Products Liability Law Daily Wrap Up, TOP STORY—EXPERT EVIDENCE—U.S.: High court asked to resolve circuit split on standard vis-a-vis adding expert witnesses, (Feb. 1, 2018)

Products Liability Law Daily Wrap Up

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By Leah S. Poniatowski, J.D.

Two women who had unsuccessfully challenged Dow Corning Corporation in products liability lawsuits arising from their auto-immune disorders allegedly caused by silicone-based breast implants asked the U.S. Supreme Court whether under the Federal Rules of Civil Procedure 16(b)(4) and 37(c)(1), which of the conflicting circuit court decisions correctly states the applicable standards for motions to add an expert when the experts already named are challenged under the Federal Rule of Evidence 702 and *Daubert* (*Gatza v. DCC Litigation Facility, Inc.*, January 25, 2018).

Two women who received silicone breast implants in the 1980s that were manufactured by Dow Corning Corporation had the implants removed in the early 1990s after reports emerged linking auto-immune system disorders with the implants. Both women, having developed debilitating auto-immune system diseases, filed products liability lawsuits shortly thereafter. Numerous women filed similar lawsuits, prompting Dow to file for bankruptcy protection. The products liability lawsuits were subject to an almost 10-year automatic stay while the bankruptcy proceedings came to a close. As part of the bankruptcy plan, the products liability plaintiffs had to proceed with their cases at a federal district court in Michigan or seek administrative relief. The women in the present case chose to proceed in the Michigan court, filing notices of intent to litigate in 2005.

DCC Litigation Facility was established as part of the bankruptcy plan to defend against the products liability lawsuits arising from silicone-based breast implants. After two years of dormancy, DCC filed appearances in 2007 and commenced filing a series of summary judgment motions. Eventually, three expert witnesses on behalf of the women provided depositions. However, before the scheduled trial date, DCC successfully moved for summary judgment on statute of limitations grounds. The U.S. Court of Appeals for the Sixth Circuit reversed, holding that the applicable limitations periods were those of Wisconsin and North Carolina, the states where the women had received the implants.

The women retained new counsel on remand and sought to add another expert witness. DCC refiled its motion to strike the testimony of the deposed witnesses pursuant to the federal evidentiary Rule 702 and *Daubert*. The women argued that under the federal procedural Rule 16(b)(4), they satisfied the "modified only for good cause" standard because the scheduling dates that had been set had expired during the appeals and pending summary judgment motions. They also asked that the expert witness identification and discovery deadlines be moved to allow the addition of another expert witness, who had provided testimony in other related cases. The women pointed to the delays brought on by Dow and the new studies that had been published during that time.

Prior proceedings. However, the trial court sided with DCC, holding that the women could not establish good cause because they were able to meet the original deadline with respect to designating experts and failed to establish that the fourth witness was not identifiable or available before that deadline. The court added that additional litigation expense was recognized as prejudicial and, accordingly, to allow the women to add the expert would further delay the case and add expense. The Sixth Circuit agreed in an unpublished opinion. It explained that on motions to amend, trial courts consider whether the moving party has shown "good cause" and whether that modification could cause the other party prejudice. The appellate court's analysis of "good cause" centered on whether the party had acted diligently, which the women failed to show.

Petition. The women challenge the Sixth Circuit's reasoning to decide the witness addition issue under Rule 16(b) and not Rule 37(c)(1), which provides a "harmless" standard. They assert that the Sixth Circuit applied an incorrect legal standard when analyzing the issue, namely that the case law upon which the court relied dealt with motions to amend pleadings—distinct from requesting expert substitution or deadline rescheduling. The women contend that other jurisdictions have resolved the issue, when considered as a "hybrid scheduling amendment/expert witness question," and do not come to the same conclusion. Specifically, the Tenth Circuit had ruled in several cases that when expert witnesses are challenged, it was an abuse of discretion not to allow an expert to be added and the scheduling order to be amended. Additionally, three other circuits have ruled similarly to the Tenth Circuit. The women stated that the Sixth Circuit's "diligently attempted to meet the original deadline" test was incongruent with the issue and that a "prejudice"/"harmless" test as used in other circuits would permit adding the fourth expert. The women cautioned that the federal procedural rules are not being consistently applied, and that the High Court should shed more light on the admissibility of expert witnesses.

This petition is No. 17-1064.

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Companies: DCC Litigation Facility, Inc.

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