

Product Liability Newsletter

In this issue, we will touch on three areas that distinguish the products liability practice in Louisiana and Texas:

- **inconsistent decisions regarding what constitutes “reasonably anticipated use” of a product**
- **one of ATRA’s “judicial hell holes” - Orleans Parish**
- **the new Texas statute of repose**

Please read the following articles to access this information along with summaries of recent case results attained by the Product Liability Team Members at Frilot, Partridge, Kohnke & Clements.

Reasonably Anticipated Use of a Product

In adopting the Louisiana Products Liability Act (“LPLA”), La. R.S. 9:2800.51 *et seq.*, the Louisiana legislature narrowed the range of product uses for which a manufacturer would be responsible. Before then, manufacturers in Louisiana, as in most states, could be found liable for all *reasonably foreseeable uses and misuses* of a product. The Louisiana legislature changed this in the LPLA by requiring a products-liability plaintiff to prove first – as a threshold issue -- that he was engaged in a *reasonably anticipated use* of the product: i.e. “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.” Under the LPLA then, only “the reasonably anticipated use of the product by the claimant or another person or entity” can support a products-liability claim against a manufacturer. And the courts look at this objective standard from the manufacturer’s point of view at the time the product left the manufacturer’s control.

Kampen v. American Isuzu Motors, Inc., 157 F.3d 306 (5th Cir. 1998) (*en banc*) was one of the leading decisions to confirm that Louisiana had indeed made it more difficult for many products-liability plaintiffs to reach trial on the merits. The *Kampen* plaintiff sued Isuzu when a factory-provided jack that he had used to raise the car’s front end collapsed while he was underneath it inspecting the car’s wheels. The owner’s manual had instructed “Use a jack only when changing tires” and expressly warned “Never to get beneath the car when using the jack.” The Fifth Circuit upheld Isuzu’s summary dismissal because Kampen’s use of the jack in contravention of the warning in the owner’s manual was not a reasonably anticipated use of the product. *Kampen*, thus, seemed to signal an early end to products litigation when plaintiffs did not heed product warnings. But recent Louisiana decisions have not consistently followed suit.

A Louisiana federal court denied a roof jack manufacturer’s motion for summary judgment in *Chambers v. A.J.C. Tools & Equipment, Inc.*, 2002 WL 31015600 (E.D. La. Sept. 9, 2002). Roof jacks form a platform upon which the roofer can stand. In *Chambers*, they allegedly failed causing plaintiff to fall to the ground. The defendant manufacturer argued that Chambers had read and violated explicit warnings regarding the weight limitation of the roof jacks and had overlapped planks contrary to an equally clear warning against doing so. The district court found the manufacturer’s warnings relevant but not dispositive of the reasonably-anticipated-use defense. Because the roof jack warnings were not nearly as express or clear as the *Kampen* warnings, the court said that material disputes of fact precluded judgment in the manufacturer’s favor as a matter of law.

Another Louisiana federal district court cited disputes of material fact as well in denying a manufacturer’s motion for summary judgment but its ruling seems to fly in the face of an unambiguous and obvious warning. In *Calvit v. Proctor & Gamble Mfg. Co.*, 207 F.Supp.2d 527 (M.D. La. 2002), the federal court denied Proctor & Gamble’s motion for summary judgment despite the fact that the plaintiff’s injuries came after he put VapoRub into a container in which he was heating water and despite specific on-product instructions to the contrary. The label on the box in which the VapoRub was shipped and the label affixed to the jar itself specifically warned: “Do not . . . place in any container in which you are heating water.” And the court did not explain how Calvit’s use of the product was one reasonably anticipated by the manufacturer. It simply stated that “there are not sufficient undisputed material facts to allow the court to determine whether there is a legally sufficient evidentiary basis . . . for a reasonable juror or trier of fact to find for the plaintiff.”

Green v. BDI Pharmaceuticals, 35,291 (La. App. 2 Cir 10/31/01), 803 So. 2d 68 upheld summary dismissal of a product manufacturer that raised reasonably anticipated use as a defense. In that case, Green became addicted to “Mini Thins,” an over-the-counter drug containing Ephedrine, an amphetamine-like compound designed to alleviate breathing problems. Green had no breathing problems. Instead he took large quantities of the drug for extra energy. Because Green never took the product for its intended purpose and vastly exceeded the recommended dosage, the court found that, as a matter of law, Green’s conduct was not a reasonably anticipated use of the product. So too, the First Circuit had earlier affirmed summary judgment favoring The Testor Corporation, a manufacturer of Testor Ozone Safe Air Brush Propellant (OSP), when the plaintiffs failed to demonstrate that the inhalation of OSP was a reasonably anticipated use under LPLA. *Butz v. Lynch*, 1999-1070 (La. App. 1 Cir 6/23/00), 762 So.2d 1214. The *Butz* court found that Testor’s knowledge of intentional abuse of its product did not create a factual dispute on the question of reasonably anticipated use where OSP warned of the grave dangers of inhaling the contents and the user chose to ignore those warnings.

It was a similar obviousness of the misuse that contributed to the court’s summary dismissal of a van manufacturer in *Blanchard v. Midland Risk Insurance*, 2001-1251 (La. App. 3 Cir 5/8/02), 817 So. 2d 458. Blanchard died when he was thrown from a milk delivery van driven by his supervisor. The van had no passenger seat. Blanchard’s employer had modified the compartment to allow restraints to be attached for a standing passenger but none were available, much less used, on the day of the fatal collision. Louisiana’s Third Circuit concluded that the manufacturer of the van could not have reasonably anticipated any such

modification and that riding in a passenger compartment without seating nor restraints was so openly and obviously dangerous, that such conduct did not constitute a reasonably anticipated use of the product.

In summary, Louisiana's statutory concept of "reasonably anticipated use" is much narrower than the earlier jurisprudential concept of "normal use" that could include misuse contrary to manufacturer's instruction; there is consensus that reasonably anticipated use is an objective standard that should not include uses clearly contrary to warnings. The success of a manufacturer's motion for summary judgment, however, still rests with that age-old problem – convincing the court that there are no material facts in dispute.

Orleans Parish Named "Judicial Hellhole"

The American Tort Reform Association's 2003 report "*Bringing Justice to Judicial Hellholes*" identifies Orleans Parish as one of thirteen jurisdictions that consistently apply the law unfairly. This comes on the heels of ATRA's 2002 report that placed Orleans Parish among eleven jurisdictions to qualify as a "birthplace of million and billion dollar awards." As support for its latest negative ranking of Orleans Parish, the ATRA report highlighted the blatant and questionable conduct of New Orleans Civil District Court Judge C. Hunter King and a pair of exorbitant jury awards.

As to Judge Hunter King, when accused of acting improperly towards his staff, he gave a sworn statement to the State Judiciary Commission denying that he had forced his employees to sell \$250-a-plate campaign fund-raising tickets and fired his court reporter who allegedly did not make her sales quota. Then, when confronted with audiotapes of his conversations with his staff, Judge King had to admit that he had lied eighteen times in his sworn statement. In removing Judge King from the bench, the Louisiana Supreme Court expressly condemned "his misconduct in lying to the Commission" as "even more reprehensible" than the judge's forcing his staff to raise campaign money.

As to the jury verdicts, Judge King had presided over *Stephen Schweitzer v. Transit Management of Southeast Louisiana*, a case in which a five-year-old girl was severely injured when she fell out of the window of a New Orleans streetcar that had been chartered for a child's birthday party. In addition to the closed head injury sustained from the fall, the girl had had her arm crushed and partially severed by the wheels of the streetcar. Celebrity counsel Johnny Cochran joined a local attorney to represent the plaintiffs. The jury returned a \$51.4 million verdict. By most accounts, the award did not reflect the defendant's responsibility for the harm but rather resulted from a passionate jury confronted with a sad injury to a child. When jurors exited Judge King's courtroom after the huge verdict, the hallway erupted into a celebratory atmosphere as Judge King allowed jurors to pose for photographs with him and Cochran.

Another cited example of the dangers of trying a jury case in Orleans Parish was *In re: New Orleans Train Car Leakage Fire Litigation*, a class action lawsuit against CSX Transportation, Inc. and other defendants. Over eight hundred plaintiffs claimed damages after they had to evacuate their homes when a railroad tank car leaked butadiene and caught fire, spreading smoke and ash over their neighborhood. No one reported any injuries and the fire burned itself out in two days. Nonetheless, the Orleans Parish jury awarded the plaintiffs \$2.5 billion in punitive damages against CSX, and \$865 million in punitive damages against four other defendants. When the Louisiana Fourth Circuit Court of Appeals upheld the award, CSX settled with the plaintiffs for \$220 million, of which 40% went to the plaintiffs' attorneys.

Since the ATRA report, an Orleans Parish jury awarded \$17.75 million to a local man who was paralyzed after he slipped while retrieving a loose ball during a league basketball game in the non-air-conditioned gym at the Jewish Community Center. The JCC had argued that (a) the accident was an unavoidable risk inherent in playing basketball, (b) the plaintiff offered no proof of moisture on the floor, much less that it had been created by heat and humidity; and (c) in any event, the JCC had not been in control of the gym when the plaintiff fell because it had rented the space to a third party basketball league for a tournament. The jury rejected the JCC's argument and found it liable for 68% (approximately \$12 million) of the total award.

THE TEXAS STATUTE OF REPOSE

At the end of the 2003 legislative session, the Texas legislature approved legislation changing many aspects of the Texas civil justice system. One of the most important changes for product manufacturers was the implementation of a new statute of repose for product liability defendants. The new Texas Statute of Repose, Tex. Civ. Prac. & Rem. Code Ann. § 16.012 is significant in that it allows product manufacturers to take advantage of a 15 year statute of repose for all products.

The purpose of repose statutes is to give absolute protection to certain parties from the burden of indefinite liability. Statutes of repose do not typically shorten an existing limitations period; instead, they fix an outer limit beyond which no action can be maintained. More specifically, the purpose of Texas' statute of repose § 16.012, is to provide product manufacturers relief from claims based on alleged defects if those claims are not brought within 15 years of the original date of sale of the product.

In 1993, Texas enacted its original statute of repose which provided that any products liability action against a producer or seller of "manufacturing equipment" must have been brought within 15 years after the original date of sale of that equipment. According to the original statute, the 15 year bar applied on proof of two conditions: (1) the incident involved "manufacturing equipment" which was expressly defined as "equipment and machinery used in the manufacturing, processing, or fabrication of tangible personal property but does not include agricultural equipment or machinery," and (2) the claimant failed to commence his product liability action against the manufacturer of the product before the end of fifteen years after the date of sale of the manufacturing equipment, or, in the alternative, if the manufacturer expressly represented that the equipment's useful life was longer than fifteen years, the claimant did not bring suit within the represented time period.

However, the new Texas statute of repose, as amended by Acts 2003, 78th Leg., ch. 204, §5.01, effective Sept 1, 2003, replaced the term "manufacturing equipment" with "product" thereby eliminating the requirement that such product was being used in the manufacturing, processing or fabrication of tangible personal property. Furthermore, the amendment added that "an action filed before July 1, 2003, is governed by the law in effect immediately before the change in law by Articles 4, 5, and 8, and that law is continued in effect for that purpose." Therefore, all products liability actions filed after July 1, 2003, are now subject to the

effect for that purpose. Therefore, all products liability actions filed after July 1, 2003 are now subject to the new broader statute of repose governing all products.

RECENT PRODUCT LIABILITY CASE RESULTS AT FRILLOT, PARTRIDGE, KOHNKE & CLEMENTS

[Francis H. "Rasch" Brown, III](#) and [James R. Silverstein](#) successfully defended Louisville Ladder Group in federal court in Marshall, Texas in September, 2003. In that case, a dentist claimed to be disabled because of a manufacturing defect in an aluminum extension ladder and to have lost wages in excess of \$8 million. After deliberating forty-five minutes, the jury wholly exonerated the ladder manufacturer.

[Francis H. "Rasch" Brown, III](#) and [James R. Silverstein](#) also successfully defended Fisher Controls International, Inc. in a case tried in state court in Lake Charles, Louisiana in April, 2003. A petrochemical company sued to recover \$2 million in lost profits and property damage resulting from an explosive decomposition in a hydrazine unit allegedly caused by a defective desuperheater. The jury found that Fisher Controls was not at fault and allocated responsibility for the incident between the petrochemical company and a co-defendant engineering firm responsible for the design of the portion of the plant at issue.

[Edward F. "Ned" Kohnke](#), [Michael North](#) and [Ricardo Rivas](#) successfully defended Nintendo of America Inc. in two personal injury cases tried simultaneously in federal court in the Western District of Louisiana. Two plaintiffs claimed that they had suffered seizures because of playing Nintendo video games, and that the seizures had been caused by the games' defective design and inadequate warnings. After four days of trial, the plaintiffs voluntarily dismissed their respective claims.

[Edward F. "Ned" Kohnke](#) and [Michael North](#) also successfully defended Rheem Manufacturing in Clarksville, Tennessee in a state court case that had been tried twice before. The plaintiff alleged that the fire that killed her son had begun when gasoline vapors contacted a Rheem gas-fired water heater installed in the family's garage. She claimed that the water heater was defectively designed and bore inappropriate labeling. After hearing a week of evidence and testimony, the 12-person jury concluded that the water heater was neither defective nor unreasonably dangerous and returned a unanimous verdict in Rheem's favor.

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This newsletter is not intended to provide legal advice on products liability or litigation matters, but is simply a guide to current developments in the area. If you have any questions, or for additional information, please contact our Editors, [Rasch Brown](#), 504-599-8012, email fhb@fpkc.com, [Kerry J. Miller](#), 504-599-8194, email kjm@fpkc.com, or [Eugene Terk](#), 504-599-8285, email et@fpkc.com.



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