to pursue contractual claims asserting that the allegedly defect decreased the value of their vehicles.

In this decision, Judge Haik of Louisiana's federal Western District, held that the case was appropriate for class certification and granted the plaintiffs' motion to certify the case as a nationwide class action. The class definition, with few exceptions, encompasses all persons or entities anywhere in the United States who acquired 1998 or 1999 Cadillac Devilles equipped with side impact air bag systems and side impact sensing modules. Judge Haik also held that in deciding the case he will apply the laws of all 50 states and the District of Columbia.

—Katie V. McGaw

CLAIMS OF INJURY CAUSED BY ALKA-SELTZER, ROBITUSSIN AND DIMETAPP ARE DISMISSED

***Ruffin v. Bayer Corp.*, 2005 WL 1788106 (W.D. La. 7/22/05); *Thomas v. Bayer Corp.*, 2005 WL 1861953 (W.D. La. 8/2/05); *George v. Bayer Corp.*, 2005 WL 1793754 (W.D. La. 7/22/05)**

In three very similar cases against Bayer Corporation, Judges Stagg and Walter of Louisiana's Western District granted Bayer's motions for summary judgment on the plaintiffs' product's liability claims.

In the first two cases, the plaintiffs, Pinkie Ruffin and Diane Thomas, both alleged that they suffered strokes as a result of taking a form of the Alka-Seltzer Plus line of cold medicine . Likewise, in the third case, plaintiff, R.L. George, alleged that he suffered a stroke as a result of taking Robitussin CF and Dimetapp Extentabs. All of these medications contained phenylpropanolamine ("PPA"), a product that the plaintiffs believed caused their conditions.

Each plaintiff filed separate suits against Bayer for negligence, fraud, misrepresentation, breach of warranty and redhibitory defects. In addition, they all alleged liability under the Louisiana Products Liability Act. Eventually all claims were dismissed in each case except the breach of warranty claim and the claim under the LPLA.

Bayer filed motions for summary judgment seeking dismissals of the plaintiffs' remaining claims in all of the cases. Bayer argued that the plaintiffs did not present any medical evidence to support allegations that the medications that each plaintiff took caused their subsequent medical problems.

Ruffin and George argued that the motions should be denied because the medical evidence did not conclusively demonstrate that the plaintiffs' medical problems were *not* caused by the medications manufactured and marketed by the defendant. Thomas did not file an opposition.

The court stated that in order to defeat summary judgment, the plaintiff must submit evidence such as expert testimony that the product, in this case PPA, was dangerous. In these cases, the plaintiffs' simple assertions that the medical evidence did not conclusively establish that the medication did not cause the plaintiffs' injuries did not fulfill that requirement.

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Additionally, in Thomas' case, the court found that with no opposition and no new discovery evidence, there was no reason to deny the motion.

Accordingly, all of Bayer's motions for summary judgments were granted as to the LPLA claims.

—Michelle D. Craig

WESTERN DISTRICT NARROWS CLAIMS AGAINST MANUFACTURER OF NAPROXEN AND ALEVE

***Stanley v. Bayer, A.G.*, 2005 WL 184692 (W.D. La. 7/28/05)**

Joshua Stanley filed suit against Bayer alleging that he suffered a heart attack resulting from his prior continuous use of Naproxen and Aleve.

Bayer filed a motion to dismiss plaintiff's claims of strict product liability, common law negligence, breach of implied warranty, misrepresentation, and failure to perform adequate testing. Bayer also sought to dismiss plaintiff's claim for attorney's fees and requested that Bayer Pharmaceutical Division – North America be dismissed as a defendant.

The Louisiana Products Liability Act establishes the exclusive theories of liability for manufacturers for damage caused by their products. Because all of the abovementioned claims were outside the scope of the LPLA, plaintiff Stanley conceded that they should be dismissed.

However, he asserted that his redhibition claim should survive. Bayer's motion to dismiss did not address that cause of action, and in a reply to the opposition, Bayer pointed out that redhibition was never alleged in any of the original pleadings. After examining the pleadings, the court determined that redhibition was not alleged and therefore could not be dismissed.

Additionally, the court granted Bayer's motion to dismiss the claim for attorney's fees and the claim against Bayer Pharmaceutical Division – North America. Because the LPLA was the plaintiff's sole source of recovery and it did not allow recovery of attorney's fees, the court determined that that claim should be dismissed. Moreover, because Bayer Pharmaceutical was a division of Bayer Corporation and not a separate legal entity, it was not capable of being sued. Accordingly, the court granted Bayer's motion to dismiss the division also.

—Michelle D. Craig

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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