

Jones Walker E*Zine

Products Liability
October 2004 Vol. 45



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Metabolife Case Continues As Three Dieters' Cases Are Dismissed

Kemp v. Metabolife Intern., Inc.,
2004 WL 2095618 (E.D. La. 9/13/04)

Another chapter in the continuing saga of the Metabolife litigation has been written. The case, involving claims by former users of the weight loss supplement, has been chronicled in this e-zine. See [APPETITE SUPPRESSANT MANUFACTURER BLOCKS CLASS CERTIFICATION BID \(March 2002\)](#) and [EASTERN DISTRICT MAINTAINS JURISDICTION OVER METABOLIFE SUIT AFTER CLASS CERTIFICATION IS DENIED \(November 2003\)](#). In the latest installment, Chief Judge Berrigan focused on the issues of whether Metabolife can cause diseases or disorders in people in general ("general causation") and whether Metabolife caused the specific ailments of three of the 302 plaintiffs ("specific causation").

The causation issue arose when the defendants brought summary judgment motions as to three of the plaintiffs, contending that the three would be unable to prove that Metabolife caused the injuries they were claiming. Judge Berrigan noted that it was each plaintiff's burden at trial to prove that it was more probable than not that her injuries were caused by the use of Metabolife. Causation includes both general and specific causation. Proof of specific causation requires medical testimony. An inability to establish specific causation is fatal to a plaintiff's claim.

None of the three plaintiffs targeted by the motion for summary judgment had medical testimony that her specific injuries were caused by Metabolife. The personal belief of each plaintiff that her injuries were caused by Metabolife was of no moment, because none were qualified to give medical testimony. Testimony from doctors to the effect that Metabolife had the propensity to cause certain types of injuries similar to those suffered by the three plaintiffs established general causation only, and was insufficient to prove that any particular plaintiff's condition was the result of ingesting Metabolife.

Plaintiffs attempted to defeat the summary judgment motions by relying on a presumption from a 1991 Louisiana Supreme Court case, *Housley v. Cerise*, known as the Housley presumption. Under the Housley presumption, if a person was in good health before an accident, and beginning with the accident symptoms of a disabling condition appear and continuously persist, the person's disability is presumed to have resulted from the accident, providing medical evidence shows there to be a reasonable possibility of a causal connection between the accident and the disabling condition.

Judge Berrigan questioned whether the Housley presumption should be applied in situations where injury allegedly arises not from a single "accident", but rather from a series of incidents – such as the continued use of Metabolife – which are not "accidental." However, even if the use of Metabolife were considered an "accident," Judge Berrigan found that the facts of the case did not satisfy the presumption, because the plaintiffs' injuries arose gradually over an extended period of use, rather than contemporaneously "with" the ingestion of Metabolife.

Accordingly, Judge Berrigan granted the motions and dismissed the three plaintiffs on summary judgment. The Metabolife case will continue to proceed with the remaining plaintiffs.

- [Madeleine Fischer](#)

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Plaintiffs' Attempt To Evade Federal Jurisdiction Thwarted In Med. Device Suit

Philibert v. Ethicon, Inc.,
2004 WL 1922032 (E.D.La. 8/25/04)

On January 9, 2004, plaintiffs filed suit in state court in New Orleans against defendants, Lifecore Biomedical, Inc., Ethicon, Inc., Johnson & Johnson, and PSS World Medical, Inc. Plaintiffs sought damages for injuries allegedly arising out of the application of the medical device, Intergel, to the inside of Tammy Philibert's abdomen during surgery to remove endometriosis.

PSS removed the matter to federal court in the Eastern District of Louisiana. Shortly thereafter, plaintiffs moved for a voluntary dismissal of PSS, Johnson & Johnson, and Lifecore. Ethicon remained as the only defendant in the suit.

On March 5, 2004, plaintiffs filed another suit in the 15th Judicial Circuit in Palm Beach County, Florida. In that suit, plaintiffs again sued Ethicon, Johnson & Johnson, and Lifecore for the damages Ms. Philibert sustained from Intergel. The plaintiffs did not sue PSS in the Florida suit, but did sue another company, Vital Pharma, Inc., a Florida corporation.

Both lawsuits arose from the same operative facts and made essentially identical claims for relief. In the Florida suit, the plaintiffs sought damages for general negligence, products liability, intentional misrepresentation, negligent misrepresentation, loss of consortium and attorney's fees. In the Louisiana suit, the plaintiffs' claims arose under the Louisiana Products Liability Act, which provides the exclusive theories of liability against manufacturers for damages caused by their products. La. R.S. § 9:2800.52.

On July 15, 2004, plaintiffs filed a motion seeking to dismiss Ethicon without prejudice in the Louisiana lawsuit. Ethicon opposed the motion. Judge Fallon of Louisiana's Eastern District denied plaintiffs' Motion for Voluntary Dismissal finding that a Florida court would likely apply Florida law, thus subjecting Ethicon to clear legal prejudice by denying Ethicon the defenses available under the Louisiana Products Liability Act.

The plaintiffs sought reconsideration of their motion. The court treated plaintiffs' motion to reconsider as a motion to alter or amend the judgment under rule 59(e) of the Federal Rules of Civil Procedure.

To obtain relief under Rule 59(e), the plaintiffs were required to (1) show the motion was necessary to correct a manifest error of law or fact, (2) present newly discovered or previously unavailable evidence, (3) show the motion was necessary to prevent manifest injustice, or (4) show the motion was justified by an intervening change in the controlling law.

The plaintiffs did not present any manifest error of law or fact, nor did they argue any change in the controlling law. In addition, the court found that the plaintiffs' introduction of affidavits waiving any possible right to seek punitive damages from Ethicon were not the sort of "newly discovered or previously unavailable evidence" that warranted granting the motion. Finally, the court found that there was no evidence that the motion was necessary to prevent manifest injustice. Accordingly, the motion to reconsider was denied and the case against Ethicon remains in Louisiana federal court.

- [Michelle D. Craig](#)

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Eastern District Strikes Fraud & Conspiracy Claims Brought By Smoker's Family

***Carter v. R.J. Reynolds Tobacco Co.,
2004 WL 1944798 (E.D. La. 8/30/04)***

Maurine Carter's spouse and children sued two tobacco companies claiming that cigarettes caused Ms. Carter's death. Included among their many claims were claims that the tobacco companies committed fraud and conspiracy. The tobacco companies moved for summary judgment to dismiss these claims, arguing that plaintiffs were limited to the legal theories listed in the Louisiana Products Liability Act ("LPLA").

Judge Ginger Berrigan agreed with the tobacco companies, rejecting plaintiffs' argument that because they alleged the fraud and conspiracy took place before the enactment of the LPLA, the LPLA didn't apply. Instead, Judge Berrigan found that the plaintiffs' claim for the wrongful death of Ms. Carter accrued on the date of her death, and the law in effect on *that date* governed. Therefore plaintiffs were restricted to the theories allowed by the LPLA, which do not include claims for fraud and conspiracy.

For more about this case see our article in the September 2004 e-zine: [EASTERN DISTRICT STRIKES PART OF SMOKER'S FAMILY'S CLAIM.](#)

- *Madeleine Fischer*

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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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