

PRODUCTS LIABILITY LAW REPORTER

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RECENT CASES

- Drugs, 51
- Farm Products, 54
- Firefighting Equipment, 54
- Food & Beverages, 55
- Industrial Products, 56
- Medical Products, 57
- Tobacco, 59
- Transportation, 59



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CONTENTS

RECENT CASES

51 Drugs

Jury in second bellwether case finds for Fosamax user who developed osteonecrosis of the jaw
Plaintiffs may avoid CAFA jurisdiction by filing separate actions of fewer than 100 plaintiffs each
Plaintiff need not identify manufacturer of specific anesthetic that injured her to state federal claim
Filing of federal class action lawsuit tolled state limitations period for Prempro plaintiff

54 Farm Products

Growers prevail in bellwether cases alleging crop damage from herbicide Oust

54 Firefighting Equipment

Firefighter suffers hearing loss from exposure to siren's high-decibel rearward noise

55 Food & Beverages

E. coli infection from contaminated hamburger leaves consumer with extensive injuries

56 Industrial Products & Equipment

Jury finds for woman diagnosed with mesothelioma decades after washing grandfather's work clothes
Use of asbestos-containing joint compounds, ceiling spray leads to worker's mesothelioma

57 Medical Products & Equipment

Federal law does not preempt state law claims against manufacturer of artificial hip implant

Claims may proceed against knee component maker; complaint need not identify specific defect
Spinal disk suit remains in federal court despite lost diversity where federal question jurisdiction applies

59 Tobacco

Jury holds tobacco company accountable for smoker's COPD death

59 Transportation

Flight nurse killed in helicopter crash after main rotor blade disintegrates
Tire detreads on recreational vehicle, causing crash that seriously injures occupants
Car's air bags deploy suddenly without impact, striking driver
GARA does not bar claim over helicopter maintenance manual because manual is not "part" under the act

DEPARTMENTS

62 Updates

U.S. Supreme Court will not review hormone therapy drug ruling

62 Index by Product/Index by Jurisdiction

63 Court Documents/Abstract Sets

64 Publish Your Case

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RECENT CASES

DRUGS

Jury in second bellwether case finds for Fosamax user who developed osteonecrosis of the jaw

Boles v. Merck & Co., U.S. Dist. Ct., S.D.N.Y., No. 1:06-cv-09455, June 25, 2010.

When Shirley Boles, 59, developed a stress fracture in her foot, her doctor ordered a scan to check her bone mineral density. The results suggested osteopenia—lower than normal density. The doctor prescribed the osteoporosis drug Fosamax to prevent further fractures. Boles took Fosamax for about 10 years. About five years after she started taking the drug, at age 64, she developed necrotic bone in her jaw. She was diagnosed with osteonecrosis of the jaw (ONJ), a condition in which dead bone in the jaw accumulates, impeding blood flow to the jaw. The condition worsened to the point where Boles now has a pathologic fracture in her mandible, and pus from the decayed jawbone drains through sores in her chin. She can eat only soft foods and will require removal and replacement of most of her mandible in the future.

Boles sued Merck & Company, the manufacturer of Fosamax, alleging strict liability design defect and negligent design. The plaintiff presented evidence that Fosamax has no fracture-reduction benefit for women with osteopenia and that it carries a substantial risk of ONJ.

The plaintiff did not claim medical expenses or lost earnings.

The jury found for plaintiff and awarded \$8 million. Counsel anticipate a motion to set aside the verdict.

The plaintiff's expert witnesses were Robert Marx, oral surgery/Fosamax-induced ONJ, Miami, Fla.; Curt Furberg, clinical trials/drug safety and efficacy, Winston-Salem, N.C.; Charles Elwell, oral surgery, Shalimar, Fla.; and James E. Mills, prescribing physician, Fort Walton Beach, Fla.

The defense expert was John Bilezikian, osteoporosis/drug efficacy, New York, N.Y.

Plaintiff's Counsel

Timothy O'Brien, Pensacola, Fla.

Gary Douglas, New York, N.Y.

James F. Green, Washington, D.C.

Comment: This is the second trial in this case. A previous trial resulted in a mistrial after the jury deadlocked seven days into deliberations.

The *Boles* case is the second verdict of three bellwether cases scheduled in the multidistrict Fosamax

RECENT CASES

litigation. In May, the jury in a different case found for Merck after concluding that the plaintiff in that case did not have ONJ. The third case is scheduled for trial later this year.

Plaintiffs may avoid CAFA jurisdiction by filing separate actions of fewer than 100 plaintiffs each

Anderson v. Bayer Corp., ___ F.3d ___, 2010 WL 2485934 (7th Cir. June 22, 2010).

Plaintiffs in litigation against a drug manufacturer may avoid federal jurisdiction under the “mass action” provision of the Class Action Fairness Act (CAFA), 28 U.S.C. §§ 1332(d) et seq., by dividing their filings into separate pleadings involving fewer than 100 plaintiffs each, the Seventh Circuit Court of Appeals held.

Consumers alleging injury from the drug T rasylo sued the manufacturer, Bayer Corporation, in five separate state court lawsuits involving mostly identical complaints. Bayer removed the cases, invoking CAFA’s “mass action” provision, § 1332(d)(11)(B)(i), which permits removal of cases joining the claims of at least 100 plaintiffs that meet the act’s other jurisdictional requirements. The trial court remanded four of the five cases on the basis that they contained fewer than 100 plaintiffs. Bayer petitioned for review, arguing that the cases should be treated as a single mass action because the five separate pleadings were merely an attempt by the plaintiffs to avoid CAFA jurisdiction. The defense also argued that diversity jurisdiction exists over most of the claims because the small number of nondiverse plaintiffs were fraudulently misjoined and must be severed.

Denying the defense’s petition, the Seventh Circuit noted that CAFA’s plain language excludes from the term “mass action” any action in which the claims were consolidated on a defendant’s motion. 28 U.S.C. § 1332(d)(11)(B)(ii)(II). The court cited *Tanoh v. Dow Chem. Co.*, 561 F.3d 945 (9th Cir. 2009), in which the Ninth Circuit considered and rejected an argument similar to Bayer’s argument here. Like Bayer, the defendant in *Tanoh* never formally moved to consolidate the state court cases. The Ninth Circuit reasoned that “[t]he absence of a formal motion cannot blink away the fact that . . . the defendant is asking us to consolidate separate actions for purposes of applying the ‘mass action’ provision.”

Agreeing with the Ninth Circuit, the court here reasoned that Bayer’s argument that the cases be treated as one action is tantamount to a request to consolidate them—a request Congress has explicitly stated cannot become a basis for removal as a mass action. Noting that

the mass action provision gives plaintiffs the choice to file separate actions that do not qualify for CAFA jurisdiction, the court concluded that because the cases here each contain fewer than 100 plaintiffs, they are not removable under the act’s plain language.

The court added that because the remanded cases do not meet CAFA’s definition of a class action, and appellate jurisdiction extends only to remand orders for “class actions” as defined in the act, the court lacked jurisdiction to hear the defendant’s fraudulent misjoinder argument.

Plaintiffs’ Counsel

John J. Driscoll, St. Louis, Mo.

A document in this case is available through the Court Documents section in the back of this issue, courtesy of Mr. Driscoll.

Plaintiff need not identify manufacturer of specific anesthetic that injured her to satisfy federal pleading requirements

Koch v. I-Flow Corp., ___ F. Supp. 2d ___, 2010 WL 2265670 (D.R.I. June 7, 2010).

A plaintiff alleging she was injured by an anesthetic administered after surgery did not have to identify the specific drug that injured her to satisfy federal pleading requirements, a U.S. district court held, refusing to dismiss strict liability, negligence, and warranty claims against several drug manufacturers.

After Shereen Koch underwent shoulder surgery, physicians implanted a pain pump that delivered the local anesthetic bupivacaine to her shoulder joint. The drug allegedly damaged Koch’s shoulder cartilage, and she sued the pump and anesthetic manufacturers in federal court in Rhode Island, alleging strict liability, negligence, and breach of warranty. She also alleged fraud and misrepresentation, asserting that the defendants were aware of the dangers of administering bupivacaine directly into the shoulder joint but concealed the dangers and misrepresented that the product was safe for this purpose. Bupivacaine is manufactured by several different manufacturers under two brand names, and Koch was unable to identify at the pleading stage which brand she received, so she addressed her allegations to the “defendant anesthetic manufacturers.”

The drug manufacturers moved to dismiss, arguing that because Koch could not identify the specific brand of anesthetic that injured her, she failed to satisfy minimum federal pleading requirements of Fed. R. Civ. P. 8(a)(2). Specifically, the defense contended Koch failed to meet the standard established by the U.S. Supreme

Court in *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007)—which requires that a complaint present sufficient facts to state a claim for relief that is plausible on its face, not merely possible—because Koch’s claims established only the possibility that a particular drug harmed her. The defendants also cited Rhode Island case law holding that products liability claimants must identify the product that harmed them.

Denying the motion as to the strict liability, negligence, and warranty claims, the court noted that the Federal Rules of Civil Procedure provide for notice pleading. A plaintiff may state alternative or hypothetical claims and may allege as many separate claims as he or she has, regardless of consistency. Moreover, Rule 20(a)(2)(a) permits the joinder of parties as long as “any right to relief is asserted against them jointly severally, or in the alternative with respect to or arising out of the same transaction.” Alternative joinder is recognized as necessary where the substance of a plaintiff’s claim indicates he or she is entitled to relief, but the plaintiff does not know which of two or more defendants is liable under the circumstances set forth in the complaint.

Noting that *Twombly* did not mark a radical change in federal pleading standards and leaves the basics of notice pleading intact, the court concluded that Koch’s complaint satisfies the plausibility standard. The court added that although Rhode Island law requires product identification, the failure to do so at the initial pleading stage is not fatal.

The court dismissed Koch’s fraud and misrepresentation claims without prejudice, however, finding that they failed to meet the heightened pleading requirements of Fed. R. Civ. P. 9(b).

Plaintiff’s Counsel

Donald A. Migliori,

Leah J. Donaldson,

Vincent L. Greene IV, and

Robert J. McConnell, all of Providence, R.I.

Michael D. Sharp, New York, N.Y.

Documents in this case are available through the Court Documents section in the back of this issue, courtesy of Mr. Migliori.

Filing of federal class action lawsuit tolls state limitations period for Prempro plaintiff

Torkie-Tork v. Wyeth, ___ F. Supp. 2d ___, 2010 WL 2505566 (E.D. Va. June 16, 2010).

A plaintiff’s claims against the manufacturer of the hormone therapy drug Prempro are not time-barred—even though some claims were filed after expiration of the

state’s two-year limitations statute—because the filing of a federal class action lawsuit of which the plaintiff was a putative member tolled the limitations period, a U.S. district court held.

Georgia Torkie-Tork took the hormone therapy drug Prempro from 1996 to June 2002, when she was diagnosed with breast cancer. She sued Wyeth, the drug’s manufacturer, in July 2004, alleging products liability, negligence, warranty, and fraud claims. Wyeth removed the case, and it was later transferred to the multidistrict litigation proceedings in Arkansas. The defense then moved for summary judgment, arguing that the plaintiff’s claims were barred by Virginia’s two-year limitations statute, Va. Code § 8.01-243(A). Under the act, the statute of limitations on personal injury claims begins running at the time the injury is sustained, regardless of when it was discovered. For fraud claims, the statute runs from the time the fraud was discovered or should reasonably have been discovered.

Denying summary judgment, the court acknowledged that because the plaintiff was diagnosed with cancer in June 2002 and filed suit in July 2004, her non-fraud claims would be barred under the state’s two-year limitations statute. The fraud claims are not barred because the record is not sufficiently developed to determine when the plaintiff knew or should have known of the alleged fraud.

Regardless of the limitations period, however, the court found that all of the plaintiff’s claims are timely because the filing of a federal class action lawsuit of which she was a putative member tolled her claims under Virginia’s tolling statute, Va. Code § 8.01-229(E)(1). The tolling statute provides that if “any action” is commenced within the prescribed limitation period but later ends or is dismissed without determining the merits, the time during which the lawsuit is pending is not computed as part of the period within which such a claim may be filed, and another action may be brought within the remaining period. Moreover, the state high court has held that § 8.01-229(E)(1) has cross-jurisdictional effect—it permits tolling of prior suits arising in both state and federal courts. Thus, under the tolling statute, a prior federal class action lawsuit would toll the statute of limitations on a state law claim for the entire time the plaintiff was a putative class member.

Here, the court noted, the federal class action lawsuit was filed on behalf of all persons physically injured by Prempro and therefore would have included the plaintiff. The lawsuit was filed in July 2002 and voluntarily dismissed in May 2003. Thus, the court concluded, the class action suit operated to toll the limitations period for the 10-month period between

RECENT CASES

its filing and dismissal, bringing all of the plaintiff's claims within the two-year period.

As such, summary judgment is inappropriate.

Plaintiff's Counsel

David Michael Kopstein, Fairfax Station, Va.

FARM PRODUCTS

Growers prevail in bellwether cases alleging crop damage from herbicide Oust

Adams v. U.S., U.S. Dist. Ct., D. Idaho, No. 4:03-cv-00049, May 13, 2010.

In 1999 and 2000, range fires in Idaho burned public lands, destroying vegetation needed to prevent soil erosion. To rehabilitate the areas and prevent growth of grasses and weeds, the U.S. Bureau of Land Management (BLM) hired contractors to apply the chemical herbicide Oust, manufactured by E.I. DuPont de Nemours and Company. The chemical, which is lethal to most crops, was applied aerially to the lands and by ground apparatus to certain buffer zones.

After the herbicide was applied, it drifted or was carried by the wind onto private lands owned by growers, causing serious, long-term damage to their land and crops.

Approximately 120 growers sued DuPont, alleging defective and negligent design of Oust, failure to warn, and misbranding under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136 et seq., and its Idaho counterpart. Among other claims, the plaintiffs alleged that DuPont failed to provide adequate warnings and instructions regarding the herbicide's use. They contended the warning was inadequate because it cautioned merely that applying Oust to dry soil when there was little likelihood of rainfall could result in the chemical drifting off target, but failed to specify how far the chemical could drift or provide adequately detailed information to enable a user to determine whether the herbicide could be applied safely in a given environment. Evidence showed that an earlier version of the label cautioned against applying Oust in arid areas, regardless of rainfall.

Suit against the United States alleged, among other claims, that the BLM could have used other chemicals that would not have drifted.

DuPont moved for summary judgment, arguing that because the U.S. Environmental Protection Agency (EPA) had approved the labeling for Oust, the warning claim was preempted by FIFRA. The trial

court denied the motion, finding no preemption.

Four bellwether cases—each involving a family farm operation—were tried to a jury.

The jury awarded a total of about \$17.83 million to the four operations, apportioning liability at 60 percent to DuPont and 40 percent to the government.

The trial court denied DuPont's motion for a new trial, and it has appealed.

The plaintiffs' experts were Walter J. Shields, soil science, Bellevue, Wash.; Terry Miller, agronomy, Burley, Idaho; Lloyd Haderlie, agronomy, Pocatello, Idaho; Charles Benbrook, pesticide labeling/misbranding, Troy, Or.; and Paolo Zannetti, atmospheric wind distribution, Fremont, Cal.

The defense experts were Remy Hennes and Steve Larson, soil science, both of Bethesda, Md.; Robert Thornton, agronomy, Pullman, Wash.; and Joseph Scire, wind distribution, Lowell, Mass.

Plaintiffs' Counsel

Steven B. Andersen,

Walter H. Bithell, and

Amanda K. Brailsford, all of Boise, Idaho

Peter C. Houtsma, Denver, Colo.

Douglas L. Abbott, Denver, Colo.

FIREFIGHTING EQUIPMENT

Firefighter suffers permanent hearing loss from exposure to siren's high-decibel rearward noise

Smyl v. Fed. Signal Corp., Pa., Phila. Co. Com. Pleas, June Term 2008, No. 3755, posttrial mots. denied June 18, 2010.

Edward Smyl joined the Philadelphia Fire Department in 1975, at age 29, and was a firefighter there for 32 years. During that time, he was exposed to high-decibel noise emitted by Federal Signal Q Mechanical sirens on the department's fire trucks. In 2007, at age 61, Smyl was diagnosed with moderate to severe high-frequency hearing loss. He now has difficulty communicating with people and misses certain words—a problem that is aggravated by background noise. He also has trouble discerning voices on the television and radio and problems hearing other sounds.

Smyl sued Federal Signal Corporation, the manufacturer of the sirens, alleging negligent design, among other claims. Specifically, the plaintiff contended that Federal Signal failed to properly test its sirens to determine the effect of their rearward sound output on firefighters. The plaintiff also contended that

the manufacturer was aware of a noise-reducing device known as a shroud, which is effective in reducing rearward noise when attached to a siren, but that the company failed to consider the device as a modification to its sirens.

The plaintiff did not claim medical expenses or lost earnings.

The jury found for the plaintiff on the negligent design claims and awarded \$100,000. The verdict was molded to \$75,000 based on a pretrial agreement to avoid removal.

The defendant's posttrial motions for a new trial or judgment n.o.v. were denied, and the plaintiff anticipates an appeal.

The plaintiff's experts included Donald Henderson, noise-induced hearing loss, Buffalo, N.Y.; and Frank Marlowe, otolaryngology, Philadelphia, Pa.

The defense experts included Lee Rowe, otolaryngology, Philadelphia, Pa.

Plaintiff's Counsel

Joseph J. Cappelli, Conshohocken, Pa.

Mark J. Mustin, Conshohocken, Pa.

Comment: Counsel represent more than 1,000 firefighters with potential claims against Federal Signal alleging hearing loss from the company's Q Mechanical or similar sirens.

FOOD & BEVERAGES

E. coli infection from contaminated hamburger leaves consumer with extensive injuries

Sieben v. Cargill Meat Solutions Corp., U.S. Dist. Ct., D. Minn., No. 0:09-cv-03447, May 12, 2010.

After eating a hamburger at a family get-together, Stephanie Smith, 20, became ill and was diagnosed with food poisoning. The infection caused severe complications for Smith, who suffered kidney failure and intractable seizures and had to be placed in a medically induced coma. Although her condition was later stabilized, Smith suffered a diffuse brain injury that impaired all aspects of cognition, particularly short-term memory, multistep reasoning, new learning, and executive functioning. She also suffered paralysis in both legs and kidney damage.

After extensive rehabilitation, Smith is able to walk with braces and a walker, but she requires assistance with many daily living activities, and she will likely need multiple kidney transplants in the future. Her past medical expenses totaled more than \$2 million, and

the present value of her future care costs is estimated at more than \$16 million. Smith had been working as a children's dance instructor. She is now permanently disabled. Her lost future earning capacity is estimated at about \$1 million.

The source of Smith's infection was traced to hamburger meat contaminated with the E. coli O157:H7 bacterium that was packaged as "Sam's Club American Chef's Selection Angus Beef Patties" and supplied by Cargill Incorporated. The meat was processed at a Cargill plant that used raw materials from at least four different suppliers.

A guardian on Smith's behalf sued Cargill in strict liability, negligence, and negligence per se, alleging that the company manufactured and sold contaminated beef products and failed to, among other things, test incoming raw materials for contamination. The plaintiff contended that although the beef trimmings and other raw materials that went into the hamburger meat are vulnerable to contamination, Cargill did not test them but instead relied on certification from individual suppliers that they had tested their meat and found it to be free of contamination. The plaintiff asserted that beef trimmings are particularly prone to contamination because they are cut from the surface areas of carcasses, which are commonly contaminated during the slaughter process.

The parties reached a confidential settlement.

The plaintiff's experts were Richard Siegler, nephrology, Davis, Cal.; Stephen Glass, neurology, Woodinville, Wash.; Robert Tomezewski, neuropsychology, Los Angeles, Cal.; and Donald Kohan, nephrology, Salt Lake City, Utah.

Plaintiff's Counsel

William D. Marler, Seattle, Wash.

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RECENT CASES

INDUSTRIAL PRODUCTS & EQUIPMENT

Jury finds for woman diagnosed with mesothelioma decades after laundering grandfather's work clothes

Farrar v. Georgia Pacific Corp., Md., Baltimore City Cir., No. 24X08000394, mot. for new trial denied May 4, 2010.

As a teen during the 1960s, Jocelyn Farrar lived with her grandfather, John Hentgen, who worked as an insulator at a building construction site. For a period of six to seven months, Hentgen worked in close proximity to drywall installers who applied and sanded asbestos-containing ready-mix joint compounds manufactured by Georgia Pacific Corporation. Hentgen was exposed to asbestos dust generated by the sanding and sweeping activities, and he carried the dust home on his work clothes, which Farrar helped launder.

In 2008, at 55, Farrar was diagnosed with mesothelioma. She underwent removal of her right lung, followed by chemotherapy and radiation. Although CT scans have not shown a recurrence of the cancer, she has only a 20 percent overall chance of a cure, and her condition is typically fatal within five years. She is also at risk of other complications because she has only one lung. Her past medical expenses totaled about \$97,000, and her future medical expenses are estimated at \$75,000.

At the time of her diagnosis, Farrar was working as a nursing instructor, but she had just obtained an advanced degree and had received several offers for administrative and faculty positions at area hospitals and universities with annual salaries ranging from \$120,000 to \$130,000. She was unable to accept those offers because of her condition.

Farrar sued Georgia Pacific and a number of other manufacturers of asbestos-containing products to which her grandfather was exposed. Suit alleged the defendants were strictly liable for providing defective asbestos-containing products and negligent for failing to warn of the dangers posed by exposure to their products.

Farrar testified that before laundering her grandfather's clothing, she shook it out, creating visible clouds of dust in the enclosed basement laundry area, and also swept the dust that fell to the floor. She also testified that she had contact with her grandfather after he returned home from work each day, and that he did not shower or change his dusty work clothing until he went to bed.

All of the defendants other than Georgia Pacific reached confidential pretrial settlements or were otherwise dismissed before trial, and the plaintiff's case

proceeded solely against Georgia Pacific.

At trial, the plaintiff offered evidence that Georgia Pacific did not place cautionary statements on its joint compound packaging until 1973 or 1974—long after Hentgen and Farrar were exposed to dust from the product.

The jury awarded about \$20.27 million, including \$18.5 million in noneconomic damages, \$1.6 million for future lost earnings, and the remainder for medical expenses.

The defense moved for a new trial, which was denied, and for judgment n.o.v., which was denied except as to future medical expenses, which the plaintiff did not oppose. Thus, the verdict was reduced by \$75,000. After offsets for the pretrial settlements and reduction for future medical expenses, Georgia Pacific is responsible for approximately \$5 million. It has appealed.

The plaintiff's expert witnesses included John Maddox, pathology, Newport News, Va.; Arthur Frank, internal and occupational medicine, Philadelphia, Pa.; Jerry Lauderdale, industrial hygiene, Austin, Tex.; Barry Castleman, medical state-of-the-art on asbestos hazards, Baltimore, Md.; and Arnold Brody, cell biology, Raleigh, N.C.

The defendant's experts were Morton Corn, medical state-of-the-art on asbestos hazards, Queenstown, Md.; and Allen Gibbs, pathology, Wales, U.K.

Plaintiff's Counsel

Thomas P. Kelly,
William G. Minkin, and
Armand J. Volta Jr., all of Baltimore, Md.

Use of asbestos-containing joint compounds, ceiling spray leads to worker's mesothelioma

Aubin v. Union Carbide Corp., Fla., Miami-Dade Co. 11th Jud. Cir., No. 08-68233(08), May 19, 2010.

From 1972 to 1974, William Aubin worked for his family's construction company sanding asbestos-containing joint compounds and applying asbestos-containing spray-on popcorn ceilings. Aubin, who was in his 20s, was exposed to asbestos dust generated by the activities. In 2008, at age 57, he was diagnosed with peritoneal mesothelioma. His prognosis is poor. His past medical expenses totaled about \$191,000.

Aubin sued Union Carbide Corporation, which processed and supplied asbestos fibers used in the joint compounds, alleging it supplied a defective and unreasonably dangerous product and failed to warn of the dangers of asbestos. Aubin also sued several manufacturers of asbestos-containing joint compounds

and popcorn ceiling sprays he had used.

The plaintiff did not claim lost earnings.

Aubin entered into confidential pretrial settlements with the joint compound and ceiling spray manufacturers, and the case proceeded to trial against Union Carbide.

The jury awarded about \$14.19 million, apportioning liability at 46.25 percent to Union Carbide and the remainder to several other manufacturers. After apportionment of fault, Union Carbide is responsible for just under \$6.67 million.

The trial court denied the defendant's posttrial motions.

The plaintiff's expert witnesses in this case were Eugene Mark, pathology, Boston, Mass.; and Arnold Brody, microbiology, Raleigh, N.C.

The defense expert witnesses were Victor Roggli, pathology, Raleigh, N.C.; and Robert Adams, industrial hygiene, Princeton, N.J.

Plaintiff's Counsel

Juan P. Bauta II, Coral Gables, Fla.

MEDICAL PRODUCTS & EQUIPMENT

Federal law does not preempt state law claims against manufacturer of artificial hip implant

Phillips v. Stryker Corp., ___ F. Supp. 2d ___, 2010 WL 2270683 (E.D. Tenn. June 3, 2010).

Federal law does not preempt state law claims against the manufacturer of an artificial hip implant, a U.S. district court found, holding that the claims escape preemption because they allege violations of federal regulations.

Marty Phillips received a Trident System artificial hip—a Class III medical device manufactured by Stryker Corporation and approved under the FDA's pre-market approval (PMA) process. After the device failed, Phillips sued Stryker and related companies, alleging it was defectively manufactured in that residue remaining on a component—the acetabular cup—prevented it from bonding properly to the bone. The defendants moved to dismiss, arguing that the PMA process triggered the preemption clause of the Medical Device Amendments of 1976 (MDA) to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 360k(a). The act bars state law claims related to a device's safety and effectiveness that are "different from, or in addition to" the federal requirements.

Denying the motion, the court noted that in *Riegel v.*

Medtronic, Inc., 128 S. Ct. 999 (2008), 27 PLLR 47 (Apr. 2008), the U.S. Supreme Court established a two-step test for determining whether federal law preempts state law claims challenging the safety and effectiveness of Class III devices approved through the PMA process. First, the court must determine whether the federal government has established requirements applicable to the device. If so, the court must decide whether the plaintiff's claim is based on state requirements that are "different from, or in addition to" the federal requirements. Here, the court concluded that the first prong is satisfied because the implant was approved through the PMA process after undergoing a battery of tests.

Turning to the second prong, the court noted that § 360k does not preempt state law claims that are premised on a violation of FDA regulations because under those circumstances, the state duties parallel, rather than add to, the federal requirements. Here, the court noted, the plaintiff's claims are premised on violations of federal regulations, including a provision requiring manufacturers to establish and maintain procedures to prevent contamination by substances that could affect product quality. Moreover, the plaintiff links his claims to the federal violations by alleging that the acetabular cup was defective because it was manufactured in violation of FDA regulations. Under these circumstances, the court concluded, the claims parallel the federal requirements and therefore survive preemption under *Riegel*.

Plaintiff's Counsel

Monica C. Vaughan, Houston, Tex.

Comment: For a similar ruling involving an artificial knee implant, see *Howard v. Sulzer Orthopedics, Inc.*, 2010 WL 2545586 (6th Cir. June 16, 2010).

Strict liability claims may proceed against knee component manufacturer; complaint need not identify specific defect

Brandt v. Depuy Orthopaedics, Inc., ___ F. Supp. 2d ___, 2010 WL 2612037 (M.D. Fla. June 28, 2010).

A plaintiff adequately pleaded strict liability against the manufacturer of a femoral knee component, a U.S. district court held, rejecting defense arguments that the claim fails because it does not identify the source and specific type of defect. The court also found that the plaintiff's negligence claim should proceed.

Pauline Brandt underwent a left total knee arthroplasty using components manufactured and distributed by Depuy Orthopaedics, Incorporated. After a femoral component allegedly failed, requiring Brandt to under-

RECENT CASES

go revision surgery, she sued Depuy, asserting strict liability and negligence claims. Depuy moved to dismiss for failure to state a claim.

Denying the motion, the court said that in order to survive a motion to dismiss, a claim must have facial plausibility—factual content that permits a court to draw a reasonable inference that the defendant is liable for the misconduct alleged. To state a claim for strict liability under Florida law, a plaintiff must allege (1) the manufacturer’s relationship to the product, (2) its unreasonably dangerous condition, and (3) a proximate causal connection between the dangerous condition and the plaintiff’s injury.

Here, the plaintiff alleges that Depuy manufactured and distributed the femoral knee component used in her surgery; that it was defective as to design, manufacture, and warning because it delaminated or otherwise malfunctioned; and that its defective condition caused her injuries. Finding these allegations sufficient, the court rejected Depuy’s argument that the strict liability claim fails because Brandt failed to allege both the source and specific type of the defect. The plaintiff’s claims that the component delaminated or otherwise malfunctioned plausibly establish that it was in an unreasonably dangerous condition, the court said. Moreover, Florida law does not require that a plaintiff specifically set out the type of defect at the pleadings stage.

Turning to the negligence claim, the court found that Brandt established that Depuy owed her a duty by alleging that as a surgical patient, she was a foreseeable user of the component. Moreover, the plaintiff adequately pleaded a breach of that duty by alleging Depuy knew or should have known that the component was defective and corrected the defects.

Thus, the court found, dismissal of the claims is not warranted.

Plaintiff’s Counsel

Chris M. Limberopoulos, Tampa, Fla.
Edward M. Albrecht, Tampa, Fla.

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Suit over defective spinal disk remains in federal court despite loss of diversity where claim also invokes federal question jurisdiction

Reider-Gordon v. Synthes Spine Co., 2010 WL 2569058 (C.D. Cal. June 22, 2010).

A plaintiff’s claims against the manufacturer of an artificial spinal disk should remain in federal court—despite joinder of a nondiverse party—because adjudication of her strict liability claim requires resolution of federal issues, a U.S. district court held, declining to remand the case.

Mikhail Reider-Gordon, a California citizen, sought treatment for degenerative disk disease at a spinal clinic operated by orthopedic surgeon Rick Delamarter. She learned of an artificial cervical disk known as the “ProDisc,” which had not yet been approved by the FDA but was undergoing clinical trials. Unbeknownst to Reider-Gordon, Delamarter and many other doctors performing the trials had a financial interest in the product. After Delamarter implanted the device, Reider-Gordon suffered pain and other problems, including a total “body shock” with intense pain radiating through her neck and arms. The device was removed, leaving her with permanent problems.

Reider-Gordon sued Synthes Spine Co., the manufacturer, and several related companies in California state court. Synthes, a Delaware corporation, removed the action based on both diversity and federal question jurisdiction. The plaintiff then filed an amended complaint naming Delamarter, a California citizen, as an additional defendant. He filed a motion to remand, which both Reider-Gordon and Synthes opposed.

Denying the motion, the court noted that under 28 U.S.C. § 1447(e), where a plaintiff seeks to join a nondiverse defendant, the court may deny joinder or it may permit joinder and remand the case to state court. Here, the court found, various factors—including the fact that Delamarter is needed for just adjudication of the case, that he was not likely joined solely to defeat diversity, and that the plaintiff may have valid claims against him—all weigh in favor of permitting joinder.

Nevertheless, the court found that remand is not appropriate—despite the resulting lack of diversity—because adjudication of the case requires resolution of federal issues. Specifically, the court noted, the strict liability claim is based solely on the defendants’ alleged violation of federal regulations, including allegations that the ProDisc was not manufactured and labeled as approved by the FDA and that the defendants provided financial incentives to physicians performing the testing, in violation of the premarket approval (PMA) process.

Because the plaintiff's right to relief depends on resolving the issue of whether the defendants circumvented the PMA process, the court concluded, federal question jurisdiction is appropriate, and remand is not warranted.

Plaintiff's Counsel

Christopher Dain Johnson,
Christopher Q. Pham,
Marcus F. Chaney, all of Woodland Hills, Cal.
Stephen Gerard Larson, Los Angeles, Cal.
Thomas V. Girardi, Los Angeles, Cal.

TOBACCO

Jury holds tobacco company accountable for smoker's COPD death

Buonomo v. R.J. Reynolds Tobacco Co., Fla., Fort Lauderdale Co. Cir., No. CACE-08019612, May 20, 2010.

Matthew Buonomo began smoking cigarettes in the 1940s, at age 13, and within the next 10 years began smoking three to four packs a day. In 1995, at age 65, he was diagnosed with chronic obstructive pulmonary disease (COPD). He died of the disease in 2008, at age 78. His medical expenses totaled more than \$400,000.

Buonomo's wife, individually and on behalf of his estate, sued R.J. Reynolds Tobacco Company, which manufactured most of the brands Buonomo smoked. The plaintiffs alleged that the company manufactured a defective and unreasonably dangerous product and failed to warn of the health risks. Suit also alleged R.J. Reynolds conspired with other tobacco companies to conceal the dangers of smoking and to mislead the public about the health risks.

The trial was structured in two phases. In the first, the jury determined that Buonomo met the criteria for being a class member under *Engle v. R.J. Reynolds Tobacco Co.*, 18 PLLR 138 (Aug. 1999). Although *Engle* was decertified as a class action, the state high court ruled that the jury's findings regarding general causation, cigarettes' addictiveness, strict liability, negligence, fraudulent concealment, and other claims would have res judicata effect in individual lawsuits. *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006), 25 PLLR 149 (Aug. 2006).

In the second phase, the jury was instructed on the *Engle* findings and asked to determine legal causation, including whether Buonomo's reliance on the defendant's concealment caused his COPD. The jury answered affirmatively and allocated fault at 77.5 percent to R.J. Reynolds and 22.5 percent to Buonomo. It

then awarded about \$30.2 million, including \$5.2 million in compensatory damages and \$25 million in punitive damages. After reduction for fault, the award totals about \$29.1 million.

The defendant's posttrial motions, including motions for a new trial and remittitur, are pending.

The plaintiffs' experts included Edgar Bolton, pulmonology, and Moises Issa, internal medicine, both of Fort Lauderdale, Fla.

The defense experts included Royce Yount, cardiology, New Orleans, La.; and Neville S. Marks, psychiatry, West Palm Beach, Fla.

Plaintiffs' Counsel

John J. Uustal, Fort Lauderdale, Fla.
Todd R. McPharlin, Fort Lauderdale, Fla.

TRANSPORTATION

Flight nurse killed in helicopter crash after main rotor blade disintegrates

Natl. Bank of Ind. v. Rolls-Royce Corp., Ind., Marion Co. Cir., No. 49D01-0905-CT-022863, May 26, 2010.

Sandra Pearson, 38, was a passenger in a Bell 206L-1 helicopter that was departing from a local fundraising event. Shortly after the helicopter lifted off, witnesses saw components fly off the aircraft. It crashed and caught fire, killing everyone aboard. Pearson, who had worked as a flight nurse earning about \$67,000 annually, is survived by two minor children.

An investigation by the National Transportation Safety Board revealed that the helicopter's main rotor blade had disintegrated in mid-flight due to a large void in the adhesive affixing a weight within the blade.

A guardian on behalf of Pearson's estate and children sued the manufacturer of the helicopter, alleging it was defective in that the main rotor blade was susceptible to fatigue fracture. The plaintiffs alleged a manufacturing defect based on the fact that there was a void in the adhesive between the internal weight and the spar—the main support in the rotor blade. Suit also alleged that the spar was defectively designed in that its composition made it susceptible to fatigue fracture.

Evidence revealed that nearly a year after the crash, the defendant issued a service bulletin on its 206L helicopters. The bulletin referenced the crash that killed Pearson and warned that a fatigue crack could occur in the main rotor blade if there was a combination of residual stress in the spar and a larger-than-acceptable void in the adhesive between the internal weight and the spar.

RECENT CASES

The parties agreed to settle for \$5.6 million.

The plaintiffs' expert witnesses in this case were Richard H. McSwain, metallurgy, Pensacola, Fla.; Donald E. Sommer, accident reconstruction, Broomfield, Colo.; Jack Lipscomb, accident reconstruction, Huddleston, Va.; and Lee Coffman, helicopter maintenance, Amarillo, Tex.

Plaintiffs' Counsel

Gary C. Robb, Kansas City, Mo.

Anita Porte Robb, Kansas City, Mo.

Tire detreads on recreational vehicle, causing crash that seriously injures occupants

Schalmo v. Goodyear Tire & Rubber Co., Fla., Pasco Co. 6th Jud. Cir., No. 51-2006-CA-2064-WS, June 25, 2010.

John Schalmo was driving a 2000 American Tradition recreational vehicle (RV) with his wife, Kelly, and her parents, William and Ruth McClintock, as passengers. While the vehicle was traveling on the highway, one of the tires—a Goodyear G159 model—suffered a tread separation. Schalmo lost control of the RV, which crashed.

William McClintock, who was about 79 at the time of the incident, suffered crush injuries that required amputation of both legs below the knee. He also suffered a ruptured diaphragm, lung contusions, and strokes. McClintock was in the hospital's intensive care unit for more than a month and underwent extensive rehabilitation. His past medical expenses paid by Medicare were about \$100,000. He later died of unrelated injuries.

Ruth McClintock, 75, suffered fractures to her right hip and pelvis and multiple facial fractures necessitating reconstructive surgery. Her past medical expenses paid by Medicare were about \$45,000.

John Schalmo, who was about 50 at the time of the incident, suffered a serious laceration on his scalp and fractures to his ribs and left foot. His past medical expenses totaled about \$15,000.

The Schalmos and Ruth McClintock, individually and on behalf of her husband's estate, sued Goodyear Tire & Rubber Company, alleging the G159 was defectively designed in that it was prone to overheating when used on RVs traveling at highway speeds for extended periods of time. The plaintiffs asserted that the tire was designed with a thick tread and steel belt package that was specifically suited for the rigors of urban delivery service, including frequent encounters with curbs and potholes. Those same design characteristics made the tire run overly hot during extended

highway use, which is common with RVs.

The plaintiffs argued that Goodyear knew of these design limitations before the first G159s were sold to the RV industry but continued to market the tire for RV use even as reports of injuries and fatalities in connection with such use mounted each year. Evidence showed that Fleetwood Motor Homes of Indiana, Inc.—the RV manufacturer—selected the tire as original equipment on the Schalmos' RV after Goodyear repeatedly assured Fleetwood that it was safe for that application.

The plaintiffs showed the jury confidential Goodyear documents—including speed and heat-testing documents—that reportedly demonstrated Goodyear's pre-sale knowledge that the tire was unsafe for RV use. The plaintiffs also offered evidence that the G159 was speed-rated for only 65 m.p.h. but that in 1998—two years before the tire here was manufactured—Goodyear increased the speed rating to 75 m.p.h. The plaintiffs contended that Goodyear made the change so it could continue selling the tire to the RV market after speed limits increased nationwide, despite actual knowledge that the higher speed rating would result in a dangerous increase in failure rates.

Other evidence showed that by 1999, there were two recalls and one product service bulletin stating that G159 tires should be replaced on some RVs. The recalls cited inadequate load margin and customer misuse, however, and did not fault the tire's design. The plaintiffs argued that the recalls were limited to only a few vehicle models because Goodyear deliberately covered up the problem with the tires, preventing a broader recall than should have occurred. The plaintiffs presented videotaped testimony by Fleetwood employees that Goodyear repeatedly advised the RV manufacturer that the tires were safe and that the failures were caused by overloading or other customer misuse.

The jury awarded just under \$5.67 million. The award included \$2.12 million to the estate of William McClintock, about \$2.05 million to Ruth McClintock, \$815,000 to John Schalmo, \$500,000 to Kelly Schalmo for loss of consortium, and \$180,000 to a subrogation plaintiff for the destruction of the RV. Medicare has asserted a lien in the amount of past medical expenses paid.

Goodyear has announced its intention to appeal, and the plaintiffs anticipate posttrial motions for a new trial, among other motions.

Plaintiffs' Counsel

Hugh N. Smith, Belleair Bluffs, Fla.

Christopher J. Roberts, Belleair Bluffs, Fla.

Comment: Fleetwood was originally named as an additional defendant in the suit based on the company's alleged decision to ignore its own studies showing that the tire was unsafe, but the company filed for bankrupt-

cy during the pendency of the proceedings.

The plaintiffs also sued the manufacturer of the RV chassis, alleging it should have independently acted on information available to it before the sale of the subject chassis indicating that the G159 tire design was not well suited for RV application. The parties reached a small, confidential settlement.

Car's air bags deploy suddenly without impact, striking driver

Payne v. Kahn Transp. Corp., Mo., Bates Co. Cir., No. 08BS-CC00051, Feb. 24, 2010.

Charlotte Payne and her husband purchased a used 1998 Cadillac DeVille from Kahn Transportation Corporation. While Payne was driving the car on a gravel road, the air bags suddenly deployed without any impact. Payne was struck by the driver's side bag and suffered injuries to her left shoulder, arm, and wrist, resulting in decreased range of motion and loss of strength in the arm. She also suffered a bulging disk at C5-6 and nerve impingement at that level, resulting in cervical pain, spasms, and sensory deficits. Her past medical expenses totaled just over \$13,000.

After the incident, Kahn replaced the air bag system, but the air bags deployed again, several years later, without impact. The second incident allegedly aggravated the injuries Payne sustained in the first incident.

Payne and her husband sued Kahn Transportation, alleging the car was defective and unreasonably dangerous in that the air bags deployed without any impact.

The plaintiffs did not claim lost earnings.

The jury awarded \$100,000 for injuries solely related to the first incident.

The plaintiffs' expert was Paul C. Vitt, family practice, Butler, Mo.

Plaintiffs' Counsel

Robert M.N. Palmer, Springfield, Mo.

Mark E. Brinkmann, Springfield, Mo.

GARA does not bar claim over helicopter maintenance manual because manual is not a "part" under the act

Rogers v. Bell Helicopter Textron, Inc., ___ Cal. Rptr. 3d ___, 2010 WL 2222256 (Cal. App. 3d Dist. June 4, 2010).

A claim alleging a helicopter's maintenance manual is defective is not time-barred under the General Aviation Revitalization Act of 1994 (GARA), 49 U.S.C.

§§ 40101 et seq., a U.S. district court held, reasoning that because federal regulations did not require that the manual be furnished with the aircraft, the manual is not a "part" under the act.

Rogers was injured in 2005 when the Bell 47D1 helicopter she was piloting crashed. The helicopter had been in operation since 1951, and the maintenance manual was issued in 1969 and last revised in 1975. In a lawsuit against Bell, Rogers alleged that the maintenance manual was defective because it gave improper instructions on balancing the helicopter's tail rotor blades. Bell moved to exclude evidence that the manual was defective, arguing that suit was barred by GARA's 18-year repose period. The trial court granted the motion, concluding the manual was a "part" of the aircraft that was last revised in 1975. The court then granted Bell's motion for nonsuit based on the lack of admissible evidence against it.

Reversing, the appellate court noted that GARA contemplates that an aircraft will be delivered with all of its original parts, although other parts may be added, and original or added parts may be replaced later. The court cited *Caldwell v. Enstrom Helicopter Corp.*, 230 F.3d 1155 (9th Cir. 2000), in which the Ninth Circuit Court of Appeals reasoned that a revised flight manual was part of a helicopter because federal regulations require helicopter manufacturers to include flight manuals with their aircraft.

Here, the court noted, although federal regulations require that a flight manual be furnished with each helicopter, there is no analogous provision for a maintenance manual—at least not for a helicopter as old as the one here. The federal regulation Bell cites for the proposition that a maintenance manual must be furnished with the aircraft applies only where the application for a type certificate for the aircraft was made after January 28, 1981. Here, because the type certificate application was made long before 1981 and the maintenance manual was not issued until 1969, the regulation does not apply. This is significant, the court said, because the act's provisions are tied to the delivery of an aircraft with its original component parts. Here, that would have included a flight manual but not a maintenance manual.

Thus, the court concluded, because the maintenance manual was not a part of the helicopter, the trial court erred in granting Bell's motion to exclude the evidence, and nonsuit was improper.

Plaintiff's Counsel

Louis Stanton Franecke, San Rafael, Cal.

Documents in this case are available through the Court Documents section in the back of this issue, courtesy of Mr. Franecke.

UPDATES

U.S. Supreme Court will not review plaintiff's verdict in hormone therapy drug case

Scroggin v. Wyeth, 27 PLLR 87 (June 2008): *cert. denied*, ___ S. Ct. ___, 2010 WL 2899010 (June 21, 2010). The U.S. Supreme Court will not review the verdict in this case alleging that hormone therapy drug manufacturers Wyeth and Upjohn failed to adequately warn of their products' breast cancer risk. In November, the Eighth Circuit Court of Appeals affirmed the jur y's award of compensatory damages against both defen-

dants, rejecting arguments based on preemption, the statute of limitations, and lack of causation. The court upheld the trial court's order vacating the punitive damages award against Upjohn but reversed the order vacating punitive damages against Wyeth and ordered a new trial on punitive damages against that defendant. *In re Prempro Prods. Liab. Litig.*, 586 F.3d 547 (8th Cir. 2009). The plaintiff is represented by **Erik B. Walker**, Houston, Tex.; and **James A. Morris Jr.** and **Steve M. Faries**, both of Austin, Tex.

INDEX BY PRODUCT

- | | | |
|---|--|---|
| <p>aircraft</p> <ul style="list-style-type: none"> helicopters, <ul style="list-style-type: none"> Bell 206L-1, 59 Bell 47D1, 61 <p>aircraft accessories/components</p> <ul style="list-style-type: none"> main rotor blade, 59 maintenance manual, 61 <p>drugs</p> <ul style="list-style-type: none"> bupivacaine, 52 Fosamax, 51 hormone therapy, 62 Prempro, 53, 62 Trasylol, 52 | <p>farm products</p> <ul style="list-style-type: none"> herbicide, 54 <p>firefighting equipment</p> <ul style="list-style-type: none"> sirens, 54 <p>food & beverages</p> <ul style="list-style-type: none"> hamburger, 54 <p>industrial products</p> <ul style="list-style-type: none"> asbestos products, 56 ceiling spray, 56 fibers, 56 joint compounds, 56 <p>medical products</p> <ul style="list-style-type: none"> artificial implants, | <ul style="list-style-type: none"> disk, 58 hip, 57 knee, 57 <p>motor vehicle accessories/components</p> <ul style="list-style-type: none"> air bag system, 61 chassis, 60 tire, 60 <p>motor vehicles</p> <ul style="list-style-type: none"> cars, <ul style="list-style-type: none"> Cadillac DeVille (1998), 61 recreational vehicle, 60 <p>tobacco</p> <ul style="list-style-type: none"> cigarettes, 59 |
|---|--|---|

INDEX BY JURISDICTION

- | | | |
|--|--|---|
| <p>Federal Courts</p> <ul style="list-style-type: none"> Supreme Court 62 1st Cir. 52 2d Cir. 51 4th Cir. 53 6th Cir. 57, 57 7th Cir. 52 | <ul style="list-style-type: none"> 8th Cir. 55, 62 9th Cir. 54, 58 11th Cir. 57 <p>State Courts</p> <ul style="list-style-type: none"> California 61 Florida 56, 59, 60 | <ul style="list-style-type: none"> Indiana 59 Maryland. 56 Missouri 61 Pennsylvania. 54 |
|--|--|---|

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KOCH V. I-FLOW CORP., p. 52 (the plaintiff's briefs opposing the defendants' motions to dismiss in a case holding that the plaintiff did not have to identify the specific drug that injured her in order to satisfy federal pleading requirements). No. PL1147.

ROGERS V. BELL HELICOPTER TEXTRON, INC., p. 61 (the plaintiff's appellate briefs in a case holding that GARA does not bar a claim involving a helicopter maintenance manual because the manual is not considered a "part" under the act). No. PL1148.

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