

SUMMER 2004

In this issue, we will discuss the following topics :

- . Redhibition in Louisiana
- . The Louisiana Products Liability Act
 - . The Use of Circumstantial Evidence to Establish a Manufacturing Defect
 - . The Obligation of Component Part Manufacturers to Provide Warnings
- . Texas Jury Awards \$580,000 Because of a Weak Ladder Latch
- . Filot Partridge's Trial Win for Water Heater Manufacturers

What is Redhibition?

Louisiana is the only state that has not adopted Article 2 of the UCC. Thus, Louisiana does not have implied warranties of merchantability and fitness for a particular purpose. The warranties of merchantability and fitness for particular purpose are the UCC warranties that provide rights to buyers when the products they purchase do not properly perform. Louisiana does impose implied warranties on buyers. In Louisiana, redhibition is the implied warranty that equates to the UCC's implied warranty of merchantability. Although it is contained in the redhibition articles of the Louisiana Civil Code, Louisiana has basically adopted the UCC's implied warranty of fitness for a particular purpose. La. Civ. Code art. 2524.

A redhibitory defect is a latent defect that exists at the time of sale that renders the object sold useless or so inconvenient that it is presumed that the buyer would not have purchased the object. La. Civ. Code art. 2520. Under redhibition, an item must be fit for "ordinary use" only, unless the buyer relies on the skill of the seller.

A buyer can bring an action in redhibition against his immediate seller, other sellers in the chain of title and product manufacturers. Immediate sellers, upstream sellers and manufacturers are joint and severally liable (solidary liability in Louisiana) to buyers in redhibition actions. La. Civ. Code art. 2531.

Sellers who are aware of defects in a product and fail to disclose them can be held liable for actual and consequential damages and attorney's fees incurred by the buyer in addition to the return of the purchase price of the product and interest from the time of sale. La. Civ. Code art. 2545. These sellers with knowledge are in "bad faith" under Louisiana law. Id. No matter their knowledge, product manufacturers are deemed to be in bad faith in redhibition actions, thereby making non-pecuniary damages and attorney's fees available against them. Remedies against sellers not aware of defects are limited to return of the purchase price of the product plus interest from time of sale, or if the buyer retains the product, an equitable reduction in the purchase price of the product. La. Civ. Code art. 2520.

Thus, on its face, the redhibition code articles appear to provide different remedies than the UCC. In actuality, however, many states have jurisprudentially interpreted the UCC to provide the same remedies that are specifically contained in the redhibition articles.

Another apparent difference between the UCC and redhibition pertains to disclaimers and limitation of liability provisions. Under the UCC, a disclaimer of the implied warranty of merchantability is sufficient if it mentions merchantability and is conspicuous. UCC §2-316(2). Further, liability may be limited to consequential damages under the UCC if the limitation is not unconscionable. UCC §2-719(3). Under Louisiana law, disclaimers and limitations of liability are only effective when they are clear, unambiguous and brought to the attention of the buyer or explained to him. La. Civ. Code art. 2548. Modern Louisiana jurisprudence has interpreted this provision objectively. In other words, if the disclaimer and limitation is rather obvious or if the buyer admits that he was aware of it, some Louisiana courts have enforced the limitation without it being specifically "brought to the buyer's attention."

Some other relevant issues in redhibition include the following. Redhibition technically does not apply to intellectual property. Nor does redhibition apply to actions against contractors by homeowners for hidden defects in a new home. Only buyers who make a reasonable investigation into the product prior to sale are entitled to an action in redhibition. La. Civ. Code art. 2521. Timely notice and an opportunity to cure the defect must be given by the buyer to maintain a claim. La. Civ. Code art. 2522. The warranty of redhibition covers only defects that exist at the time of delivery. There is a presumption that the defect existed at delivery if it manifests within three days of delivery. La. Civ. Code art. 2530.

A sophisticated seller is treated differently from a one-time seller similar to the distinction between merchant and non-merchants in the UCC. Likewise, the statute of limitations for a redhibition action (known as the prescriptive period in Louisiana) is the same as it is under the UCC implied warranty of merchantability: four years from delivery or one year from discovery of the defect. La. Civ. Code art. 2524.

Use of Circumstantial Evidence to Establish a Manufacturing Defect under the LPLA

The Louisiana Products Liability Act, La. R.S. 9:2800.51 et seq. sets forth in unambiguous language the burden of proof required for a plaintiff to establish a prima facie manufacturing defect claim. La. R.S. 9:2800.55 states a plaintiff must demonstrate that "at the time the product left its manufacturer's control, the product deviated in a material way from the manufacturer's specifications or performance standards for the product or from otherwise identical products manufactured by the same manufacturer." Several Louisiana cases, however, support the conclusion that a plaintiff may establish a manufacturing defect claim without producing evidence that the product in question deviated from the design specifications or performance standards established by the manufacturer. According to these cases, a manufacturing defect for purposes of the LPLA, may instead be established by circumstantial evidence under the evidentiary doctrine of *res ipsa loquitur* in light of circumstances in which "the only reasonable and fair conclusion is that the acts resulted from the breach of duty on the part of the defendant." *Jurks v. Ford Motor Co.*, 752 So. 2d 260, 265 (La. App. 2d Cir. 2000)

In principle, Louisiana courts have recognized that the use of circumstantial evidence to establish a manufacturing defect should be "sparingly applied." *Marks v. Dupre Transport, Inc.*, 2002 WL 31319940 (E. D. La. October 15, 2002); citing *Spott v. Otis Elevator Co.*, 601 So. 2d 1355, 1362 (La. 1992). Louisiana courts have repeatedly reaffirmed the maxim that the fact of an accident is legally insufficient to demonstrate a defect in construction or composition. At the same time, the ability of a plaintiff to successfully invoke the doctrine of *res ipsa loquitur* in a product liability case has been assisted by reported decisions relaxing the requirement that the manufacturer must have "exclusive control" of the product in order for *res ipsa* to be applicable. See, E.g., *Williams v. Emerson Elec. Co.*, 909 F. Supp. 395 (N.D. La. 1995) (plaintiff properly invoked doctrine of *res ipsa loquitur* to meet evidentiary burden of causation despite the fact that plaintiff controlled ladder for four days prior to accident because the ladder failed under allegedly normal conditions during only its second use).

Circumstantial evidence of a manufacturing defect was deemed sufficient to defeat a summary judgment motion in the recent case of *Hanover American Ins. Co. v. Trippe Mfg. Co.*, 843 So. 2d 571 (La. App. 2 Cir. 2003). In *Hanover*, an insurer alleged that fire damage to a building was caused by an uninterruptible power supply ("UPS"), a device which provided electrical power to the insured's computer file server in the event of a power interruption. An electrical engineer retained by the insurer identified three "faults" in the UPS after examining the device. The insurer's engineer could not determine which of the "faults" caused the fire, nor did the expert identify a specific deviation from the manufacturer's performance standards or design specifications. The Second Circuit concluded that the product obviously failed to satisfy the manufacturer's performance standard if it ignited a fire in normal operation. The conclusion was not based on evidence regarding the manufacturer's performance standards and is plainly inconsistent with the principle that a defect may not be presumed from the occurrence of the incident.

Two recent cases have rejected plaintiffs' efforts to establish a prima facie manufacturing defect claim through the use of circumstantial evidence. In *Marks v. Dupre Transport, Inc.*, 202 WL31319940 (E. D. La. October 15, 2002), the Court found that *res ipsa loquitur* was inapplicable to establish a defect in a Freightliner tractor which was four or five years old at the time of the accident and where there existed a real possibility of other causes, including driver error. In *Clark v. Bohn Ford, Inc.*, 213 F. Supp. 2D 957 (S. D. Ind. 2002) (applying Louisiana law), the Court entered summary judgment in two cases, finding that the plaintiffs could not prove a manufacturing defect merely by showing that there had been a tire blowout and subsequent vehicle rollover. The Court concluded that "failure of a tire is not such an unusual event that a defect can be incurred solely from the fact that the accident occurred." *Id.* (quoting *Clement v. Griffin*, 634 So. 2d 412, 429-30 (La. Ct. App. 1994)).

Obligation of Component Part Manufacturer to Provide Warnings

Under the Louisiana Products Liability Act, hereinafter ("LPLA"), La. R.S. 9:2800.51 et seq. a product or component may be unreasonably dangerous because of inadequate warnings to users or handlers. La. R.S. 9:2800.57(B) states in part, "a manufacturer is not required to provide an adequate warning about his product when: (1) product is not dangerous to an extent beyond that which would be contemplated by the ordinary user or handler of the product, with the ordinary knowledge common to the community as to the product's characteristics; or (2) user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic."

Furthermore, La. R.S. 9:2800.57(C) clearly establishes a duty upon a manufacturer to use reasonable care to provide an adequate warning of such characteristics (i.e., ones that may cause danger), and its danger to users and product. The duty established by §9:2800.57(C) is a duty placed directly upon the manufacturer. It cannot be delegated. Generally, the manufacturer of a component part, which is incorporated into another product, does not have a duty to warn. More specifically, where a component part was not itself defective or unreasonably dangerous at the

specifically, where a component part was not itself defective or unreasonably dangerous at the time of its delivery to the assembler-manufacturer and the manufacturer did not participate in the design, manufacture, or installation of the entire system, the component manufacturer will not be held liable for failure to warn. *Koonce v. Quaker Safety Products & Mfg. Co.*, 798 F.2d 700 (5th Cir. 1986) (applying Texas law).

For example, in *Longo v. E.I. DuPont De Nemour & Co.*, 632 So.2d 1193 (La. App. 4th Cir. 1994), DuPont supplied Teflon, to a medical device manufacturer who used the Teflon in manufacturing various medical implants. The implants subsequently fractured in numerous patients, causing physical injury. In their products liability action against DuPont, the plaintiffs alleged that DuPont failed to warn of the unreasonably dangerous propensities of Teflon when used in medical implants. Evidence showed that DuPont did not have any knowledge of the risks created by use of Teflon in medical products. The Longo court exonerated the defendant and held that DuPont, as the component part manufacturer, had no duty to warn. See also *Klem v. E.I. DuPont*, 19 F.3d 997 (5th Cir. 1994).

Thus, Louisiana cases are consistent with the principle of law that has been routinely followed throughout this country that states that a supplier of component parts generally has no duty to warn the subsequent assembler or its customers of any dangers that may arise after the components are assembled. See *Schaffer by Schaffer v. A.O. Smith Harvester Prods.*, 74 F.3d 722 (6th Cir. 1996); *Petrucelli v. Bohringer & Ratzinger*, 46 F.3d 1298 (3rd Cir. 1995); *Castaldo v. Pittsburgh-Des Moines Steel Co.*, 376 A.2d 88 (Del. Supp. 1977); *Mitchell v. Sky Climber, Inc.*, 487 N.E. 2d 1374 (Mass. 1986); *DePrimo v. Lehn & Fink Products Co.*, 538 A.2d 461 (N.J. 1987).

Texas Jury Awards Plaintiff \$580,000 on Basis that Ladder Latch Should Have Been Made of Stronger Material

On April 21, 2004, a Trinity County, Texas jury awarded \$580,000 in damages to Carl Stockmeyer as a result of injuries he sustained while using a ladder manufactured by Krause, Inc.

The plaintiff was originally injured when the 300 pound capacity, Type IA, articulated ladder he was using collapsed. Eyewitness evidence presented at trial revealed that the plaintiff had set up the ladder facing the wrong direction and that plaintiff, and his assistant, had both successfully used the subject ladder without incident before the collapse.

Plaintiff alleged that the ladder was defectively designed and manufactured by Krause. More specifically, plaintiff argued that the ladder's latch failed because it was made of a zinc alloy. Plaintiff, through his liability expert, further argued that the latch should have been made of steel or some other stronger material. In defense, Krause argued that the ladder's improper set-up caused the accident. Defendant claimed that in addition to facing the wrong direction, the ladder had also been placed too far from the house and on an uneven surface.

The jury ultimately held that Krause was liable for the plaintiff's injuries and awarded \$580,000 for past and future medical costs and pain and suffering.

Firm Wins Four Month Jury Trial for Water Heater Manufacturers

The Firm, in its representation of the five major manufacturers of water heaters in America, A. O. Smith Corporation, American Water Heater Company, Bradford White Corporation, Rheem Manufacturing Company, and State Industries, Inc. recently completed a four month jury trial in state court in New Orleans on their behalf. The trial involved claims by the Water Heater Manufacturers that millions of water heater dip tubes supplied to them by Perfection Corporation, a third party supplier to the industry, were defective.

Generally, residential water heaters with a top inlet connection for the cold water supply have a plastic tube which brings the cold water to the bottom of the heater, so it can be heated by the burner or element. This tube, which is called the "dip tube," is intended to prevent incoming cold water from mixing with existing hot water. Some of the component part dip tubes that were supplied by Perfection Corporation between August, 1993 and October, 1996 were defective. The defective dip tubes break off within the water heater or slowly disintegrate and release small white plastic particles into the plumbing thereby clogging the filter and screens on faucets, shower heads, dishwashers and washing machines. In either case, the supply of hot water is reduced.

A unanimous 12-person jury found that Perfection breached its warranties to the Water Heater Manufacturers. The jury also found Perfection liable to the Manufacturers under their tort theory of contribution.

The trial in New Orleans arose out of 23 class actions filed against the Manufacturers and Perfection by consumers throughout the United States. Scott Partridge and Kerry Miller led the Firm's defense of the Manufacturers in these cases, which were quickly consolidated into one case in federal court. This consolidated case culminated in a national class settlement, which resolved the claims and potential claims of 46,000,000 consumers throughout the United States. When

the claims and potential claims of 10,000,000 consumers throughout the United States. When Perfection refused to participate in the settlement, the Firm filed suit on behalf of the Manufacturers against Perfection in New Orleans. This suit included claims against the liability insurers of Perfection under the Louisiana Direct Action Statute, which permits insurers to be sued in the same action with their insureds. All of Perfection's insurers that were sued settled before or during the course of trial.

Ned Kohnke, Mike Phillips and Kerry Miller of the Firm successfully tried the case on behalf of the Water Heater Manufacturers.

To learn more about Frilot, Partridge, Kohnke & Clements, please visit our website at www.fpkc.com.



Legal Disclaimers :

All rights reserved. Frilot, Partridge, Kohnke & Clements, L.C., 3600 Energy Centre, 1100 Poydras Street, New Orleans, Louisiana 70163-3600, Telephone (504) 599-8000.

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 fb@fpkc.com, Kerry J. Miller, 504-599-8194, email kjm@fpkc.com, or Eugene Terk, 504-599-8285, email et@fpkc.com.

[Click here if you would like to unsubscribe](#)

[Forward to Friend or Colleague](#)