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## La. Judge Rejects Defense Motion to Dismiss, Finds Complaint Properly Pled

NEW ORLEANS -- A Louisiana federal court has denied a motion to dismiss, finding that, at this stage in the litigation, the plaintiffs were not required to specifically name the defendants' products that allegedly caused the benzene-related injury. *Moore, et al. v. BASF Corp., et al.*, No. 11-1001 (E.D. La.).

In the Nov. 21 opinion, the U.S. District Court for the Eastern District of Louisiana ruled that at this time, it is sufficient for the plaintiffs to merely allege that Craig Moore was exposed to the defendants' "benzene-containing products."

The plaintiffs contend that Moore's multiple myeloma was caused by exposure to benzene-containing paint products with which he worked when employed as painter from 1981 to 2005. The plaintiffs filed the claims under the Louisiana Products Liability Act (LPLA).

Valspar Corp., however, moved to dismiss the complaint, citing its failure to state a claim for relief that is plausible on its face. Defendants Exxon Mobil Corp. and International Paint later joined in the motion.

In addressing the motion, the federal court noted that in order for the complaint to defeat the motion, it must establish more than a "sheer possibility" that the plaintiffs' claim is true.

The defendants argue, however, that the negligence and strict liability claims fail because LPLA applies to the plaintiffs' cause of action and "establishes the exclusive theories of liability." The plaintiffs countered by saying that LPLA is prospective in nature and that they can assert the negligence and strict liability claims based on alleged exposure that occurred before the LPLA was passed.

The District Court agreed, noting that the Louisiana Supreme Court has ruled that the LPLA cannot be applied retroactively.

"[I]f Moore's cause of action accrued before the passage of the LPLA on September 1, 1988, then pre-LPLA law would apply to his claims," the court said.

In determining when Moore's cause of action accrued, the District Court applied the significant tortious exposure theory.

"Moore was not diagnosed with multiple myeloma until March 25, 2010," the court noted. "Plaintiffs allege, however, that Moore regularly used and came into contact with benzene or benzene-containing products including paints, solvents, primers and thinners from 1981 to 2005. The plaintiffs allege that defendants

manufactured, distributed, and sold these products. Plaintiffs also assert that Moore used Exxon's Ruse Ban 392 from the early 1970s through the 1980s. Plaintiffs contend that Moore 'sustained tissue damage shortly after each exposure to benzene, resulting in distinct bodily injuries.' If Moore demonstrates that he sustained significant tortious exposure before the passage of the LPLA in 1988, then his cause of action would have accrued before the passage of the LPLA, and his claim would be governed by pre-LPLA law. Based on the allegations of the complaint, plaintiffs have stated plausible claims for negligence and strict liability under pre-LPLA law."

The District Court also rejected the defendants' contention that the plaintiffs had not asserted the claims with requisite particularity, saying that the failure to specify a name of the Valspar and International Paint products is not fatal at this stage in the litigation.

"Plaintiffs' failure to point to the specific Valspar and International Paint products, and to name the exact dates when and places where exposure to defendants' products occurred does not make the claim implausible at the pleading stage," the court opined. "In order to prevail against any defendant in this lawsuit, Moore will have to demonstrate that his exposure to a benzene-containing product manufactured by that defendant was a substantial factor generating his injury. The court finds, however, that at this early stage plaintiffs' complaint is sufficiently pleaded to survive dismissal on this Rule 12(b)(6) motion."

Counsel for the plaintiffs are L. Eric Williams Jr. of the Williams Law Office in Metairie, La., and Richard J. Fernandez and Amber Cisney of Richard J. Fernandez LLC in Metairie, La.

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