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COURT DISMISSES FRAUD CLAIMS UNDER LPLA IN DEFECTIVE SUTURE CASE

***Truxillo v. Johnson & Johnson*, No. CIV A. 07-2883, 2007 WL 1853363 (E.D. La. June 27, 2007)**

In 2001, Losanna Truxillo underwent surgery in Thibodeaux, Louisiana. The surgeons who performed the procedure used sutures manufactured by Johnson & Johnson to close. After her surgery, Truxillo suffered abdominal bleeding and required two more surgeries and three excisions of foreign bodies. Truxillo sued the suture manufacturer, Johnson & Johnson, alleging that it knew the sutures were defective but did not warn surgeons of the risks involved in using them. Truxillo alleged that Johnson & Johnson fraudulently concealed material information and committed fraud by keeping the sutures on the market after it knew that the sutures were dangerous.

Johnson & Johnson filed a motion to dismiss, arguing that the Louisiana Products Liability Act does not allow a claimant to recover on the basis of fraud. Agreeing with Johnson & Johnson, the Court rejected Truxillo's argument that the Louisiana legislature did not intend to eliminate fraud claims under the LPLA.

In the alternative, Truxillo argued for the application of New Jersey law, which would have allowed her fraud claims. Under applicable Louisiana conflicts of law rules, products liability actions are governed by Louisiana law when the injury was sustained in Louisiana by a person domiciled or residing in Louisiana or when the product was manufactured, produced, or acquired in Louisiana. Since Truxillo was a Louisiana resident who was injured in Louisiana, the Court concluded that Louisiana law should apply. The conflicts of law rules provide for an exception to the ordinary rules in an "exceptional case" where the policies of another state would be "seriously impaired" if its law were not applied. Truxillo argued that the laws of New Jersey would be seriously impaired if not applied to the issues at hand. After analyzing the relevant policies and the relationship of each state to the parties and dispute, the Court determined it was "far from clear" that New Jersey law would be most affected; thus, Louisiana law applied. As such, there could be no claim sounding in fraud made pursuant to the LPLA. Accordingly, the Court granted Johnson & Johnson's motion to dismiss.

– *Emily E. Eagan*

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PHARMACY MAY HAVE DUTY TO WARN IF DOCTOR PRESCRIBES DRUG IN EXCESSIVE DOSAGES

***LeBlanc v. Wyeth*, Inc., ___ F.Supp.2d ____, 2007 WL 2027390 (W.D. La. July 10, 2007)**

Charles LeBlanc suffered from a life threatening heart condition. His treating physician prescribed the drug Cordarone/Amiodarone. LeBlanc ultimately suffered from lung disease allegedly caused by excessive doses of the drug. LeBlanc filed suit against various defendants, including the drug manufacturer, Wyeth, and the pharmacy that filled the prescriptions, Prescription Management Services, Inc. ("PMSI"). PMSI brought a motion to have the claims against it dismissed on summary judgment. Judge Tucker Melancon of the U.S. District Court, Western District of Louisiana, granted PMSI's motion in part, dismissing the majority of LeBlanc's claims. However, he did not dismiss LeBlanc's claims against PMSI for negligent failure to warn.

LeBlanc's troubles began when he underwent two heart surgeries and his treating physician subsequently prescribed Cordarone/Amiodarone at 800 mg per day to treat a life threatening, post-operative heart condition. After one week of treatment, the doctor made a note to reduce the drug to 400 mg per day. However, LeBlanc was discharged with a prescription that was for 800 mg per day. PMSI filled the prescription as written for an 800 mg per day dosage. At the third prescription refill request, PMSI faxed a request to LeBlanc's new treating physician, who approved the 800 mg per day dosage. Ultimately, LeBlanc became very ill, was diagnosed with lung disease, and was ordered to stop taking the drug.

Judge Melancon dismissed LeBlanc's claims against PMSI under the Louisiana Products Liability Act because PMSI was neither a manufacturer nor seller under the LPLA. Judge Melancon also dismissed claims of fraudulent misrepresentation, redhibition, implied warranty, and breach of express warranty against PMSI, finding that there was no dispute that PMSI did not know nor should have known that the product was defective and that LeBlanc had not adequately supported his non-LPLA claims against PMSI.

Nonetheless, Judge Melancon did not grant PMSI summary judgment on LeBlanc's claim that PMSI breached a duty to warn, which it had as a pharmacist. Judge Melancon noted that there was no Louisiana Supreme Court case addressing the duty of a pharmacist; however, both parties cited a Louisiana Third Circuit case holding that a pharmacist has a duty to correctly fill a prescription and to warn the patient or notify the doctor of an excessive dosage or other problems with the prescription that create a substantial risk of harm to the patient. Judge Melancon acknowledged that the pharmacist does not, however, have a duty to question a judgment made by a physician as to the propriety of a prescription or to warn customers of the hazardous effects associated with a particular drug. Both parties appeared to agree that PMSI correctly filled the prescription as written, and Judge Melancon did not address whether the prescribed dosage was excessive on its face.

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Judge Melancon framed the issue as whether LeBlanc's treating physicians would have altered the dosage if PMSI had notified LeBlanc's physicians that it received a prescription for an "excessive dosage" of the drug. There was conflicting evidence regarding the physicians' possible course of action if PMSI had contacted them. Judge Melancon found that this question of fact would have to be determined by the jury. Accordingly, Judge Melancon denied PMSI's motion and refused to dismiss LeBlanc's claim against PMSI for negligent failure to warn.

– *Bernard H. Booth*

STATE LAW CLAIMS AGAINST MERCK, MANUFACTURER OF VIOXX, TO CONTINUE

In re Vioxx Products Liability Litigation, ___ F.Supp.2d ____, 2007 WL 1952964 (E.D. La. July 3, 2007)

The latest chapter in the saga of the Vioxx multidistrict litigation pending before Judge Fallon in the Eastern District of Louisiana unfolded a few weeks ago. Merck, Vioxx's manufacturer, filed a motion for summary judgment in cases filed by two individual users of the formerly popular non-steroidal anti-inflammatory pain reliever. The users both claimed to have suffered heart attacks as a result of taking Vioxx.

Merck's summary judgment asserted that the users' state law claims of failure to warn were preempted because Vioxx was approved by the FDA and the approval procedure included review and approval of the warning label. Merck argued that allowing plaintiffs to pursue claims under state law would defeat the purpose of the FDA approval procedure, because a manufacturer could be held civilly liable under state law for a warning which fully comported with FDA requirements.

Judge Fallon noted that until very recently, the FDA had noted that state law claims and FDA regulation could co-exist. Judge Fallon did not find the FDA's recent change of position on this issue persuasive. Because there is no federal remedy for such injuries, "a finding of implied preemption in these cases would abolish state-law remedies and would, in effect, render legally impotent those who sustain injuries from defective prescription drugs." Judge Fallon concluded that the FDA regulations do not in fact conflict with state laws because manufacturers are not prohibited from issuing revised warnings that are stronger than the original FDA-approved labels.

Judge Fallon denied Merck's motion in this ruling which has great significance for the thousands of other cases included in this multidistrict litigation. To read more, see our earlier articles on other aspects of the Vioxx litigation. VIOXX CASES CENTRALIZED BEFORE JUDGE FALLON IN LOUISIANA'S EASTERN DISTRICT (March 2005); JUDGE IN VIOXX CASES 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);

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VIOXX FOREIGN CLASS ACTIONS DISMISSED (October 2006); 50 MILLION DOLLAR VIOXX AWARD DEEMED EXCESSIVE (October 2006); VIOXX PLAINTIFFS MUST SUE INDIVIDUALLY FOR INJURY & DEATH; CLASS STATUS DENIED (January 2007); 2 BELLWETHER VIOXX CASES MAY BE RE-TRIED; PLAINTIFF ATTORNEY "AGENDA" DISCLOSED (July 2007).

– *Madeleine Fischer*

REDHIBITORY CLAIMS NOT ALWAYS SUITABLE FOR CLASS ACTIONS

***State v. Ford Motor Co*., 2006-1810 (La.App. 1 Cir. 6/27/07), ___ So.2d ____.**

In December 2003, the State of Louisiana filed a class action against Ford Motor Company seeking, among other things, relief under Louisiana's redhibition law. Louisiana alleged that the Ford Crown Victoria Police Interceptor vehicle, which was designed to be used by law enforcement personnel, contained a hidden defect causing an increased risk of fuel leakage and combustion in rear-impact collisions. The trial court certified a class of "all parishes, municipalities, police and sheriff departments, law enforcement districts, and other political subdivisions within [Louisiana] who have purchased, leased, or otherwise acquired [Interceptors] since the 1992 model year for use as law enforcement vehicles." Ford appealed to a five-judge panel, the majority of which reversed the class action certification and remanded the matter to the trial court. Interestingly, multiple judges opined on the suitability of a class action for maintaining redhibitory claims.

The appellate court majority found that, for purposes of redhibitory actions, the class lacked the predominance of common issues necessary to maintain a class action. Ford's defenses of comparative fault and prescription could not be determined on a class-wide basis. Whether Ford's alleged liability could be reduced by an individual plaintiff's own negligent actions in using the Interceptor would depend upon the unique facts of each individual case. Likewise, whether an action is untimely depends on when each individual plaintiff discovered the Interceptor's defect. Another member of the appellate court, while agreeing that a class action was inappropriate, pointed out that, in this case, a redhibition claim is incompatible with class certification. Redhibition claims involve subjective issues of individual knowledge and reliance. Therefore, plaintiff-by-plaintiff adjudication of liability and defense issues must be made.

One dissenting member of the appellate court, however, would have permitted the class action because he found that common issues predominated. The primary issue of whether the Interceptor is redhibitorily defective calls for both common questions and common proof. Additionally, because the damages suffered by each class member arise out of the purchase of each Interceptor and are based on the legal theory of redhibition, the damages suffered by the class representative are typical of those of other class members.

This case is important because it demonstrates that class actions often may be unsuitable to maintain redhibitory actions. Depending on the facts of the particular

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case, a defendant may be able to defeat class certification in a redhibitory action by arguing that the issues of plaintiff fault, prescription, knowledge, and reliance are individualistic in nature and cannot be resolved on a class-wide basis.

– *Sarah B. Belter*

MANUFACTURER NOT LIABLE FOR IMPROPERLY PLACED MEDICAL WASTE BIN

***Marshall v. East Jefferson General Hosp. Foundation,* (La.App. 5 Cir. 6/26/07), ___ So.2d ____**

On May 3, 2001, two-year old Jacob was at East Jefferson General Hospital with his father, Christopher Marshall, visiting his mother Michele following the birth of the Marshalls' daughter. Jacob was injured when he put his hand into an uncovered hazardous waste bin containing at least 30–40 used hypodermic needles. When Mr. and Mrs. Marshall realized their son had been stuck on the finger by a contaminated needle, they both became upset and fearful. Jacob underwent blood tests for hepatitis and HIV infection, which were negative. The Marshalls asserted they sustained, and continue to sustain, severe emotional upset, fear, and anxiety, worrying about Jacob's health and possible exposure to HIV and other diseases that might be incurable or cause severe, debilitating, and permanent injury or death.

The Marshalls, individually and on behalf of Jacob, filed suit against East Jefferson General Hospital Foundation (EJGH) as well as Medical Waste Services of America, L.L.C. (MWS). The Marshalls alleged that they suffered severe mental anguish as bystanders, and as a result of witnessing the foreseeable act of their son having been stuck by used, contaminated syringes. The Marshalls asserted negligence claims against EJGH. As to MWS specifically, the Marshalls alleged the hazardous waste bin at issue was designed, manufactured, and/or installed by MWS, and "was unreasonably dangerous in design and as presented in its use, as it contained no top or seal, had not been properly installed, maintained, or inspected, and had not been regularly emptied, all of which presented an unreasonable risk of harm."

MWS filed a motion for summary judgment, seeking dismissal of the Marshalls' claims against it. MWS argued that it was not liable because, although the Marshalls' experts concluded that the sharps disposal bin at issue should not have been used in the type of hospital room where the accident at issue occurred, those experts did not conclude that the bin was inherently dangerous for use anywhere. Both of the Marshalls' experts stated only that the design of the sharps disposal container in the room was not appropriate for *this* location and setting because it did not prevent the introduction of a hand into the filled container. In addition, they suggested that the design of this sharps container created a significant and potentially deadly hazard for a foreseeable population who could be present in *that* hospital room. MWS established that the decision to use this type of sharps bin in the room at issue was made solely by the hospital and MWS had no role whatsoever in that decision. MWS also argued that

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the Marshalls did not plead an adequate warnings claim and presented no evidence to support one.

MWS also addressed the Marshalls; argument that the MWS' biohazards container was unreasonably dangerous in design because an alternative design was available that could have prevented the Jacob's injury and adopting such a design would not have been a burden to MWS. MWS asserted that EJGH did not involve it in the bin-selection process and that it could have provided EJGH with an alternative design had it been requested by EJGH. Two types of bins were available at the time of this incident. The type at issue in this case had a round hole in the top and a removable plastic cap. The other had a horizontally-hinged, mailbox-style opening, with a guard that would have prevented a child from sticking a hand inside. EJGH ordered the first type, with the round hole in the top, and EJGH decided where to install the bins.

After a hearing, the trial court judge granted summary judgment in favor of MWS. The Marshalls appealed.

Louisiana's Fifth Circuit Court of Appeals affirmed the district court ruling and found that there was no dispute of material fact relating to the liability of MWS. The Court agreed that there was an alternative disposal bin available that would have been safer, but the Marshalls did not refute the evidence offered by MWS that the choice of bin was entirely made by EJGH. The Marshalls failed to show that the absence of a cap on the vertical-drop lid container here was attributable to MWS. Further, the Marshalls did not allege an inadequate warnings claim in the petition and did not support such a claim against MWS.

This ruling can be beneficial to manufacturers defending against products liability claims if the manufacturer can show that it did not participate in the choice, placement, or use of its product where these particular factors are at issue in the litigation. If a product is appropriate for use in one situation but not others, and the choice of use is made by the consumer with no input from the manufacturer, the manufacturer can assert this defense to a products liability claim.

– *Don A. Rouzan*

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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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