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VIOXX TRIAL JUDGE BARS PLAINTIFFS' EXPERT FROM TESTIFYING AS TO CAUSE OF DEATH

In re Vioxx Products Liability Litigation, MDL No. 1657, 2005 WL 3541045 (E.D.La. 12/6/05)

The Vioxx litigation has received nationwide media attention since its inception, with over 7,000 state and federal lawsuits already filed to date. (See VIOXX CASES CENTRALIZED BEFORE JUDGE FALLON IN LOUISIANA'S EASTERN DISTRICT in our March 2005 E*Zine and JUDGE IN VIOXX CASES APPROVES ALL EXPERTS FOR BOTH SIDES TO TESTIFY in our December 2005 E*Zine.) The federal cases have been centralized for certain proceedings before Judge Eldon Fallon of Louisiana's Eastern District. One of those cases, which concerns the role that Vioxx played in the death of Richard Irvin, Jr., ended in a mistrial last month before Judge Fallon. (The case was tried by Judge Fallon in Houston, Texas due to hurricane damage to the court in New Orleans.) This case involves Judge Fallon's ruling on the testimony of one expert, before the mistrial was declared. The ruling is important for the insight it gives into Judge Fallon's thinking for the many additional Vioxx cases he is handling.

Vioxx is a non-steroidal anti-inflammatory drug, developed by defendant Merck & Co., Inc. and approved by the Food and Drug Administration in the 1990s. Since its approval, Vioxx gained widespread acceptance among physicians treating patients with arthritis and other conditions causing chronic or acute pain. In 2001, Irvin, a 53-year-old man with severe lower back and hip pain, had been taking Vioxx for approximately one month when he suffered a heart attack and died. An autopsy revealed a blood clot in his coronary artery. Over three years later, Merck withdrew Vioxx from the market when clinical trial data indicated that the use of Vioxx increased the risk of heart attack and stroke. Plaintiffs, Irvin's surviving spouse, minor children, and estate, then brought this action alleging that Vioxx was a defective product, that Merck knew Vioxx was defective, and that Merck failed to warn Irvin of Vioxx's defective nature. Prior to the start of the trial, Judge Fallon ruled on a number of *Daubert* and *Daubert-like* motions concerning both parties' use of scien-

tific testimony in Irvin's case. For the most part, Judge Fallon approved the offered experts, including one Dr. Thomas Baldwin.

Judge Fallon originally found Dr. Baldwin, a cardiologist, qualified to testify as an expert regarding Irvin's cardiac condition at the time of his death, but did not rule as to whether Dr. Baldwin was qualified to offer an opinion on Vioxx as the specific cause of death. At trial, however, plaintiffs' counsel pursued this line of questioning, drawing an objection from defense counsel that Dr. Baldwin was not competent to render such an opinion. Judge Fallon agreed, subsequently ruling that Dr. Baldwin was unqualified to testify as to whether Vioxx caused Irvin's death.

Denying a motion to reconsider by the plaintiffs, Judge Fallon explained that his ruling was governed by Federal Rule of Evidence 702, which imposes specific requirements on a prospective expert. Here, Dr. Baldwin did not have the knowledge, skill, experience, training or education necessary to render an opinion as to whether Vioxx played a role in producing the blood clot that led to Irvin's death. Dr. Baldwin's trial testimony revealed that he failed to understand not only relevant scientific literature, but also numerous Vioxx tests and studies. In fact, Dr. Baldwin even admitted his lack of expertise regarding Vioxx-like drugs.

Judge Fallon's ruling is important because it demonstrates that even though he may have previously qualified as an expert, he will not permit that expert to take broad latitude with his trial testimony. An expert's testimony will be strictly limited to those areas in which he is proved competent. At the same time, however, Judge Fallon acknowledged that some experts may demonstrate skill in areas outside their initial qualifications and, in those cases, he may permit their testimony. Because the same experts will likely appear in the state Vioxx suits where the issues and attorneys are substantially identical to those in the federal Vioxx suits, Judge Fallon's expert rulings in Irvin's suit provides guidance for future Vioxx litigation.

—*Sarah B. Belter*

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LA. 4TH CIRCUIT APPLIES BELGIAN LAW TO FOREIGN INSURANCE POLICY IN ASBESTOS CASE

Murden v. Acands, Inc., 2005-0319 & 2004-2122, 2005 WL 3701481 (La.App. 4 Cir. 12/14/05)

Champion International Corporation distributed wallboard in Louisiana until 1974. Nearly twenty years later, John Murden allegedly contracted asbestosis due to his contact with the wallboard while employed in the state. Murden's surviving family members filed suit in Orleans Parish against Champion, who then filed a third-party demand against the Belgian manufacturer of the wallboard, as well as the Belgian insurer of both the distributor and the manufacturer. Champion alleged that the insurer was liable under the terms of a products liability insurance policy to provide coverage for any damages that Champion paid for the Murden family's claims. The family members reached a settlement with Champion and released all claims against it. This left Champion, the foreign manufacturer and the foreign insurer as the only remaining parties in the lawsuit. The insurer argued that under Belgian law, the policy did not provide coverage. The trial court agreed with Champion that Louisiana law applied, and that the policy provided coverage. The insurer appealed to the Fourth Circuit, who held that under Louisiana choice of law principles, Belgian law applied. Properly interpreted under Belgian law, the policy provided coverage for the products liability claims.

The Fourth Circuit began its analysis with the Louisiana Civil Code choice of law article that states that unless otherwise provided, a lawsuit that has contacts with more than one state is governed by the law of the state whose public policies would most seriously be impaired if its law were not applied. Whether Louisiana or Belgian law should be apply to the policy interpretation would be determined by weighing the interests of each state in the light of: (1) the relationship of each state to the parties in the dispute; and (2) the policies and needs of the interstate and international judicial systems, including the interest in upholding the justified expectations of the parties and minimizing the adverse consequences that might follow from subjecting a party to the law of more than one jurisdiction.

A second Louisiana Civil Code Article provides that for contracts such as an insurance policy, an analysis of the two states' interests must also include considerations of (1) the pertinent contacts of each state to the parties and the contract, including the place of negotiation, formation, and performance of the contract, the domicile and place of business of the parties; (2) the nature and type of contract at issue; and (3) the interest in facilitating orderly business transactions and promoting fair multistate commerce.

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Given these considerations, the Fourth Circuit held that Belgian law applied. The only contact that Louisiana had to the dispute was the fact that the injury occurred in the state to a Louisiana resident. However, the Murden family members had already received a settlement and were no longer participants in the lawsuit. The insurance policy was negotiated and formed in Belgium between a Belgian manufacturer and a Belgian insurer. The contract was intended to provide coverage wherever Champion distributed the products; Louisiana was just one of many potential locations. The court held that the parties intended Belgian law to govern the policy, otherwise the policy could be subject to fifty different interpretations depending upon where suit was filed.

Finally, the court held that the policy provided coverage over the products liability claims against Champion. Asbestosis is a "bodily injur[y] … accidentally caused" as required by the policy, because it is not premeditated or purposeful. Under Belgian law, an accident need not be sudden, unforeseen, and abnormal. Coverage exists even when a liability claim is filed after the term of the insurance policy ends, so long as the exposure to the injurious product occurred during the term.

This case should caution Louisiana distributors that Louisiana courts are hesitant to apply Louisiana law merely because suit is filed in the state for an injury that occurred in the jurisdiction. A choice of law analysis will differ depending upon the circumstances of each case, but here, the Fourth Circuit decided that Belgian law should apply to the policy interpretation. The Fourth circuit held that the foreign manufacturer and foreign insurer justifiably expected Belgian law to apply to the policy. The court reasoned that a contrary holding would subject foreign entities to potential liability anywhere in the United States, merely due to the single fact that an injury occurring there, and could discourage commerce between Louisiana and foreign states.

—*John B. Rosenquest IV*

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LA. 5TH CIRCUIT REVIVES CASE VS. SLEEP DRUG MANUFACTURER FOR INADEQUATE WARNING

Kampmann v. Mason, 2005-0423 (La.App. 5 Cir. 1/17/06), 2006 WL 118949

In this case the Louisiana Fifth Circuit Court of Appeal addressed the proof needed for a drug manufacturer to prevail, when sued on a claim that the manufacturer failed to provide an adequate warning of a potentially serious side effect of the drug.

Plaintiff Kampmann was prescribed the drug trazodone for difficulty sleeping. Within two weeks he experienced a painful erection and penile dysfunction. Eventually he had several surgeries and was left with permanent erectile impairment. Plaintiff sued his doctor, his pharmacist, and Sidmark, the manufacturer of trazodone, claiming that he had not been sufficiently warned of this potential side effect.

Louisiana follows the "learned intermediary" doctrine in warning claims against prescription drug manufacturers. A drug manufacturer's duty to warn is fulfilled by giving an adequate warning to the physician. It is then the physician's duty to pass along the warning to the patient. Here, the trial judge granted Sidmark summary judgment on the basis of the "learned intermediary" doctrine.

The Louisiana Fifth Circuit reversed the summary judgment and reinstated Kampmann's claim against Sidmark. Sidmark had supported its summary judgment motion by producing a copy of its product insert that it provided with trazodone when it was shipped to wholesalers. Kampmann had supported his opposition to the summary judgment by showing that the warnings which *he* had personally received were different from the insert, and did not include warning of the risk of erectile dysfunction. The Fifth Circuit found that the warning included in the product insert to wholesalers was not sufficient proof that the warning had reached doctors or that the warning was sufficient notice that the danger was serious and required emergency treatment at the onset of symptoms.

The Fifth Circuit implied that the deficiency in Sidmark's motion could have been cured by including an affidavit from the treating physician or even from another physician that the warning had been received and clearly described the risk. Drug manufacturers planning to rely on the "learned intermediary" doctrine should make sure to buttress their product inserts with physician testimony.

—*Madeleine Fischer*

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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