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TIME BARRED VIOXX CLAIMS DISMISSED DAY BEFORE ONE OF LARGEST SETTLEMENTS EVER

In re Vioxx Products, MDL No. 1657, ___ F. Supp.2d ___, 2007 WL 3332708 (E.D. La. 11/8/2007); 2007 WL 3334339 (E.D. La. 11/8/2007); 2007 WL 3353404 (E.D. La. 11/8/2007)

On November 9, 2007, Merck & Company announced that it will pay \$4.85 billion to end thousands of state and federal lawsuits over its painkiller Vioxx. This settlement, one of the largest drug settlements in history, includes varying payments depending on the severity of the injuries, attorneys' fees, and additional fees to firms that helped in the discovery process. Just one day prior to this announcement, Judge Eldon Fallon of Louisiana's Eastern District, who is handling thousands of these cases, issued three rulings regarding whether some or all of individual plaintiffs' claims from eight states were time barred by the relevant statute of limitations.

Background

Vioxx is a drug used to relieve pain and inflammation resulting from osteoarthritis, rheumatoid arthritis, menstrual pain, and migraine headaches. On September 23, 2004, an external safety board informed Merck that the study it was conducting showed a significantly increased rate of cardiovascular events in the patients that took Vioxx as compared to patients that were taking a placebo. Subsequently, on September 30, 2004, Merck voluntarily withdrew Vioxx from the market. Also on this date, the news media reported extensively on the withdrawal of Vioxx, including NBC's "The Today Show," ABC's "Good Morning America," CBS's "Early Show," and CNN's "American Morning." The heavy media coverage continued throughout the day, and continued for weeks through paper media and local reports across the country.

In October 2007, Merck filed several motions for summary judgment in several individual cases involving plaintiffs from Pennsylvania, Puerto Rico, Illinois, Texas, California, Indiana, Kentucky, and Tennessee. For each plaintiff, Merck argued that the claims asserted were time barred by the applicable statutes of limitations. The Plaintiffs' Steering Committee, on behalf of the individual plaintiffs, argued that the discovery rule stopped the time limitation from beginning until the plaintiff discovered his or her injury. The Plaintiffs' Steering Committee also argued that the fraudulent concealment doctrine stopped the time limitation from running because Merck's fraudulent concealment of relevant facts prevented the plaintiff from learning of his or her injury.

November 8 Rulings

In deciding the individual claims, the court followed a three step review. First, the court determined which state's choice-of-law rules applied to each individual claim. Next, following the choice-of-law determination, the court chose the applicable statutes of limitations. Finally, the court determined when each limitations

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period began to run and whether or not the statutes had been tolled. In determining whether the limitation had been tolled, the court reviewed whether a state's application of the class action tolling doctrine allowed the time limitations to stop running when a class action lawsuit is filed. Judge Fallon concluded that none of the states applied the class action tolling doctrine.

In Judge Fallon's review of choice-of-law rules, he noted that there were two types of claims in this case: 1) claims filed in the plaintiff's home-state that were later transferred to the Eastern District of Louisiana into this multi-district litigation case; and 2) claims directly filed in the Eastern District of Louisiana into this multi-district litigation case. Judge Fallon determined that the cases filed directly in the Eastern District of Louisiana would need to follow Louisiana's choice-of-law rules and the cases filed in the individual states would follow that state's choice-of-law rules.

After deciding the choice-of-law rules issue, Judge Fallon moved to which state's statutes of limitations applied to each individual case. Although Judge Fallon applied different choice-of-law rules of each state to each individual plaintiff, the result for all of the plaintiffs was the same – the plaintiffs' home-state's statutes of limitations would apply to that plaintiff's individual case. Judge Fallon briefly discussed whether Louisiana's prescription law would apply to the cases filed directly in the Eastern District of Louisiana, but quickly dismissed this idea because Louisiana's only interest in the suit was the court's location, as neither Merck nor any of the plaintiffs were located in Louisiana.

Next, Judge Fallon discussed each individual plaintiff cases and claims that were made to determine whether each claim was time barred by the applicable statute of limitations. Each plaintiff had a variety of claims including personal injury, strict liability, breach of warranty, and fraudulent misrepresentation claims. For all of the claims, Judge Fallon next determined when the statute of limitations began to run. With regards to the majority of the claims, including personal injury claims in negligence and strict liability, Judge Fallon held that the statute of limitations began on September 30, 2004, the day that Merck withdrew Vioxx from the market. The court held that the extensive media coverage on this date put the plaintiffs on notice of the potential link between Vioxx and each plaintiff's alleged injuries. With the statute of limitations beginning on September 30, 2004, Judge Fallon dismissed the following claims as time barred:

Pennsylvania: claims for strict products liability for defective design, failure to warn, negligent design, negligent failure to warn, negligent misrepresentation, and fraudulent omission or concealment.

Puerto Rico: claims for strict products liability for defective design and failure to warn, negligence and/or wantonness, fraudulent misrepresentation and fraudulent omission or suppression.

Illinois: claims for strict liability, negligence, and gross negligence.

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Texas: claims for strict liability, failure to warn, negligence, and wantonness.

California: claims for strict products liability for defective design and failure to warn, negligent design, negligent failure to warn, and negligent misrepresentation.

Indiana: claims for negligent design, failure to reasonably test, failure to warn, strict liability, fraud, and constructive fraud.

Kentucky: claims for negligence, defective design, marketing defect, and failure to warn.

Tennessee: claims for strict liability and negligence.

After determining that most claims' statutes of limitations began to run on September 30, 2004, Judge Fallon next reviewed the plaintiffs' claims for breach of warranty. Judge Fallon found that the statutes began to run on the date on which Merck delivered the product to the plaintiffs. In all of the cases, the delivery of the product was between 1999 and 2003. As a result, Judge Fallon dismissed the claims for breach of express and implied warranty claims as time barred in all eight of the states.

Finally, Judge Fallon reviewed the remaining claims involving fraud. Judge Fallon held that the statute of limitations began to run on fraud claims on September 30, 2004. The following fraud claims survived statute of limitations challenges:

Illinois: claims for common-law fraud were not dismissed as time barred; however, the court noted that it was not ruling on the merits of the case, but merely not dismissing it as time barred.

Texas: claims for fraud, misrepresentation, and suppression were not dismissed as time barred; however, the court noted that it was not ruling on the merits of the case, but merely not dismissing it as time barred.

Kentucky: claims for misrepresentation and fraud were not dismissed as time barred; however, the court noted that it was not ruling on the merits of the case, but merely not dismissing it as time barred.

Conclusion

As a result of Judge Fallon's case by case approach to each of the individual plaintiffs' claims, both sides faced various obstacles as to the remaining viable claims. Merck would have to spend the time and legal fees in defending each individual claim. On the other hand, each individual plaintiff faced the possibility that all of his or her claims would be dismissed as time barred. In light of these obstacles,

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both sides agreed to settle for \$4.85 million, which, as it is processed, will result in the dismissal of thousands of Vioxx cases.

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 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); [2 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).

– [Sara C. Valentine](#)

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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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