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COURT STRIKES PLAINTIFF'S ATTEMPT TO MANIPULATE JURISDICTION IN HEARTBURN DRUG CASE

In re Propulsid Products Liability Litigation, 2007 WL 1668752 (E.D. La. 6/6/07)

Patricia Barnes, a Mississippi resident, filed suit in Mississippi state court against Johnson & Johnson and Janssen Pharmaceutica, both New Jersey companies, as well as various healthcare providers who were residents of Mississippi and Tennessee. She claimed damages as a result of taking the heartburn drug Propulsid. Over three years later, Barnes dismissed all defendants except Janssen and Johnson & Johnson (the manufacturers of the drug), who immediately removed the action to federal court. The case was referred to Judge Eldon Fallon of the U.S. District Court, Eastern District of Louisiana, to be consolidated with other similar cases as part of Multi-District Litigation.

Federal courts have jurisdiction over cases in which citizens of different states sue over state law claims when the amount in controversy exceeds \$75,000. If a plaintiff files such a suit in a state court, the defendant may remove the case to federal court within one year. Here, the presence of Mississippi defendants initially prevented this case from being removed to federal court. When Janssen and Johnson & Johnson removed the case to federal court three years after its filing (due to the dismissal of non-diverse defendants), Barnes sought to have the case sent back to Mississippi court, arguing that the defendants were well beyond the one-year deadline. Judge Fallon denied Barnes's motion to remand, invoking an equitable exception to the one year deadline on removal. The court found that in the nearly three years that the case had been pending in state court, Barnes had not taken steps to prosecute the case against the Mississippi defendants and there was no justifiable reason for dismissing the Mississippi defendants nearly three years after suit was filed. The court found that Barnes's filing suit against the Mississippi defendants in the first place was "forum manipulation," *i.e.*, the only reason for joining the non-diverse defendants was to keep the case out of federal court. Under these circumstances, the court found it would be inequitable to enforce the one-year removal deadline.

Previous articles on the Propulsid litigation include: [FED. COURT REFUSES TO CERTIFY NATIONAL MEDICAL MONITORING CLASS IN PROPULSID DRUG LITIGATION](#) (July 2002); [LPLA CLAIMS AGAINST PHARMACISTS IN PROPULSID DRUG LITIGATION DISMISSED](#) (August 2002); [HEARTBURN MEDICINE NOT SHOWN TO BE DEFECTIVELY DESIGNED PER LA. EASTERN DISTRICT COURT](#) (March 2003); [PROPULSID DRUG CASE TO PROCEED ON WARNINGS CLAIM; RESTRICTED USE PROGRAM EVIDENCE EXCLUDED](#)

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(April 2003); and [PROPULSID CASE DISMISSED ON SUMM. JUDGM'T WHEN PLAINTIFF EXPERTS FAIL TO PASS DAUBERT MUSTER](#) (June 2003).

– [Bernard H. Booth](#)

TWO BELLWETHER VIOXX CASES MAY BE RE-TRIED; PLAINTIFF ATTORNEY “AGENDA” DISCLOSED

(1) *In re Vioxx Products Liability Litigation*, ___ F.Supp.2d ___, 2007 WL 1558675 (E.D. La. 5/30/07)

(2) *In re Vioxx Products Liability Litigation*, 2007 WL 1632430 (E.D. La. 6/5/07)

(3) *In re Vioxx Products Liability Litigation*, 2007 WL 1558700 (E.D. La. 5/30/07)

These cases arise out of multi-district litigation centralized before Judge Eldon Fallon of Louisiana’s Eastern District. All cases focus on alleged increased health risks (including heart attack and/or stroke) when taking the anti-inflammatory drug Vioxx, manufactured by the defendant, Merck. Judge Fallon denied class certification for these cases, which number in the thousands. As a result, plaintiffs, guided by the Plaintiffs Steering Committee (“PSC”), have begun trials of certain “bellwether” cases, hoping that other cases might settle based on the outcomes of these selected trials. Judge Fallon recently issued three significant rulings in these cases.

(1) The first bellwether case was that of the family of Richard Irvin, a man who died of a heart attack at age 53, allegedly as a result of taking Vioxx. The central issue in the case was whether Irvin’s death was caused by Vioxx. The case was tried to a jury in Houston, Texas, in Fall 2005 and resulted in a hung jury. (The Houston venue was used due to temporary closure of the New Orleans courthouse by Hurricane Katrina.) The case was then retried in February 2006 in New Orleans. At the trial in February 2006, Merck offered the testimony of Dr. Barry Rayburn, an expert in cardiology. Dr. Rayburn stated that in his opinion Vioxx was not a substantial contributing factor in Irvin’s fatal heart attack. The jury rendered a verdict exonerating Merck.

Following the conclusion of the February 2006 trial, plaintiffs’ counsel learned that Dr. Rayburn, who had testified that he was board certified in internal medicine and cardiology, was not in fact so certified. Indeed, Dr. Rayburn had allowed these certifications to lapse several years earlier.

Judge Fallon found that this was a material misrepresentation that called into question both the court’s acceptance of Dr. Rayburn as an expert as well as the truthfulness of his testimony. “These matters are not trivial, especially in this litigation where experts often disagree on critical issues such as causation. Dr. Rayburn’s misrepresentation undoubtedly affected the Plaintiff’s ability to impeach him and thus to fully and fairly present her case to the jury.” Accordingly, Judge Fallon granted the Irvin family a new trial, which will now be the third trial of the Irvin case.

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(2) Last August, a jury in New Orleans awarded \$50,000,000 in compensatory damages and \$1,000,000 in punitive damages to the second bellwether plaintiff, Gerald Barnett, a man who, at age 58, suffered a heart attack allegedly as a result of his use of Vioxx. Judge Fallon was troubled by the excessiveness of the compensatory damages award and within two weeks of the verdict granted a new trial on the issue of compensatory damages alone.

Both Merck and the plaintiff asked Judge Fallon to reconsider his ruling. Judge Fallon took the opportunity to clarify his prior ruling and to modify it in part. Judge Fallon stated that while the jury's verdict on compensatory damages was excessive, it was not the result of passion or prejudice. He gave plaintiff the option of going through a new trial on compensatory damages or accepting the figure of \$600,000 in compensatory damages (*i.e.*, a total of \$1,600,000 when added to the \$1,000,000 punitive damage award).

(3) In a third ruling, Judge Fallon refused to order Merck to return to the PSC a 29-page document constituting an "agenda" for an internal conference call of the PSC that occurred in August 2005. The "agenda" was a detailed litigation strategy outline that discussed the various scientific issues in this case. The "agenda" noted which attorneys were working on each topic and discussed their respective "objectives" with potential witnesses. The PSC inadvertently delivered this document to two of its expert witnesses. Later, in connection with the testimony of these experts, the PSC provided Merck with copies of all documents provided by them to the experts, including the "agenda."

When the PSC realized that through its inadvertence this confidential document had fallen into the hands of the opponent, Merck, it moved the court for an order that the document be returned and that Merck be prohibited from using the document henceforth.

Judge Fallon ruled that the inadvertent disclosure of this "agenda," which would otherwise be protected under the "attorney work product doctrine," waived its protection. Under the Federal Rules of Civil Procedure, a party who uses an expert witness is required to disclose to the other side all documents submitted for consideration by the expert, whether or not the expert actually relies on the document. Judge Fallon found that Merck was under no obligation to return or destroy the document but could only use the document to cross-examine witnesses to whom the document had already been disclosed or who were otherwise familiar with its contents.

To read more about the Vioxx cases, see our earlier articles: [VIOXX CASES CENTRALIZED BEFORE JUDGE FALLON IN LOUISIANA'S EASTERN DISTRICT](#) (March 2005); [JUDGE IN VIOXX CASE APPROVES ALL EXPERTS FOR BOTH SIDES TO TESTIFY](#) (December 2005); [VIOXX TRIAL JUDGE BARS PLAINTIFFS' EXPERT FROM TESTIFYING AS TO CAUSE OF DEATH](#) (February 2006); [VIOXX FOREIGN CLASS ACTIONS DISMISSED](#) (October 2006); [50 MILLION DOLLAR VIOXX AWARD DEEMED EXCESSIVE](#) (October 2006); [VIOXX](#)

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[PLAINTIFFS MUST SUE INDIVIDUALLY FOR INJURY & DEATH; CLASS STATUS DENIED](#) (January 2007).

– *Madeleine Fischer*

COURT RESTORES BUYERS' ACTION FOR WATER DAMAGE AGAINST HOME FINISH MANUFACTURER

Gad v. Granberry, 07-0117 (La.App. 3 Cir. 5/30/07), 2007 WL 1545880

In 1995, the Gads purchased a home from Robert Granberry. Before the sale, the Gads had the home inspected, and some moisture damage was found around certain windows. The problem was attributed to improper sealing, and, shortly after the sale, the Gads had the problem windows recaulked and sealed. In 1999, Alexis Mallet, a forensic consultant investigating deterioration at wood window frames and framing members, noted excessive moisture levels in several areas, which he attributed to inadequate or missing sealants. Again, the Gads had the problem areas resealed. In 2001, the Gads again consulted Mallet, complaining of continued deterioration. Mallet recommended the Gads consult an architect, which they did in late 2001. The architect, Fabian Patin, ultimately identified problems with the installation of the Exterior Insulation and Finish System (“EIFS”), manufactured by Dryvit, as the source of the moisture damage. When he opened up the exterior walls of the house, the architect found that the damage was extensive, with mold growing behind ninety percent of the home’s exterior.

The Gads filed suit in March 2002 alleging a products liability cause of action against Dryvit, a redhibition action against Granberry, and actions for fraud and negligent misrepresentation against the real estate agents who represented Granberry in the transaction. Each defendant filed an exception of prescription, claiming that the Gads knew or should have known about the problem by 1999, and, accordingly, the one year prescriptive period on each of these claims had long since run. The Gads argued that they were unaware of the problem until 2001 at the earliest, when the architect first identified the EIFS as the source of the damage. In an affidavit filed in the trial court, Mallet stated that he never told the Gads or implied in his 1999 report that the EIFS system was the problem. Rather, he believed, and told the Gads, that the problem was a lack of sealing or caulking.

The trial court agreed with the defendants, and granted their exceptions.

The Third Circuit analyzed similar cases wherein home owners were made aware of a problem but were not made aware of the true origin of the problem. In each of these earlier cases, the court determined that the prescriptive period did not begin to run until the home owner was made aware of the true origin of the problem. It was insufficient notice to simply be aware that a problem existed.

The defect that Mr. Patin identified as the cause of the extensive, hidden damage he found was not the inade-

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quate sealants noted by Mr. Mallet, but rather a design flaw in the use of sealants alone as a moisture barrier for the EIFS, combined with the inability of trapped water to escape. Mr. Patin was the first expert to suggest such a system-wide problem to the Gads, and it was his removal of the EIFS walls that exposed the true extent of the damage.

The Third Circuit reversed the trial court's ruling, reinstated the case and remanded the case for further proceedings.

– [*Emily E. Eagan*](#)

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Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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