

From The Bench

legal news of interest

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The Louisiana Supreme Court Stops Flood of Lawsuits

by Richard R. Montgomery

Bourgeois v. A.P. Green Industries, Inc.¹ is a medical monitoring case which has been around our courts for years. The 24th Judicial District Court, the Louisiana Fifth Circuit Court of Appeal and the Louisiana Supreme Court have all issued rulings. **Bourgeois** is a class action lawsuit brought by former and current employees against Avondale Industries for damages caused by asbestos exposure.

In **Bourgeois I**, the Louisiana Supreme Court ruled an uninjured claimant who was exposed to asbestos had a cause of action against the defendants in order to recover costs for medical monitoring.² The decision opened the floodgates for lawsuits against employers for damages for mere exposure to asbestos, rather than only allowing damages in cases of actual injury.

In 1999, the Louisiana Legislature intervened by amending *LSA-C.C. Art. 2315* to eliminate medical monitoring as a compensable item of damage in the absence of a manifest physical or mental injury or disease. This amendment overruled the Supreme Court's 1998 decision.³ The Act was also intended to apply to pending suits. In response, the **Bourgeois I** defendants filed an exception of no cause of action to dismiss the plaintiffs' claims.

In 2001, the Louisiana Supreme Court rendered a second opinion in **Bourgeois II** finding the retroactive portion of the 1999 amendment to *Article 2315* was unconstitutional, and accordingly, maintained the plaintiffs' causes of actions. The Court, however, upheld the Act in all other respects, specifically stating medical monitoring was not a compensable damage in Louisiana for causes of action arising after July 9, 1999.⁴ A claimant who was exposed to asbestos (or any hazardous substance) prior to July 9, 1999 had a cause of action and did not have to prove actual injury.

However, the Louisiana Supreme Court recently closed the door even further on non-injured plaintiffs in the case of **Bonnette v. Conoco, Inc.**,⁵ overruling a potentially dangerous decision by the Third Circuit Court of Appeal and somewhat limiting their prior opinions in **Bourgeois I** and **II**. In **Bonnette**, numerous residents of Westlake, Louisiana filed a class action lawsuit against Conoco after it was discovered soil excavated from a Conoco construction site and delivered to the residents contained asbestos. The Third Circuit upheld a trial court award for compensatory and punitive damages, including property damages, mental anguish, damages for an increased risk of cancer, medical expenses including future psychotherapy and punitive damages.

Q. Can a plaintiff bring suit for damages based on any exposure to a potentially hazardous substance, no matter how slight, and no matter whether any physical injury occurred?

a. No. A claimant must prove, with competent medical evidence, that the risk of contracting a disease following exposure is significant.



Clearly, the appellate decision in *Bonnette* would have allowed a plaintiff to bring a cause of action for damages based on any exposure to a potentially hazardous substance, no matter how slight, and no matter whether any physical injury occurred. However, the Louisiana Supreme Court reversed the appellate court holding Louisiana does not recognize a cause of action for an increased risk of a future injury when it is speculative or merely possible. It further held that the possibility of contracting cancer following exposure to a carcinogen, though potentially dangerous, is too tenuous to be a viable cause of action.

The Supreme Court distinguished its decision in *Bonnette* from *Bourgeois I*. The *Bourgeois I* plaintiffs established, with competent medical evidence, the risk of contracting a disease following exposure was significant. The Court in *Bonnette* also denied the award of emotional distress for failing to prove a genuine and serious mental distress arising from the contaminated soil. Punitive damages were not allowed because Conoco's conduct was not highly unreasonable and did not involve an extreme departure from ordinary care. However, the Supreme Court upheld the award for property damages based on a diminution of value only.

The 1999 amendment to *Article 2315* and the recent decision in *Bonnette* are very important for asbestos and other toxic tort defendants. Absent these, recovery would have been allowed for even the slightest exposure, potentially creating a flood of lawsuits by non-injured plaintiffs.

¹ 97-3188 (La. 7/8/98); 716 So.2d 355; 00-1528 (La. 4/3/01); 783 So.2d 1251.

² *Bourgeois*, 97-3188 (La. 7/8/98); 716 So.2d 355.

³ See Act 989 of 1999, *LSA-C.C. Art. 2315*.

⁴ *Bourgeois*, 00-1528 (La. 4/3/01); 783 So.2d 1251.

⁵ 01-2767 (La. 1/28/03); 837 So.2d 1219.



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Prescription; Interruption

If there is a conflict between *LSA-C.C. Art. 2324(C)* (interruption of prescription as to joint tortfeasors) and *LSA-C.C. Art. 3462* (when an action is filed in an improper venue, interruption by suit only occurs as to those defendants served within the prescriptive period), the latter article controls. Thus, where venue is not proper as to certain joint tortfeasors who are named in the suit but who are not served within the prescriptive period, the filing of the suit does not interrupt prescription against them. *Bell v. Kreider*, 03-CA-300 (La.App 5 Cir., 9/16/03)

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