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Parent's Individual Request for Damages Beyond the Scope of the Vaccine Act

Case v. Merck & Co.,
2002 WL 1897014 (E.D. La. 11/5/02)

Judge Sarah Vance of Louisiana's Eastern District has allowed the parents of a child allegedly injured by childhood vaccines to proceed with suit for their own lost wages and loss of consortium, finding that these claims are not barred by the National Childhood Vaccine Injury Act (the "Vaccine Act").

Plaintiffs' son was the recipient of numerous injections of vaccines, all of which were packaged in thimerosal, a chemical compound containing mercury that is used as a preservative in childhood vaccines. After learning that their son had mercury poisoning, plaintiffs filed suit for damages alleging their son suffered injuries resulting from thimerosal contained in vaccines administered to him during childhood.

Defendants, manufacturers of thimerosal and vaccines containing thimerosal, moved to dismiss on the grounds that plaintiffs' claims were barred by the Vaccine Act, 42 U.S.C. 300 aa (2002). One defendant also asserted that plaintiffs failed to state a claim under the Louisiana Products Liability Act. Defendants requested that should their motions to dismiss be denied, the lawsuit be stayed pending the resolution of certain issues by the court established by the Vaccine Act (the "Vaccine Court").

The Vaccine Act provides no-fault compensation to individuals who sustain vaccine-related injuries. A child who claims injury from a vaccine must first file a petition in the Vaccine Court, before the child can file a civil lawsuit against a vaccine manufacturer. Included in the list of eligible expenses are costs of "diagnosis, medical or other remedial care..., residential and custodial care and services expenses, special equipment, related travel expenses, and facilities determined to be reasonably necessary." The Act prohibits compensation "for other than the health, education or welfare of the person who suffered the vaccine-related injury with respect to which the compensation is paid." 42 U.S.C. § 300 aa (15)(d)(2). To that end, the Vaccine Court has held that compensation is *only* allowed for the benefit of the victim. *Schafer v. American Cyanamid Co.,* 20 F.3d 1, 5 (1st Cir. 1994).

However, the Vaccine Act does not bar civil suits brought by parents, individually and on their own behalf, for their own damages arising from the vaccine-related injuries of their children. Parents who suffer their own damages, such as lost wages and loss of consortium, cannot sue in the Vaccine Court but must bring their own separate suit to recover those damages. In that vein, Judge Vance, relying extensively on the Vaccine Court's interpretation of the Vaccine Act in *Schaefer,* allowed the parents to proceed with their claim for lost wages and loss of consortium. Judge Vance did strike the plaintiffs' claim for negligent infliction of emotional distress because the parents did not claim that they witnessed the vaccinations or were aware at the time of the vaccinations that any injury had occurred.

One defendant also argued that it should be dismissed because under the Louisiana Products Liability Act the manufacturer of thimerosal would owe no duty to warn ultimate purchasers of vaccines of any purported dangers. As a bulk supplier of thimerosal, the manufacturer argued it had no duty to warn anyone since it supplied the thimerosal to vaccine manufacturers who were "sophisticated users". It also argued that Louisiana's "learned intermediary" doctrine allows a manufacturer to fulfill its duty to warn by informing the prescribing physician of side effects and risks. Judge Vance rejected these arguments finding that there was no factual basis in the record by which to determine if the vaccine manufacturers were sophisticated users, and it was not clear what the prescribing physician knew about thimerosal.

Finally, defendants' request for a stay pending the outcome of proceedings in the Vaccine Court was also denied. The defendants argued that the Vaccine Court is presently considering the important issue of causation: does thimerosal cause injuries such as those sustained by the plaintiffs' child? Defendants urged the court to delay this case until the causation issue was decided in the Vaccine Court because "the policy behind the Vaccine Act is to spare vaccine manufacturers the expense of litigating the same issues in multiple courts."

Noting that some courts had been persuaded by this argument, Judge Vance rejected it for two reasons. First, the plaintiffs' child never brought his own suit before the Vaccine Court; thus, there was "no Vaccine Court decision [specific to the plaintiffs' child] to await." Second, under the Vaccine Act, the findings of fact and conclusions of law of the Vaccine Court are not admissible in evidence. Accordingly, even were the Vaccine Court to conclude that thimerosal is not injurious, that finding would not be binding on the current case.

For an account of earlier skirmishing in this case see our article in the September, 2002 e-zine: SUIT AGAINST HOSPITAL FOR INJECTION OF ALLEGEDLY DEFECTIVE VACCINE HELD PRESCRIBED.

- *Mary Mitchell Felton*

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Plaintiffs Thwart Federal Jurisdiction by Changing Allegations after Filing Suit

Herzog v. Johns Manville Products Corp.,
2002 WL 31556352 (E.D. La. 11/15/02)

Suits filed in state court may be removed to federal court when the plaintiffs and defendants are citizens of different states under the "diversity jurisdiction" statute. In this toxic mold case, Judge Fallon affirmed a magistrate's ruling that allowed plaintiffs to amend their complaint to add non-diverse defendants, thereby virtually assuring the case would be sent back to state court.

Plaintiffs sued Johns Manville in Louisiana state court, seeking recovery under the Louisiana Products Liability Act for toxic mold damage and injuries allegedly resulting from insulation manufactured by Johns Manville. Johns Manville promptly removed the case to federal court on the basis of diversity jurisdiction. Approximately four months later, plaintiffs sought to amend their complaint to add as defendants two entities involved in the installation of the roof and insulation. Not surprisingly, these two defendants were Louisiana residents whose addition would destroy diversity jurisdiction.

The magistrate granted plaintiffs' motion to amend. In her ruling, the magistrate found that consideration of the factors enumerated in *Hensgens v. Deere & Co.,* 833 F.2d 1179 (5th Cir. 1987), militated in favor of allowing the amendment. Johns Manville sought review of this ruling and was left with the unenviable task of convincing the district judge that the magistrate's ruling was "clearly erroneous and contrary to law." With reference to the *Hensgens* factors, the district judge found that because the plaintiffs stated a valid cause of action against the defendants, destruction of diversity

jurisdiction was not the principal purpose of the amendment. Additionally, no significant activity beyond the pleading stage had occurred, plaintiffs were not dilatory in seeking to amend the complaint and forcing the plaintiffs to file a separate suit on the same facts would be a "waste of judicial resources." In summary, the district court affirmed the magistrate's ruling.

Herzog demonstrates the increasing difficulty for non-resident defendants to maintain diversity jurisdiction once a case has been removed. It is also an indication of the superficial nature of the *Hensgens* factors, or at least a superficial application of these factors. Under the somewhat optimistic assumption that a lawyer uncovers all salient facts prior to instituting suit, the existence of the Louisiana defendants should have been known to plaintiffs when suit was filed in Louisiana state court. The addition of the two Louisiana defendants after the fact of removal seems more of a creative exercise by counsel for the plaintiffs in destroying diversity than a true cause of action against the Louisiana defendants. It should be noted that the district court did at least order plaintiffs to produce the expert reports that provided the basis for the amending allegations naming the Louisiana defendants as a prerequisite to filing a motion to remand.

Nevertheless, in the end Johns Manville is left with the "waste" of its own resources in removing the case to federal court only to alert opposing counsel to the need to dig a little further to uncover a Louisiana defendant – no matter how tangentially related to the suit. As this "waste" could have been avoided with proper pre-suit investigation, in the future courts may want to consider shifting the burden to the party seeking amendment to adequately explain why the facts providing the basis for amendment could not have been know at the time of institution of the original suit. At the very least, a more searching analysis under *Hensgens* is warranted to discourage the *post hoc* search for non-diverse defendants.

- *L. Etienne Balart*

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Breast Implant Recipient's Fear of Cancer Not Reasonable Says La. Eastern District Judge

Maurer v. Heyer-Schulte Corp.,
2002 WL 31819160 (E.D. 12/13/02).

U.S. District Judge Carl Barbier has dismissed the case of a plaintiff who claimed she feared she would contract cancer from her polyurethane foam-coated breast implants.

The plaintiff's claim related to two sets of breast implants placed in her body in 1979 and 1989. Plaintiff argued that the polyurethane foam which coated the implants could be carcinogenic. At the time of this decision, plaintiff's only significant remaining claim was for fear of cancer.

Judge Barbier reviewed Louisiana case law on the requirements for a fear of cancer claim. Although stating that, "The plaintiff's fear of developing cancer must be reasonable and causally related to the defendant's negligence," the court adopted an extremely liberal reading of the word "reasonable". For her fear to be reasonable, the court said, the plaintiff need not prove that the breast implants would more probably than not lead to cancer. Reasonableness required only that there be some possibility of acquiring the disease, "no matter how remote."

Even under this lax standard, however, Judge Barbier found that the plaintiff could not sustain her burden of proof. The defendant submitted voluminous epidemiological studies showing no causal link between breast implants and cancer. In addition the defendant submitted documents from the Food and Drug Administration, the American Cancer Society, the American Medical Association, and the European Committee on Quality Assurance and Medical Devices in Plastic Surgery, all of which concluded that breast implants do not cause cancer.

In opposition plaintiff produced some handwritten notes dating back to 1985 in which two of defendant's employees discussed the possibility that deteriorating polyurethane foam could be

carcinogenic, and a staff report of a congressional committee investigating breast implants. Judge Barbier found that these were not scientific studies and could not create an issue of material fact on the question of whether breast implants cause cancer. The sole scientific study submitted by plaintiff was a study on the effect of deteriorating polyurethane foam on rats. Judge Barbier noted that the use of animal studies to predict carcinogenicity in humans is frowned upon and rejected that evidence as well.

Judge Barbier also chastised the plaintiff for asking that he admit by reference an entire library collection of documents from another proceeding. “Plaintiff cannot expect the Court to go digging in this collection to find evidence that supports her case.”

Ultimately, Judge Barbier found that the defendant was entitled to summary judgment because plaintiff failed to raise any serious issue either by documentation or expert opinion that breast implants cause cancer.

Despite an obvious victory for the breast implant manufacturer, the case includes some troubling language as to the criteria for a viable fear of cancer claim. The idea that proof of any possibility of acquiring a disease equates to a reasonable fear is supported only by a 1993 Louisiana Third Circuit case and a 1974 Louisiana Supreme Court case. The Third Circuit case appears to be an aberration, and the 1974 Louisiana Supreme Court case predates the onslaught of toxic tort claims of the 1980's in which the “fear of cancer” claim has been examined with greater scrutiny nationwide. Judge Barbier’s discussion of the “reasonableness” requirement in the loose terms of these two cases as if it were well-settled law in Louisiana unfortunately gives more weight to these cases than they deserve and may set Louisiana on a path diverging from that of most other states as to what is a “reasonable” fear.

- Madeleine Fischer

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Fight over Warnings Assures Trial; Record Retention Policy Can’t Foil Discovery

St. Pierre v. Maingot,
2002 WL 31473850 (E.D. La. 10/31/2002) & 2002 WL 31655355 (E.D. La. 11/21/2002)

In the first of two separate opinions regarding the same case, Judge Thomas Porteous of the United States District Court for the Eastern District of Louisiana reveals obstacles to summary judgment facing lawyers defending a products liability claim alleging failure to warn. In the second opinion, Magistrate Judge Karen Roby permitted the plaintiff to discover expert reports used in closed cases involving the defendant manufacturer, but stopped short of ordering production of the manufacturer’s financial papers.

The case involved a minor who ran a rented Yamaha watercraft over a dinghy containing four people, killing one and injuring the others. The mother of the decedent brought a wrongful death action against the manufacturer of the watercraft alleging design defect and failure to adequately warn. The manufacturer moved for summary judgment, resulting in the court’s first opinion. After Judge Porteous denied the summary judgment, the plaintiff moved to compel production of the manufacturer’s financial documents and all reports related to Yamaha personal watercraft prepared for the manufacturer by its expert witness – subjects addressed in the second opinion authored by Magistrate Roby.

Summary Judgment

Both parties produced a laundry list of arguments for and against summary judgment. The plaintiff raised several unanswered questions about the adequacy of the warnings provided by the manufacturer and the person who rented out the watercraft to the minor. Consequently, the court denied summary judgment finding that issues of material fact remained concerning:

- the adequacy of written warnings in an owner's manual and product decals,
- the adequacy of verbal operation warnings given by persons renting or selling the product; and
- the appropriateness of warnings vis-a-vis the language used; its conspicuousness, clarity, and consistency; its position or placement on the product; the age and experience of the user; and the peculiarities of the product's market.

Motion to Compel Discovery

Expert Reports

The plaintiff sought all reports related to personal watercraft ever prepared for the manufacturer by its expert witness in any case. The manufacturer countered that it no longer possessed old reports which had been discarded pursuant to its document retention policy, but admitted that the expert might have provided such reports in several closed cases. The court found that the manufacturer's frequent involvement in litigation gave it access to these prior reports through its relationship with its expert witness. Consequently, the court ordered the manufacturer to produce them.

Financial Reports

The plaintiff also sought to obtain financial documents from the manufacturer to show the profitability of its personal watercraft line of products. She claimed entitlement to this information, first, because she had a claim for punitive damages under maritime law and, second, because the manufacturer raised a "lack of economic feasibility" defense to her claim that alternative safety devices should have been installed to make the manufacturer's personal watercraft safer. The manufacturer countered that plaintiff's complaint did not put it on notice that it was subject to punitive damages as required by Rule 8(a) of the Federal Rules of Civil Procedure, that punitive damages are not available under Louisiana product liability law, that the facts as pled did not support maritime jurisdiction, and that its corporate economic information was irrelevant because it was the plaintiff's burden to establish the cost of a proposed alternative design.

Addressing punitive damages, the court acknowledged a split among the district courts, but concluded that punitive damages are not special damages, and need not be specially pled under Rule 9(g) of the Federal Rules of Civil Procedure. However, it stated that punitive damages should be reserved for willful wrongdoing or for defendants who act with reckless indifference to the known rights of others. It also stated that Rule 8(a) requires that the complaint allege facts sufficient to put the other party on notice of a claim for punitive damages. It reasoned that to comply with Rule 8(a), the complaint should have alleged either reckless indifference or willful wrongdoing on the part of the manufacturer. Because the complaint did not so allege, the court concluded that the plaintiff did not have a claim for punitive damages against the manufacturer. Having so concluded, the court found no need to address the manufacturer's other arguments against punitive damages, although the court explained in a footnote that federal admiralty jurisdiction did not apply to plaintiff's tort claim because the accident occurred in the territorial waters of a foreign country and not within the navigable waters of the United States or on the "high seas".

Next, the court considered whether the manufacturer's lack of feasibility defense warranted that the plaintiff discover its financial information. The plaintiff contended that this information would enable her to determine the cost of alternative designs; it would also reveal the manufacturer's profits, revenues, and expenses which were relevant to her claim of failure to warn. The court noted that it was unaware of any authority supporting the plaintiff's propositions. It stated that the burden was on her to show that an alternative design existed that would have prevented the accident, and to prove that the watercraft's inadequate warning rendered it "unreasonably dangerous." Furthermore, the court stated that, to counter the manufacturer's economic feasibility defense, the plaintiff needed to consider only the cost of the watercraft as designed, the cost of her alternative design, and the cost of providing adequate warnings. The court concluded that the plaintiff could obtain the necessary information without access to the manufacturer's financial records. Thus, it denied the plaintiff's motion to compel production of the manufacturer's financial records.

- Andrew M. Obi

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