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Retroactive Application of the Louisiana Products Liability Act: A Civilian Analysis

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RETROACTIVE APPLICATION OF THE LOUISIANA PRODUCTS LIABILITY ACT: A CIVILIAN ANALYSIS

INTRODUCTION

In the 1988 regular legislative session, the legislature enacted a body of products liability law for Louisiana. This new legislation, called the "Louisiana Products Liability Act,"[1] is now the *exclusive* basis of manufacturer liability for damages caused by their products.[2] As is common with any newly enacted legislation, a decision must be made concerning the retroactive or prospective application of the Act. This dilemma will surface when a claimant sues on a cause of action that arose before September 1, 1988, the effective date of the Act. Since the Act, as passed by the Louisiana legislature and signed into effect by the Governor, does not expressly state whether it should be applied prospectively or retroactively, it will be up to the courts to decide this issue.

The purpose of this comment is to determine whether the new products liability law should be applied retroactively to causes of action that arose before September 1, 1988. The discussion is divided into five sections. The first section identifies the procedure that should be used in making the determination of whether or not newly enacted legislation can be applied retroactively. The second section examines the intent of the legislature with respect to retroactive application of the new Act. The third section analyzes the effect of the new Act on prior Louisiana law in the area of products liability. This section lists the elements and causes of action that existed before the new legislation and examines six possible conflicts between new and old law. The fourth section presents Louisiana jurisprudence that has interpreted issues of retroactive application of newly enacted statutes. This section examines cases holding that enacted statutes could be applied retroactively, as well as those that allowed only prospective application of new statutes. The final section of this comment asserts the conclusion that the new Act should be applied retroactively.

DETERMINING RETROACTIVE APPLICATION

A two-step analysis is used in this comment to examine whether the Act should be applied retroactively. The first question is whether there

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1. La. R.S. 9:2800.51-2800.59 (Supp. 1989).
2. La. R.S. 9:2800.52 (Supp. 1989).

is a legislative expression concerning the application of the Act. If there is, then the Act will be applied accordingly. If there is not, the second question is whether the Act is substantive, interpretive, or procedural within the meaning of article 6 of the Louisiana Civil Code.[3]

The first question is whether the legislature expressly provided for the retroactive application of the new Act. This question is answered by examining the specific language of the Act. The legislature, in this instance, did not expressly provide for the retroactive application of the Act. Since the final version of the Act did not include this type of expression, the next inquiry in this analysis will be to determine the proper classification of the new Act in accordance with article 6 of the Louisiana Civil Code.

Article 6 of the Louisiana Civil Code contains the residual rule of retroactive and prospective application. The article provides that "substantive" laws prescribe for the future only. Laws that can be termed as "procedural" or "interpretive" are applied both prospectively and retroactively unless there exists legislative expression to the contrary.[4] It

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3. La. S. No. 684, amend. number 9 (May 25, 1988). In theory, however, a third step should also be employed for this analysis. See comment (b) to article 6 of the Louisiana Civil Code. The Constitution controls the outer-limits of the retroactive application of laws. See also Jefferson Disposal Co. v. Parish of Jefferson, La., 603 F. Supp. 1125 (E.D. La. 1985). A law cannot be applied retroactively if it divests vested substantive rights. The theoretical third step, that the ultimate test for retroactive application of legislation is the Due Process Clause of the Fourteenth Amendment of the United States Constitution, can arise in one of three ways. First, the rights granted under a state law might be *more protective* than those secured under the United States Constitution. There would never be a constitutional problem in this situation since anything allowed under state law would necessarily be allowed under the constitution.

Second, the state law analysis and the constitutional analysis dealing with the possible retroactive application of legislation might be identical. Under this type of analysis, the same considerations are applied in determining whether a law is substantive under state law and under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. It is this author's belief that the Louisiana courts have followed this type of analysis, equating the due process analysis with the article 6 analysis.

Third, state law might exclude or grant more rights than allowed by the constitution. This would mean the state courts conduct their analysis totally independent of the constitutional ramifications. Although this does not seem to be the trend by Louisiana courts, this scenario could become very important to this type of discussion. If the due process requirement ever becomes more restrictive than those of the state, then this third step in the analysis—the constitutional step—will have to be conducted.

It is this author's belief that at present Louisiana courts equate the constitutional due process analysis with the article 6 analysis when interpreting this issue. This comment proceeds on that assumption. If the requirements change to the effect of more protection being secured under the Constitution than article 6, further investigation will have to be conducted. At present, however, that divergence is beyond the scope of this comment.

4. Louisiana Civil Code article 6 provides "in the absence of contrary legislative expression, substantive laws apply prospectively only. Procedural and interpretive laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary."

is well settled in Louisiana jurisprudence that procedural and interpretive laws will be applied both prospectively and retroactively unless the legislature has provided otherwise.[5] A substantive law creates, defines, and regulates rights and obligations.[6] By contrast, a procedural or interpretive law prescribes a method of obtaining redress or enforcing rights and obligations created by substantive laws.[7] Such laws do not establish new rights, but merely establish the meaning that rights had from the time of their creation.[8]

LEGISLATIVE HISTORY AND PASSAGE OF THE NEW PRODUCTS LIABILITY ACT

The first question that must be resolved when examining the possible retroactive application of the new Act is to determine whether a legislative expression directs its application. In this case, the question will be whether the legislature expressly stated that the Act is to be applied retroactively or only prospectively. If no legislative expression is found then the analysis proceeds to the second step, determining whether the law is substantive, procedural, or interpretive within the meaning of article 6 of the Louisiana Civil Code.

As originally introduced, Louisiana Revised Statutes 9:2800.58, section 2 stated that the Act would "become effective on September 1, 1988."[9] At a subsequent Senate committee meeting, an amendment inserted the following language: "and shall apply to causes of action sustained on or after that date."[10] This express prohibition in the statute itself would have prevented the courts from applying the Act retroactively.[11] Later in the legislative session, however, the full Senate deleted the amendment[12] and reinstated only the original language, placing the effective date of the Act on September 1, 1988. The final form of the Act makes no mention of causes of action arising on, after, or before that date.

The legislature did not bar retroactivity when it could have easily done so. This legislative history indicates that the legislature did not

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5. La. Civ. Code art. 6 comment (c); Ardoin v. Hartford Accident and Indem. Co., 360 So. 2d 1331 (La. 1978); Barron v. State Dep't of Pub. Safety, 397 So. 2d 29 (La. App. 2d Cir.), writ denied, 401 So. 2d 1188 (1981).

6. Black's Law Dictionary 1281 (5th ed. 1979).

7. Id. at 1083.

8. Coates v. Owens-Corning Fiberglass Corp., 444 So. 2d 788, 790 (La. App. 4th Cir. 1984).

9. Orig. La. S. No. 684; proposed as La. R.S. 9:2800.58, p. 7, line 1.

10. La. S. No. 684, amend. no. 50 (May 17, 1988).

11. La. Civ. Code art. 6. The legislature can expressly prohibit retroactive application of otherwise retroactive laws that are interpretive or procedural.

12. La. S. No. 684, amend. no. 9 (May 25, 1988).

intend to exclude the possibility of retroactive application of the new Act. By rejecting the language that would have made the Act operate prospectively only, the legislature has placed the burden on the courts to decide this issue.

Absent legislative expression concerning the retroactive application of the Act, the Act must be classified under article 6 in order to determine if the Act can apply retroactively.[13] Since the legislative intent is a valuable guide in this classification process, further examination of the legislative history is warranted.

The new products liability law was presented at a committee meeting as one of a number of tort reform bills.[14] Senator Hainkel, who presented the bill, told the committee that the main purpose of the bill was to cure the problems created by the *Halphen v. Johns-Manville Sales Corp.* decision:[15]

> I would simply like to say that with the advent of a decision which we all in legal circles know as *Halphen*, we got out of the . . . mainstream of the legalistic system in this country. Traditionally, there were four ways whereby a product could be defective or an injured person could recover. This decision . . . added a fifth way which I consider to be unfair, unreasonable, and illogical, and the main aspect of this bill, frankly, is to go back to the traditional four matters whereby a product was defective and there could be recovery . . . [t]hat's the meat of the bill.[16]

Based on this and other explanations of the bill at this committee meeting,[17] it is clear that this bill was a means of overruling the *Halphen* decision and replacing it with the products liability law that has traditionally been recognized in Louisiana.

THE EFFECT OF THE ACT ON PRIOR LAW

Since there is no legislative expression on the retroactive application of the Act, the analysis centers on the classification of the Act according to Article 6 of the Louisiana Civil Code. Will it be seen as substantive, in which case it could not have retroactive application, or will it be deemed to be procedural or interpretive, in which case retroactivity would not be precluded? This section of the comment examines whether

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13. See infra text and accompanying note 3.

14. New Products Liability Act: Minutes of Committee Meetings on Act 684 Before Senate Committee on Judiciary A, 1988 Sess. (May 17, 1988) [hereinafter Minutes].

15. 484 So. 2d 110 (La. 1986).

16. Minutes, supra note 14, at 3.

17. Minutes, supra note 14.

the Act either creates or eliminates vested substantive rights. The most logical means of analyzing this question is to outline briefly what products liability law of Louisiana consisted of before the new Act, and then to analyze the effect of the Act on this prior law.

The Louisiana Supreme Court in *Weber v. Fidelity and Casualty Insurance Co. of New York*[18] outlined a structure for Louisiana products liability that has been continuously accepted, reaffirmed, and applied by the courts in Louisiana.[19] Explaining the rights against a manufacturer, the court stated that a manufacturer was liable to any person who sustained an injury because of a defect in the design, composition, or manufacture of an article if the injury might reasonably have been anticipated.[20] The claimant, said the court, bore the burden of proof that the injury-causing product was "unreasonably dangerous to normal use" and that this defective condition caused the injury.[21] It was not necessary to show specific instances of negligence because a manufacturer was presumed to know of the defects or vices in the things it made.[22]

The state of products liability law changed significantly in 1986, when the Louisiana Supreme Court responded to a certified question from the Fifth Circuit in *Halphen v. Johns-Manville Sales Corp.*[23] In *Halphen*, a widow sued an asbestos manufacturer for the wrongful death of her husband, who died as a result of his exposure to asbestos. A judgment was rendered against the defendant-manufacturer in the District Court. On appeal, the Fifth Circuit certified the following question to the Louisiana Supreme Court: "In a strict products liability case, may a manufacturer be held liable for injuries caused by an unreasonably dangerous product if the manufacturer establishes that it did not know and reasonably could not have known of the inherent danger posed by its product?"[24] Answering this question in the affirmative, the Louisiana Supreme Court not only expanded the recognized theories of products liability, but also established a new theory, the unreasonably dangerous per se theory.[25] Under any theory, "the plaintiff must prove that the harm resulted from the condition of the product, that the condition made the product unreasonably dangerous to normal use and that the

18. 259 La. 599, 250 So. 2d 754 (1971).

19. Harris v. Atlanta Stove Works, Inc., 428 So. 2d 1040 (La. App. 1st Cir.), writ denied, 434 So. 2d 1106 (1983); Hunt v. City Stores, Inc., 387 So. 2d 585 (La. 1980); Chappuis v. Sears Roebuck and Co., 358 So. 2d 926 (La. 1978).

20. Id. at 602, 250 So. 2d at 755.

21. Id. at 603, 250 So. 2d at 756.

22. Id.

23. 484 So. 2d 110 (La. 1986).

24. Id. at 113.

25. Id.

condition existed at the time the product left the manufacturer's control."[26]

Under the unreasonably dangerous per se theory, liability was imposed on a manufacturer simply on the basis of the product's characteristics, regardless of the manufacturer's knowledge, intent, or conduct. The product was unreasonably dangerous per se if a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighed the product's utility.[27] The state of scientific knowledge and existing technology were irrelevant to the question of liability under this type of theory.[28] In other words, a manufacturer was liable for injuries caused by his product even though it was impossible, at the time the product was manufactured, to discover a possible risk or hazard in light of existing technology.

Regardless of the prior law, only products liability theories outlined in the new Act are available against the manufacturer for claims arising after September 1, 1988. The issues concerning the retroactive application of the new Act will become relevant only when the claim sued on arose before this date and the new Act conflicts with prior law. In order to illustrate these issues, the new Act must be compared to the preexisting products liability law.

Comparing the new Act to prior law in this area, six potential conflicts exist, and each must be closely scrutinized to ascertain its effect on previously recognized law. The six critical elements of the new Act are: i) manufacturer liability based on an inadequate warning; ii) manufacturer liability based on the failure to conform to an express warranty; iii) the unavailability of attorney's fees; iv) a more stringent burden of proof; v) the specific provision for a state-of-the-art defense; and iv) the exclusivity clause of the new Act, which eliminates the unreasonably dangerous per se theory. The fifth and sixth elements will prove to be the most problematic issues of the Act for this comment because both lie in direct conflict with the analysis and interpretation enunciated in *Halphen*.

For this type of analysis to be successful, each of these six areas must be examined in relation to prior law for the purpose of determining whether any vested substantive rights are eliminated or created by the Act. If any of these six areas are shown to violate vested rights, then the Act cannot be applied retroactively.

First, the Act specifies that a claimant can recover from a manufacturer when a product is unreasonably dangerous because of an inadequate warning.[29] The question becomes whether or not a new theory

26. Id.
27. Id. at 114.
28. Id.
29. La. R.S. 9:2800.57 (Supp. 1989).

of recovery is created by this provision. While no statute imposed this duty before the Act, this specific duty can be retrieved from various cases in our jurisprudence. Hence, the conflict between this provision and prior law is illusory, and no retroactivity question arises.[30]

Second, the new Act creates a theory of recovery for failure to conform to an express warranty.[31] This cause of action was not one of those listed in *Halphen*. It can, however, be directly linked to Article 2315[32] in that the untruthfulness of the warranty is "an act of man that causes damage to another." For this reason, the new statutory cause of action for nonconformity with an express warranty does not create a new right, but merely gives a specific title to a right that has always existed under article 2315. Again, the new law does not conflict with the old, and no retroactivity question arises.

Third, the Act does not allow the recovery of attorneys' fees.[33] Generally, attorneys' fees are not recoverable in tort law in Louisiana. Tort law is based on article 2315, which does not provide for attorneys' fees. Confusion has sometimes accompanied this issue because an action in redhibition under Louisiana Civil Code article 2545 allows the recovery of attorneys' fees. The leading case on this issue is *Philippe v. Browning Arms Co.*[34] This case involved an action by Dr. Philippe to recover damages suffered when his gun accidentally discharged and severed his right thumb. By applying article 2545, which authorizes attorneys' fees in redhibition cases, through article 2315 the Louisiana Supreme Court allowed a recovery of attorneys' fees.[35] It bears emphasis that this case did not base the award of attorneys' fees on article 2315, but on the express grant of attorneys' fees in article 2545. The Act does not preclude the recovery of attorneys' fees under actions sounding in redhibition, but only prohibits the recovery of attorney's fees in an action based solely upon the new legislation. If the facts and circumstances of a case fit a theory of redhibition, then the courts could arguably still award attorney's fees to a claimant on that basis. Once more, there is arguably no direct conflict with prior law, and no retroactivity question.

Fourth, the Act makes the plaintiff's burden of proof more stringent in certain cases. Under the design theory of the new Act, the claimant

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30. Scott v. White Trucks, 699 F.2d 714 (5th Cir. 1983); Reed v. John Deere, 569 F. Supp. 371 (M.D. La. 1983); Straley v. Calongne Drayage and Storage, Inc., 346 So. 2d 171 (La. 1977); Lanclos v. Rockwell Int'l Corp., 470 So. 2d 924 (La. App. 3d Cir.), writ denied, 477 So. 2d 87 (1985); Oatis v. Catalytic, Inc., 433 So. 2d 328 (La. App. 3d Cir. 1983).

31. La. R.S. 9800.58 (Supp. 1989).

32. Louisiana Civil Code article 2315 provides "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."

33. La. R.S. 9:2800.53(5) (Supp. 1989).

34. 395 So. 2d 310 (La. 1981).

35. Id. at 319.

must introduce evidence of the *existence* of an alternative design that was available at the time the product left the manufacturer's control.[36] Traditionally, the plaintiff's burden under a design theory had been to show an alternative *feasible* design.[37] The new standard requires the plaintiff to prove the existence, rather than the mere feasibility, of an alternative design under this theory. The claimant's burden of proof in a design theory under the new Act is more stringent than it had been under prior jurisprudence. Hence, there is an apparent conflict between the new and the old law. Although this raises a question of retroactive application, it is one that can be summarily disposed of. Statutes establishing burdens of proof have always been classified as procedural, and therefore, according to article 6, should be applied retroactively absent contrary legislative expression.[38]

Clearly, the first four elements analyzed previously can be easily eliminated from this discussion because they do not present a problem with the retroactive application of the new Act. The first three areas merely codify aspects of Louisiana law that were in existence before the new Act. The fourth area creates a more stringent burden of proof, which will not bar the retroactive application of the new Act.[39] As a result, these four issues can be dispensed with at this juncture.

Unfortunately, however, the last two problem areas cannot be resolved so easily. Both change the law and neither is procedural. Hence, a thorough analysis must be conducted in order to determine whether either of these two provisions, the exclusion of the category of unreasonably dangerous per se and the inclusion of the state-of-the-art defense to design cases, will serve as a bar to retroactive application of the Act. The next section of this comment analyzes this issue and illustrates how the courts have reacted in very similar situations concerning the retroactive application of newly enacted statutes.

RETROACTIVE APPLICATION OF LEGISLATION THAT RESPONDS TO A PREVIOUS JUDICIAL INTERPRETATION

In a number of cases, Louisiana courts have addressed the question whether a statute is substantive, or instead procedural or interpretive. The starting point of the analysis is the premise that retroactive application of statutes is generally prohibited.[40] Louisiana courts are compelled to follow a true civilian analysis, the leading example of which is found

36. Crawford, The Louisiana Products Liability Act, 36 La. B.J. 173, 175 (1988).
37. Id.
38. Ardoin v. Hartford Accident & Indem. Co., 360 So. 2d 1331, 1339 (La. 1978).
39. Id.
40. Cahn v. Cahn, 468 So. 2d 1176, 1181 (La. 1985).

in *Ardoin v. Hartford Accident and Indemnity Co.*[41] *Ardoin* involved a suit for medical malpractice.[42] On July 9, 1976, the victim died during a coronary artery by-pass[43] operation in a Lafayette, Louisiana hospital when air instead of blood was inadvertently pumped into his heart. The trial court, relying on the "Locality Rule,"[44] excluded a Baton Rouge doctor's testimony on the degree of care normally exercised by members of this medical speciality.

The question in *Ardoin* became whether a statute,[45] that in effect abolished the locality rule for specialists but was enacted after the victim's death could be applied retroactively. The statute in question contained no legislative expression with respect to retroactivity. The supreme court, interpreting old article 8, recognized interpretive, remedial, and procedural laws as exceptions to the nonretroactivity rule[46] and held that this statute should be applied retroactively. Laws that determine burdens of proof or clarify existing laws, said the court, should be classified as procedural or interpretive and accorded retroactive effects. The statute in question, declared the *Ardoin* court, "is an interpretive statute which does not establish new rights and duties but merely determines the meaning of existing laws and may thus be applied to facts occurring prior to its promulgation."[47] The court determined that even though retroactive application of the statute changed the analysis of the case, it did not divest anyone of any vested rights. The statute merely interpreted the meaning that the existing laws had at the time the damage was sustained. The distinction between procedural laws and substantive laws set out by *Ardoin* persisted in the case law and was codified in new article 6.

Later courts have relied on *Ardoin* to hold that legislation enacted in response to an erroneous judicial interpretation of a statute is interpretive and can be applied retroactively. In *Tullier v. Tullier*,[48] for example, the Louisiana Supreme Court held that a newly enacted statute that eliminated a judicially created rule could be applied retroactively

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41. 360 So. 2d 1331.

42. Id. Decedent's wife and nine children brought a wrongful death action alleging that the negligence of various defendants caused the death of the victim.

43. Id. This type of operation requires that the patient's heart be stopped and his respiratory and circulatory functions be performed by a "heart-lung" machine during the surgery.

44. Id. This is a rule of law which restricts proof of medical negligence to a standard of care that is exercised in the community where the doctor practices.

45. Id. La. R.S. 9:2794 (Supp. 1988) (the locality rule does not apply to medical specialists).

46. 360 So. 2d at 1338 (citing 1 M. Planiol, Civil Law Treatise, Nos. 249-52 (La. St. L. Inst. transl. 1959)); A. Yiannopoulos, Civil Law Systems 68 (1977)).

47. 360 So. 2d at 1339.

48. 464 So. 2d 278 (La. 1985).

because no vested substantive rights would be violated. The *Tullier* court faced the issue of whether a statute eliminating the double declaration rule[49] in community property matters could be given retroactive effect. The statute did not contain a provision regarding its prospective or retroactive application.

The court noted that the double declaration rule had been created by the courts. The judicially created double declaration rule, said the court, could not have created any substantive rights of ownership in property because the creation of rights is solely within the legislator's power.[50] Hence, the statute eliminating the rule could be retroactively applied because it did not destroy any vested rights.

The *Tullier* court relied heavily on the civilian theory that the legislature possesses the exclusive power to create substantive rights. For purposes of this comment, the case is most important for its articulation of the corollary to the civilian doctrine: a jurisprudentially created rule does not create substantive rights. Therefore, absent contrary legislative expression, an amendment overruling a jurisprudential rule can be applied retroactively.[51]

An examination of the legislative intent behind the new Act, which was presented earlier in this comment, shows that the Act was passed in response to the effect that the *Halphen* decision had on Louisiana's products liability law. This falls precisely within the rule set out by the *Tullier* case and therefore retroactive application of the Act should present no difficulty.

Other cases bolster this conclusion. *Peppard v. Hilton Hotels Corp.*[52] and *Laubie v. Sonesta International Hotel Corp.*[53] are two cases in which the application of a legislatively amended statute was at issue. The

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49. Wood v. Wood, 424 So. 2d 1143, 1145-46 (La. App. 1st Cir. 1982). As to immovable property acquired by one spouse during a marriage, there is an irrebuttable presumption that it is community property unless there exists in the act of acquisition the couple's declaration that the property was acquired with the funds of that spouse separately, and that it was being acquired for that spouse's individual estate.

50. 464 So. 2d at 282.

51. This is in contrast to the situation in which a legislative amendment creates substantive rights. See Coates v. Owens-Corning Fiberglass Corp., 444 So. 2d 788 (La. App. 4th Cir. 1984). In *Coates*, an amendment to article 2315 of the Louisiana Civil Code creating the action for loss of consortium was not applied retroactively because the amendment created substantive rights. The *Tullier* court recognized the amendment did not create substantive rights, but merely interpreted the way that the courts should have enforced rights at the time that the action arose. The contrast between a *Tullier* analysis, where the legislature merely overrules a jurisprudential rule, and a *Coates* analysis, where the legislature *creates new substantive rights*, is relevant for purposes of this comment because the new Act is not the creation of new substantive rights. See infra text and accompanying notes 29-35, 38-39, 50.

52. 482 So. 2d 639 (La. App. 4th Cir. 1986).

53. 752 F.2d 165 (5th Cir. 1985).

statute at issue in both cases was Louisiana Civil Code article 2971, which limits the liability of landlords and innkeepers to a maximum of five hundred dollars.[54] The legislature amended the article in 1982, and each case addressed the effect of the amendment. In both of these cases, the courts held that the 1982 amendment to Article 2971 was interpretive of the law as it had existed before an aberrant supreme court decision and thus could be applied retroactively.

In *Laubie*, hotel guests brought an action against a hotel to recover for theft of jewelry valued at $50,000 from their hotel room.[55] Because of a Louisiana statute limiting liability to one hundred dollars, the federal district court found an insufficient amount in the action for lack of the controversy and dismissed the case for lack of subject matter jurisdiction. On appeal, the Fifth Circuit Court of Appeals certified questions regarding the statute to the Louisiana Supreme Court,[56] which answered that the statute did not apply to an innkeeper's delictual, as opposed to contractual, liability.[57] Based on this answer, the Fifth Circuit reversed and remanded the case to the lower court.[58] After the supreme court's decision, the Louisiana legislature, in 1982, amended article 2971 to limit expressly both the contractual and delictual liability[59] to five hundred dollars. By this amendment, the legislature overruled the earlier supreme court's decision.

Upon remand, the federal district court faced the issue whether the amended statute should be applied to the Laubie's claim. The court ruled that because Louisiana is a civil law jurisdiction, and because the legislative will as expressed in the Civil Code is the preeminent source of law in Louisiana, the amended act should prevail over the Louisiana Supreme Court's interpretation of the statute. The amended statute was found to be interpretive[60] by the federal district court, which dismissed the action once again for lack of federal jurisdiction. On the second appeal by the plaintiffs,[61] the Fifth Circuit affirmed the district court's decision, stating,

> [i]n Louisiana, a civil law jurisdiction, the legislative will, as expressed in the articles of the [Civil] Code, is supreme. Case law, although valuable, is of secondary importance. The amended

54. La. Civ. Code art. 2971.

55. 752 F.2d at 166. The Laubie's room was entered by unknown persons who broke the chain lock on the door and stole jewelry valued at approximately $50,000.00.

56. Laubie v. Sonesta Int'l Hotel Corp., 626 F.2d 1324 (5th Cir. 1981).

57. *Laubie*, 398 So. 2d 1374 (La. 1981).

58. *Laubie*, 650 F.2d 680 (5th Cir. 1981).

59. 1982 La. Acts No. 382, § 1.

60. *Laubie*, 587 F. Supp. 457, 459-460 (E.D. La. 1984).

61. *Laubie*, 752 F.2d 165 (5th Cir. 1985).

> Act, therefore, takes precedence over the judicial interpretation of the statute.[62]

The amendment, said the court, was aimed at overruling a judicial interpretation that the legislature disagreed with, and at clarifying the meaning of the statute. The amended statute was viewed as interpretive legislation, which did not divest vested rights. In short, the 1982 amendment applied retroactively.

A Louisiana court addressed the same question in *Peppard*. Before the 1982 amendment to article 2791, the Peppard's room in the Hilton Hotel was burglarized. In 1983 the trial court rendered a judgment limiting the Peppard's recovery to five hundred dollars under article 2971. On appeal, the fourth circuit accepted the reasoning used in *Laubie* and ruled that the amendment to article 2971, even though it was enacted after the plaintiffs sustained the damage, was interpretive law and could be applied retroactively without any violation of vested rights.

The rule of *Laubie* and *Peppard* can be applied to the question of the retroactivity of the Louisiana Products Liability Act. The reasoning presented in these cases can be used to urge retroactive application of the Act. Arguably, the Act is interpretive legislation that should not be barred from retroactive application. The legislature's enactment of the new legislation in response to *Halphen* is analogous to the legislative amendment of article 2971 after the Louisiana Supreme Court's decision in *Laubie*. In both instances, the legislature defined the law as it should have been interpreted instead of the way it was interpreted by the Louisiana Supreme Court. No legislatively created rights were taken away by the amendment; only a judicial interpretation was affected.

Another case, *Baron v. State, Department of Public Safety*,[63] presents a very clear example of interpretive legislation. In that case, the plaintiff's license was revoked after he was adjudged a habitual offender.[64] At that time, Louisiana Revised Statutes 32:1479 placed restrictions on the ability[65] of a habitual offender to secure a new driver's license. The statute listed three restrictions, all joined by the word "and."[66] Prior to 1978, the Louisiana Supreme Court had applied this "and" as an "or," making the requirements disjunctive.[67] The legislature, disagreeing with the supreme court's interpretation of the statute, changed the wording to ensure that a habitual offender could not regain a driver's license until all of

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62. Id. at 167.

63. 397 So. 2d 29 (La. App. 2d Cir.), writ denied, 401 So. 2d 1188 (1981).

64. Id. La. R.S. 32:1471-79 (Supp. 1988).

65. Jefferson Disposal Co. v. Parish of Jefferson, 603 F. Supp. 1125, 1135 (E.D. La. 1985).

66. 397 So. 2d at 30, pursuant to La. R.S. 32:1479 (1978).

67. Id.

the requirements in the statute were met.[68] The amendment did not contain a legislative expression concerning its retroactive or prospective application, and the courts were called upon to decide the issue.

The second circuit compared the amended statute to the Louisiana Supreme Court's decision a year earlier and termed the new law "a classical example of interpretive legislation."[69] Rights, noted the court, do not vest because of an erroneous interpretation of a statute, and retroactive application of interpretive amendments did not divest substantive rights. The earlier judicial interpretation of "and," said the court, did not comply with the meaning of the statute, and the amendment specified the true meaning that the statute had at the time that the action arose.[70] The legislative intent expressed in the amended statute, said the court, prevailed over an earlier judicial interpretation.

Taken together, these cases clearly demonstrate that the new Act should operate retroactively. Since the elimination of a judicially created rule does not destroy vested substantive rights, as shown in *Tullier*, the elimination of the judicially created unreasonably dangerous per se rule does not impair substantive rights. In *Laubie* and *Peppard*, the amendment to Louisiana Civil Code article 2971 was given retroactive application based on the civil law precept that the legislative will defines substantive rights, while an erroneous judicial interpretation of a statute does not. Likewise, the *Baron* case shows that legislation which responds to erroneous judicial interpretations of a statute are to be applied retroactively.

The new Act clarifies the meaning and rights that were secured under article 2315 from its inception. This clarification defines the rights recognized by the legislature in the area of products liability differently than earlier judicial interpretations. Based on this analysis, there should be no bar to retroactive application of the new Act. The issue should be resolved in favor of the legislators' will rather than prior rules created by the courts.

One case decided by the Louisiana courts may at first seem to undercut this analysis. The *Faucheaux v. Alton Oschner Medical Foundation Hospital and Clinic*[71] decision by the Louisiana Supreme Court appears to conflict with the principles just examined. The court's statement that "statutes enacted after the acquisition of such a vested property right . . . cannot be retroactively applied to divest the plaintiff of his vested right. . . ."[72] might be interpreted as denying retroactive appli-

68. Id.
69. Id. at 31.
70. Id.
71. 470 So. 2d 878 (La. 1985).
72. Id. at 879.

cation of legislation such as the new Act. *Faucheaux* was a suit against a hospital in which the plaintiff alleged that blood transfusions during surgery caused him to contract hepatitis. The Louisiana legislature later enacted statutes that granted immunity to medical personnel for strict tort liability from the use of blood that results in viral disease.[73] The Louisiana Supreme Court ruled that these statutes could not be applied retroactively.

What the opinion in this case does not state is that the legislature specifically provided that the new legislation be applied prospectively only. Thus, regardless of how the supreme court would have classified this new statute,[74] the legislature precluded any possible retroactive application by providing that "[t]he provisions of this Article are intended to be prospective in nature and shall not affect causes of action which have arisen prior to the effective date of this Article."[75] This language was not mentioned in the *Faucheaux* opinion, but it made the question of retroactivity moot. Hence, *Faucheaux* carries very little weight.[76]

Merely because an amended statute can be linked somehow to a prior judicial decision does not *necessarily* mean that the amendment is interpretive legislation and will apply retroactively. If retroactive application of a statute would violate vested substantive rights, then the statute can be applied prospectively only. The point of the above discussion is that, under Louisiana law, judicial decisions do not create substantive rights. The *Cahn v. Cahn*[77] case serves to illustrate the point. In that decision, the supreme court held that an amended statute governing the partition of coowned property could not be retroactively applied because the amendment created a substantive change in the law. The amended statute in question was viewed as substantive rather than interpretive.

The *Cahn* court dealt with a situation that had been interpreted differently by both the trial court and the appellate court[78] before the statute in question was amended. The trial court had held that Louisiana Civil Code Article 543 barred a partition by licitation in this instance. The appellate court reversed this decision, holding that this version of article 543 did not bar a partition by licitation in this situation. Sometime

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73. La. R.S. 9:2797 (Supp. 1988).

74. La. Civ. Code art. 6 (procedural or interpretive).

75. La. R.S. 9:2797 (Supp. 1988).

76. *Faucheaux* is a *per curiam* opinion, while *Ardoin* is a majority opinion, both written by Justice Dennis. It is this author's belief that the majority's opinion is much more significant for this analysis because the facts and circumstances of *Ardoin*, as compared to that of *Faucheaux*, are much more in line with the pending question of possible retroactive application of the new Act.

77. 468 So. 2d 1176 (La. 1985).

78. Id. at 1178.

after the appellate court's decision, the legislature amended article 543 to allow a partition by licitation in this type of situation.

The *Cahn* court ruled that the amendment destroyed a substantive right and therefore could not be applied retroactively. When the action arose, noted the court, the coowner had a right to keep her property free from partition by licitation under the express terms of the statute; the wording of the amended statue would prohibit her from keeping their property free from partition by licitation.[79] The elimination of the right expressly provided by the statute when the action arose would divest the defendant of a vested right, and the court correctly concluded that the amendment could not have retroactive effects.

The court's decision in *Cahn* is not inconsistent with the proposition that the new Act should not be retroactively applied. The situations are readily distinguishable, because in *Cahn*, the issue concerned an amendment to a Louisiana Civil Code article that, in effect, changed the wording and the meaning of the article in question. Substantive rights are vested by the express provisions of the Civil Code, and therefore amendments to the express terms would not be applied retroactively. The Act, on the other hand, is not an amendment to prior *statutory* law; it is at most an amendment to prior *jurisprudential* rules. As the courts have made so clear, substantive rights are not vested by judicial interpretations. Because of these critical differences in the two situations, the *Cahn* decision should not impede retroactive application of the new Act.

Absent any legislative expression to the contrary, the retroactive application of this statute will depend on whether or not it is classified as substantive or interpretive legislation. As was expressed in the cases presented in this section, when the legislature clarifies the meaning of a law in response to a court's interpretation of that law, this clarification has been viewed as interpretive and afforded retroactive application. No substantive rights are created by judicial decisions, and legislation overruling those decisions can be given retroactive application.[80]

CONCLUSION: RETROACTIVE APPLICATION

The purpose of this comment has been to address the issue of whether the new Products Liability Act should be applied retroactively to causes of action arising before September 1, 1988. A basic two step analysis consisting of legislative expression and Louisiana Civil Code article 6 was used to determine if retroactive application of the Act is the correct conclusion for this issue. Since there is no specific legislative

79. Id. at 1180.

80. See supra note 35.

expression concerning the retroactive or prospective application of the Act, it must be determined whether the Act is substantive, interpretive, or procedural. Although the Act does alter six specific aspects of prior jurisprudence on this issue, no substantive rights are created or destroyed. The Act merely serves to codify law as it existed and alter a claimant's burden of proof. In other instances, the Act interprets the law as it should have been recognized before its promulgation.

If the Act is declared to be substantive, then it cannot be retroactively applied. If, on the other hand, the Act is deemed to be procedural or remedial, it will have both retroactive and prospective effects in accordance with article 6 of the Louisiana Civil Code. The cases presented in this comment, all consisting of different factual situations but logically connected to this issue because of their analysis of the application of newly enacted legislation, show that this Act should be viewed as interpretive or procedural instead of as substantive.

The legislature could have easily resolved this issue had it desired to do so. By creating this Act to overrule the *Halphen* decision, and by rejecting the restrictive language that was proposed and originally accepted, the question of retroactivity is placed in the hands of the courts.

In light of the foregoing analysis and explanations, the Act should be given retroactive application. The analogies to the legally similar cases presented herein, along with the reasons behind the Act, are in strong support of retroactive application. The legislature's intent was to not prohibit retroactivity. All of the evidence available, in relation to the relevant issues in this problem, leads to the conclusion that the new Products Liability Act should be applied retroactively.

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