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Louisiana Legislature Blocks "Fatty Food" Suits and Makes Law Retroactive

Louisiana Revised Statute 9:2799.6.

In the wake of the already rising wave of "fatty food" litigation, the Louisiana Legislature recently enacted La. R.S. 9:2799.6. The statute, which was signed by Governor Foster and became effective on June 2, 2003, purports to limit the civil liability of a manufacturer, distributor or seller of food or non-alcoholic beverages in cases premised upon the individual's weight gain, obesity, or a health condition related to weight gain or obesity, and resulting from long-term consumption of the food or non-alcoholic beverage. "Long-term consumption" is defined as the "cumulative effect of the consumption of food or nonalcoholic beverages, and not the effect of a single instance of consumption." The statute is to apply retroactively to all claims existing, including actions pending or filed on or after June 2, 2003.

Obviously not content to allow juries to resolve the issue of personal responsibility – or at least not content to allow plaintiff's lawyers yet another roll of the dice – the legislature effectively stamped out what appears to be the next "tobacco litigation." It remains to be seen however if the law's retroactivity provision will withstand the scrutiny of the Louisiana Supreme Court. Most recently, in *Bourgeois v. A.P. Green Industries, Inc.,* 2000-1528 (La. 4/3/01); 783 So.2d 1251, the court, citing constitutional concerns under the Due Process and Contract Clauses, held that the retroactive application of a statute eliminating a cause of action for medical monitoring divested the plaintiffs of a vested property right, in violation of the Constitution. One should expect a similar challenge to the retroactive application of La. R.S. 9:2799.6.

- *L. Etienne Balart*

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Williams Dissenters Have Last Word as LA S. CT. Changes Mind on Prescription for Blood Products

David v. Our Lady of the Lake Hosp., Inc.,
2002-2675 (La. 7/2/03), ___ So.2d ___.

Nearly two years ago we reported that the Louisiana Supreme Court had overruled a year 2000 decision and held that all pre-1982 claims against hospitals arising out of defective blood transfusions were governed by general tort prescription requiring only that the plaintiff file suit within one year from

the date of discovery of damages arising from the tainted transfusion. *Williams v. Jackson Parish Hospital,* 2000-3170 (La. 10/16/01), 798 So.2d 921 (reported in the February 2002 e-zine as LA. HIGH COURT OVERRULES PREVIOUS HOLDING ON PRESCRIPTION OF BLOOD PRODUCT CLAIMS). Now the Supreme Court has done an about face, overruling *Williams* and holding that claims of strict liability in tort for transfusions of contaminated blood occurring between 1975 and 1982 are governed by the provisions of La. R.S. 9:5628 and are prescribed.

The facts of the *David* case are straightforward and squarely presented the prescription issue for the Supreme Court's review. The plaintiff, Rocky Wayne David, received blood transfusions at Our Lady of the Lake Hospital, Inc. ("OLOL" – a private hospital) in 1979. Many years later he was diagnosed with hepatitis C and in 1999 filed suit against OLOL in strict products liability. The hospital filed an exception of prescription pursuant to La.R.S. 9:5628 which was initially granted but went through a protracted review process. Meantime David's case was tried and resulted in a judgment of over $2,000,000.

Confusion as to the hospital's exception of prescription was understandable. When David filed his suit in 1999 the controlling case was *Branch v. Willis-Knighton Medical Center,* 1992-3086 (La. 4/28/94), 636 So.2d 211. In *Branch* the Louisiana Supreme Court held that "strict tort liability actions arising out of the sale of blood in a defective condition unreasonably dangerous to the user or consumer" were governed by general tort prescription, allowing suit to be brought within one year of discovery of the damages caused by the transfusion. The court rejected applicability of La.R.S. 9:5628 which at the time of the transfusions at issue in all of the cases discussed here read:

> A. *No action* for damages for injury or death *against any ... hospital* duly licensed under the laws of this state, *whether based upon tort, or breach of contract, or otherwise, arising out of patient care* shall be brought unless filed within one year from the date of the alleged act, omission, or neglect, or within one year from the date of discovery of the alleged act, omission, or neglect; however, even as to claims filed within one year from the date of such discovery, in all events such claims must be filed at the latest within a period of three years from the date of the alleged act, omission, or neglect.

(Emphasis added.) Former Justice Dennis, who wrote the *Branch* opinion, reasoned that La.R.S. 9:5628 was limited only to actions traditionally classified as "medical malpractice" and did not apply to the sale of blood.

One year after David filed the instant suit, David had reason to be worried his claim might be prescribed when in *Boutte v. Jefferson Parish Hospital Service District No. 1,* 1999-2402 (La. 4/11/00), 759 So.2d 45, a unanimous court held that the Medical Malpractice Act (La.R.S. 40:1299.41 *et seq.*), which was enacted in 1975, and amended in 1976 to include reference to "legal responsibility of a health care provider arising from defects in blood," governed a claim against a private hospital for damage arising from defects in blood received in 1981 and 1982. The *Boutte* court found that plaintiff's cause of action was barred by the three-year prescription applicable to medical malpractice cases. *Boutte* did not overrule *Branch,* however, since the transfusion in *Branch* took place before the critical 1976 amendment.

David's suit began looking up when the Louisiana Supreme Court overruled *Boutte* in *Williams v. Jackson Parish Hospital,* 2000-3170 (La. 10/16/01), 798 So.2d 921. Compared to the unanimity of *Boutte, Williams* evidenced a deeply fractured court. The opinion was written by Justice *Pro Tempore* Lobrano who was sitting in place of Justice Lemmon who had retired but not yet been replaced. Justice *Pro Tempore* Ciaccio sat in place of Justice Johnson and joined in the majority opinion as did regularly sitting Justices Calogero and Kimball. The dissenters were Justices Knoll, Traylor, and Victory.

The majority in *Williams* held that *Boutte* was incorrect when it found that a strict products liability claim based on a blood transfusion is a malpractice claim under the Medical Malpractice Act. Finding that claims for contaminated blood transfusions do not "arise out of patient care", the majority held that La.R.S. 9:5628 was inapplicable, and such claims were governed by general tort prescription articles, allowing the claim to be filed within one year of the date the damages were discovered.

On the basis of the *Williams* case, OLOL's exception of prescription was eventually turned down by the First Circuit Court of Appeal, apparently securing for the meanwhile David's $2,000,000 plus judgment. Despite the *Williams* precedent, OLOL sought review of the prescription denial from the Supreme Court, perhaps sensing the fragility of the *Williams* decision, due to the unusual composition of the majority in that case (two *pro tempore* justices).

OLOL's gamble was well taken because in this 5 to 2 opinion the Supreme Court once again reversed course. Returning to a simple reading of La.R.S. 9:5628 the court found that the statute bars such actions when they are brought more than three years after the date of the transfusion. The primary basis for the majority opinion was the all-encompassing language of La.R.S. 9:5628 itself:

> Louisiana Revised Statute 9:5628 begins with the words *"[n]o action* for damages for injury." (Emphasis added.) "No action" is clear, unambiguous, explicit, unequivocal, and dispositive. The parenthetical phrase which follows merely illustrates the types of actions which cannot be brought, including those sounding in tort and those sounding in contract. However, the statute then broadens the illustrative types of actions infinitely when it states "or otherwise." Thus, not only those actions sounding in tort or contract, but actions sounding "otherwise" are barred if the action arises out of patient care. The word "otherwise" indisputably includes strict liability for a defective product. Products liability, which involves the sale of a product that causes an injury, emerged from the crossroads of tort and contract. In sum, no action, whether sounding in tort or contract or otherwise, can be brought after the prescriptive period if the action arises from patient care. As Justice Victory stated in his dissent in *Williams,* "We need go no further than the plain language of La. R.S. 9:5826." *Williams,* 2000-3170 at 2, 798 So .2d at 933, Victory, J., dissenting.

> We agree with OLOL's argument that the phrase "whether based upon tort, or breach of contract or otherwise" in LSA-R.S.9:5628 includes strict liability claims. The statute contains no qualifying or limiting language that would negate its application to a strict liability action brought against a hospital for an act arising out of patient care. The words "or otherwise" are all inclusive of actions regardless of the factual bases involved or the legal theories asserted. Further, applying the prescriptive period of LSA-R.S. 9:5628 to strict liability actions arising out of patient care is consistent with the legislative policy for which the statute was enacted, specifically, to avoid medical malpractice insurance crises.

The court found that all of the terms of La.R.S. 9:5628 applied. The hospital in question, although a private hospital, which would not be qualified under the MMA, did qualify under La.R.S. 9:5628 which applies to "any ... hospital." Further, the sale and transfusion of blood arises out of patient care according to the majority, which relied heavily on Justice Knoll's dissent in *Williams* where she expressed her strong views on that subject by saying, "Patients do not buy and sell blood as a pure commercial transaction; rather, blood is bought and used as an integral part of the care afforded patients at the time of medical treatment."

Despite its holding, the court held back on delivering David's case the final blow. Instead it remanded the case to the trial court to allow David to argue that La.R.S. 9:5628 was unconstitutional *as applied to him.* In something of an understatement, the court agreed that "equity suggests that since the jurisprudence addressing the applicability of LSA-R.S. 9:5628 to a cause of action such as David's has been in a state of flux, remand is proper under the extraordinary circumstances encountered during this prolonged litigation."

Justice Calogero dissented at length complaining that, "a new majority scores quite an upset in regard to settled jurisprudence," and remarking that, "I see no reason, other than a court reconfigured in part and excluding one of the justices who was in the majority in *Williams* because recused in this case, for choosing to reconsider the reasons espoused in *Williams,* to which I continue to adhere." Justice Johnson also dissented.

Justice Weimer, the most recently elected member of the court wrote the majority opinion here. The three dissenters in *Williams,* Knoll, Traylor, and Victory joined him. The fifth member of the majority was retired judge Moon Landrieu, sitting *ad hoc* in place of Justice Kimball who was recused as Justice Calogero's dissent noted. Notably Justice Kimball having been in the majority in *Williams* would likely have dissented here. However, her dissent would not have been determinative as there still would have been a four vote majority. As Justice Weimer is up for re-election shortly, should he fail to retain his seat, this issue could be revisited yet again in the near future.

In an interesting footnote the court left open "the issue of whether health care providers who administered blood contaminated with hepatitis C prior to 1975 [*i.e.,* prior to the enactment of La. R.S. 9:5628] can be held strictly liable to an injured patient." The court referenced the issue of whether

contaminated blood during that time period might be deemed to be "unavoidably unsafe." The Fourth Circuit recently applied this doctrine in a case of a 1963 blood transfusion. *Chauvin v. Sisters of Mercy Health System,* 2001-1834 (La.App. 4 Cir. 5/8/02), 818 So.2d 833, *writ denied,* 2002-1587 (La. 9/30/02), 825 So.2d 1194. (See our article in the July 2002 e-zine 4TH CIR. RECOGNIZES "UNAVOIDABLY UNSAFE" DEFENSE TO STRICT BLOOD PRODUCTS LIABILITY CASE.)

- *Madeleine Fischer*

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$1,182,000 CDC Verdict Reversed for Lack of "Alternative" Evidence

Seither v. Winnebago Industries, Inc.,
99-17502 (La. App. 4 Cir. 7/2/03) ___ So. 2d ___.

This decision from the Louisiana Fourth Circuit Court of Appeal recognizes important evidentiary prerequisites needed to maintain products liability actions based on defective design and failure to warn. Plaintiff Seither's husband and one of her sons were killed, and her other two sons injured, when the 1994 Winnebago Brave Recreational Vehicle (the "RV") in which they were passengers hit a tree. Seither asserted wrongful death actions and actions on behalf of her two surviving sons against Winnebago and others. After a series of settlements, Winnebago (the manufacturer of the RV) was the only defendant left at trial in the Civil District Court ("CDC") in Orleans Parish. Seither's product liability claims against Winnebago were based on defective design (crashworthiness) and failure to warn. The jury awarded the plaintiff $1,182,000 in damages and apportioned fault as follows: Winnebago 40%, Reliable (the seller of the RV) 30%, and Bernard Seither (driver and plaintiff's father-in-law) and his insurer 30%.

The Fourth Circuit reversed the judgment against Winnebago based primarily on a lack of evidence to sustain the design and warning product liability claims. The court held that the trial court abused its discretion in refusing to grant Winnebago a directed verdict on the design defect claim, because the plaintiff had failed to establish a valid alternative design under the Louisiana Products Liability Act (the "LPLA"). Plaintiff offered design expert John Stilson, who at trial presented a mock-up of a Dodge Ram van as a proposed alternative design. The court, however, held this evidence insufficient to satisfy the alternative design element required for an LPLA design defect claim under La. Rev. Stat. § 2800.65(1) stating: "Mr. Stilson presented merely a concept that was untested, unengineered, and not presented to the jury in any fashion more than mere speculation. In fact, the Dodge van theory or concept represented by Mr. Stilson was shown to be invalid and incapable of passing required federal tests." Finding that "there was no valid evidence concerning [the] viable alternative design," the appellate court found that the trial court should have granted Winnebago a directed verdict on the design defect claim.

The Fourth Circuit also reversed the verdict on the "failure to warn" claim on evidentiary grounds. The court noted that "the only possible warning could have been not to crash the vehicle into a tree." Manufacturers, however, have no duty to warn against such known and obvious dangers. The court thus found that Seither had failed to present any expert testimony or specific proposed alternative warning and held the trial court's failure to enter a directed verdict to Winnebago on the warnings claims an abuse of discretion.

The evidentiary holdings of *Seither* for products liability claims are important not only for directed verdict but may be persuasive on summary judgment as well.

- *Judith V. Windhorst*

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