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SELLER OF APPETITE SUPPRESSANT COULD BE STRICTLY LIABLE TO STROKE VICTIM

***Weaver v. CAA Industries Inc.*, 2008 WL 2170837 (5th Cir. May 27, 2008)**

In 1995, Robert Weaver began taking Permathene, an over-the-counter appetite suppressant/diet drug marketed and sold by CAA Industries ("CAA"). Eleven days later he suffered a stroke. The diet drug was manufactured by Phoenix Laboratories, Inc. ("Phoenix") at its facilities using a formula provided by CAA. The finished product was then shipped in bulk to CAA, who packaged, labeled, and sold the appetite suppressant to the public at retail outlets. Weaver filed a products liability suit against CAA to recover for his injuries allegedly caused by ingesting Permathene. He alleged that the appetite suppressant was unreasonably dangerous due to defective manufacture and design, that CAA breached an express warranty, failed to adequately test Permathene, and failed to adequately warn of the risk associated with taking the product.

The United States Fifth Circuit Court of Appeals determined that, despite the fact the Phoenix manufactured the drug, CAA could be held strictly liable to Weaver as a manufacturer under the Louisiana Product Liability Act ("LPLA"). CAA fell squarely within the definition of manufacturer under the LPLA because it packaged, labeled, and sold the Permathene as its own product. The Fifth Circuit noted that under the LPLA, as a manufacturer, CAA could be held strictly liable to Weaver, even if the injuries resulted solely from Phoenix's fault in manufacturing the appetite suppressant.

Weaver did not assert any claims against Phoenix directly. However, CAA filed a third-party suit against Phoenix's insurer, claiming the insurer had a duty under the policy to indemnify and defend CAA as a vendor of Phoenix's product. The trial court held CAA's coverage was excluded under the express terms of the policy because it altered the drug by labeling it, and because it provided Phoenix with ingredients of the diet drug. The Fifth Circuit overturned the trial court, holding that the alteration exclusion was not triggered because there was no connection between the CAA's packaging and labeling of the appetite suppressant and Weaver's injury. Lastly, the court held that based on the common sense definitions of "ingredients" and "formula," CAA was not excluded from coverage because a formula is not an ingredient but a list of ingredients to be used.

– *Wade B. Hammett*

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BELL TOLLS FOR TOXIC EXPOSURE CLAIMS AGAINST PAINT MANUFACTURER

***Denoux v. Vessel Management Services, Inc.*, 2007-2143 (La. May 21, 2008) ___ So.2d ____**

Plaintiffs, employees of Vessel Management Services, Inc., filed suit alleging exposure to toxic fumes while doing painting and chipping work on the hull of the M/V Belle of Orleans in April and June of 2000. The initial suit was filed on November 14, 2001, under the Jones Act, 46 U.S.C. § 688, providing for a three-year statute of limitations. In addition to their employer, the plaintiffs named the vessel's owner, the The Belle of New Orleans, LLC, and the vessel's operator, Bally's of Louisiana, Inc. These two defendants then filed a third-party demand against Glidden Company ("Glidden"), the paint manufacturer, asserting products liability claims. On March 17, 2006, the plaintiffs added Glidden as a direct defendant.

The plaintiffs alleged products liability and negligence claims, and claimed that Glidden was solidarily liable with the other defendants. Glidden filed an exception of prescription, which the trial court sustained. Glidden argued, and the trial court accepted, that plaintiffs' claims were governed by the one-year prescriptive period found in the Louisiana Civil Code. The primary issue before the court of appeal was whether the plaintiffs met their burden to show that the claims against Glidden were subject to federal admiralty jurisdiction, *i.e.*, maritime law's three-year prescriptive period.

The court of appeal noted that the plaintiffs submitted no evidence into the record, and in the absence of evidence the exception had to be decided on the facts alleged in the petition. From the face of the petition, when adding Glidden as a defendant, the plaintiffs alleged only state law claims against Glidden, and did not allege any facts to support admiralty jurisdiction. With respect to the claims of solidary liability, the court noted that a timely suit against one alleged solidary obligor does not revive an action that has prescribed as to the other solidary obligor. The plaintiffs' claims were not instituted within one year of the alleged April and June 2000 exposure.

– *L. Etienne Balart*

CASES REMAINING AFTER HUGE VIOXX SETTLEMENT FACE DEADLINES FOR EXPERTS

***In re Vioxx Products Liability Litigation*, ___ F. Supp. 2d ____, 2008 WL 2229264 (E.D.La. May 30, 2008)**

In the latest development in the Vioxx Multidistrict Litigation, Judge Eldon Fallon has extended plaintiffs' case-specific expert report deadlines by several weeks.

In February 2005, all federal Vioxx cases were centralized in the Eastern District of Louisiana before Judge Fallon. The cases focused on alleged increased health

risks (including heart attack and/or stroke) when taking the anti-inflammatory drug manufactured by Merck.

Judge Fallon has faced many challenges in managing this massive litigation, as has been previously reported in this E*Zine. Among other particularly significant measures, he has denied certification as a class action, ruled on the admissibility of various experts' opinions, tried a half-dozen bellwether cases, examined and ruled upon issues of various state's law relating to statutes of limitations, and reduced a $50 million award as excessive.

In November 2007, plaintiffs and Merck announced a settlement of $4.85 billion to settle thousands of state and federal lawsuits. However, certain plaintiffs who were not eligible to join in the settlement or who elected not to submit their claims to the Vioxx Resolution Program were given deadlines to submit expert reports to Merck. Those plaintiffs were required by Judge Fallon to submit minimal scientific evidence in the form of an expert report that Vioxx could have caused their specific injury.

Faced with a plea for more time by the non-participating plaintiffs, Judge Fallon reluctantly gave them several more weeks. However, he chided plaintiffs noting that the requirement for an expert report should not have been onerous due to the fact that the case had been pending for several years. Merck had produced over 22 million pages of documents; six bellwether trials had been conducted; and, in addition to extensive formal general discovery, plaintiffs' attorneys throughout the country had been studying, exploring, and discovering the effects of Vioxx on the human body for nearly a decade.

The order for case-specific expert reports that Judge Fallon entered is of a type known as a *Lone Pine* order, after the case in which it was initially devised. *Lone Pine* orders are frequently used in mass tort litigation to manage the burden such litigation imposes upon courts and defendants by culling out potentially meritless claims. Judge Fallon stated that because Vioxx cases have proved difficult and costly to try, the requirement that plaintiffs show a minimal basis for their claims in the form of an expert report was reasonable and benefited plaintiffs as well as defendants.

Judge Fallon's *Lone Pine* order will serve to streamline the remaining litigation for those who are not participating in the settlement.

For previous articles regarding the Vioxx litigation, see 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 PLAINTIFFS MUST SUE INDIVIDUALLY FOR INJURY & DEATH; CLASS STATUS DENIED (January 2007); TWO BELLWETHER VIOXX CASES MAY BE RE-TRIED; PLAINTIFF ATTORNEY "AGENDA" DISCLOSED (July 2007); STATE LAW CLAIMS AGAINST MERCK, MANUFACTURER OF VIOXX, TO CONTINUE (August

2007); and TIME BARRED VIOXX CLAIMS DISMISSED A DAY BEFORE ONE OF LARGEST SETTLEMENTS EVER (December 2007).

– *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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