Products Liability Law Daily Wrap Up, TOP STORY—DRUGS—N.J. Super. App. Div.: Choice of law, summary judgment rulings for Accutane makers in New Jersey MCL largely reversed, (Jul. 26, 2017)

Products Liability Law Daily Wrap Up

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By John W. Scanlan, J.D.

Warnings issued after April 10, 2002, of the risk of developing Inflammatory Bowel Disease (IBD) from ingesting the drug Accutane were not adequate as a matter of law, a New Jersey appellate court ruled in an unpublished decision reversing summary judgment favoring Hoffman-La Roche, Inc. and Roche Laboratories in 18 cases that were part of multicounty litigation in that state. The trial court also erred in finding that New Jersey substantive law applied in hundreds of other cases filed by residents of 44 other jurisdictions, reversing summary judgment for the defendants in many of the states but upholding it in others after making a state-by-state analysis of the relevant laws (*In re: Accutane Litigation*, July 25, 2017, *per curiam*).

In May 2005, the New Jersey Supreme Court designated Civil Action No. 271 as multi-county litigation (MCL) to centralize management of all Accutane litigation in the state. By the time the trial court issued its ruling, nearly 5,000 cases had been filed. The court first dismissed with prejudice all failure to warn claims brought by New Jersey residents because it found the warnings adequate under New Jersey law [see *Products Liability Law Daily*'s April 3, 2015 analysis]. In a subsequent decision, the court decided that New Jersey law would apply to the cases filed by out-of-state residents due to representations made by counsel for the plaintiffs. It also would be impractical to require jurors in Atlantic County to apply the laws of 44 other states and it would be unfair for out-of-state plaintiffs to petition New Jersey to create an MCL and then insist on having their claims adjudicated using the laws of their home states, the court reasoned. In the alternative, the trial court conducted a state-by-state analysis of the laws of each of the 44 jurisdictions before dismissing 392 cases under the laws of 21 of those jurisdictions, denied dismissal for 101 cases in 20 other jurisdictions, and dismissed 19 cases in three jurisdictions because it found that the law was so unclear that New Jersey law should apply [see *Products Liability Law Daily*'s July 27, 2015 analysis]. Appeals of both decisions were before the appellate court.

New Jersey cases. Stating that it rejected the trial court's determination that the warning was clear enough to negate a trial on its adequacy, the appellate court reversed the grant of summary judgment for the defendants. The post-2002 warnings to physicians and patients may be clearer than the 1984 warnings they replaced, the court said, but still lacked the "causal" language that would cause physicians to convey a warning to their patients. The language that IBD was "associated" with IBD use was susceptible of different meanings and, when viewed in the light most favorable to the plaintiffs, was not sufficiently strong to suggest to a reasonably prudent reader that being "associated" with IBD was the same as "causing" IBD. The warnings also did not have information regarding a latency effect or any statement that IBD is not reversible, instead implying that a patient that is "treated" would not suffer "serious health problems." Further, there was evidence that the defendants had after-acquired knowledge of harmful effects that they did not disclose, including that in some cases that there was a causal effect between Accutane and IBD, and that the defendants had received several positive rechallenge reports that they did not include in the label. This evidence was sufficient to overcome the rebuttable statutory presumption of adequacy and to create a jury question as to the adequacy of the warning. The court also found that the plaintiffs had presented substantial evidence of economically-driven manipulation of the post-market regulatory process even though it observed that it was not necessary to address this issue.

Choice of law. The trial court erred in finding that New Jersey law applied to the cases brought by out-of-state plaintiffs instead of the law of the state where the injury took place. The trial court had determined that the out-of-state plaintiffs' counsel had waived a choice-of-law analysis because he had represented to the court in the

petition for MCL treatment that the plaintiffs sought a determination of whether the defendants had violated the New Jersey Products Liability Act. However, the appellate court found that this statement did not constitute a waiver of a choice of law analysis that was binding upon all out-of-state plaintiffs in the MCL, but should at most be considered a factor in the choice-of-law analysis. At that time, the appellate court noted, that attorney had not been designated liaison counsel and the complaints currently on appeal had not yet been filed; as a result, he did not have the authority to stipulate to the choice of law for the plaintiffs (and had not done so).

Applying New Jersey's choice of law rules, the appellate court rejected the approach that simplification of procedures and uniformity of results should govern the choice of law questions. Because each plaintiff had filed a separate complaint, there was less potential for jury confusion as there was in a case in which plaintiffs pursued claims under the laws of several states in a single proceeding. However, the appellate court agreed with the reasoning of the trial court's alternative analysis, which found that the law of the state of injury applied to 41 of the 44 jurisdictions (plus the three that the trial court found overly confusing). There was a conflict between New Jersey law and the laws of the other 44 jurisdictions because only three of those jurisdictions had adopted statutory rebuttable presumptions of adequacy for FDA-approved warnings, as New Jersey had, and those three appeared to apply those presumptions differently than New Jersey did. Applying the Restatement (Second) of Conflicts of Law, the court found that the states where the injuries took place had a more significant relationship to the suits than New Jersey—the injuries occurred in those states, the plaintiffs resided there, and the plaintiffs were prescribed and ingested the drugs there. Furthermore, the defendants deliberately had marketed and sold their products in those jurisdictions.

New Jersey's interest in deterring local manufacturers from providing inadequate product warnings did not outweigh the other states' interests in protecting their citizens from harm and compensating their citizens for injuries, and application of New Jersey law limiting liability for FDA-approved warnings could frustrate other states' policies in deterring a larger scope of inadequate warnings. The defendants could not reasonably expect the protection of New Jersey's presumption to apply in other states lacking an interest in reducing the liability of pharmaceutical makers in New Jersey. Interests of judicial administration should be given lesser weight.

Out of state plaintiffs. Examining the substantive law of the 44 other jurisdictions, the appellate court reversed the trial court's summary judgment rulings for plaintiffs in some but not all of the jurisdictions involved.

For three jurisdictions, the trial court erred in applying New Jersey law on the grounds that those jurisdictions' law was either "irrational" (Louisiana) or too sparse to apply (Nebraska and South Dakota) because the trial court was required to disregard its own substantive preference and to ascertain the law of those jurisdictions.

In jurisdictions in which the learned intermediary doctrine had been adopted in a way in which the trial court believed that permitted a determination of the adequacy of a drug label's warning as a matter of law, the appellate panel found that reversal of the trial court's grant of summary judgment to the manufacturers was warranted for plaintiffs in Alabama, Florida, Georgia, Illinois, Kentucky, Puerto Rico, Tennessee, and Washington, but summary judgment was affirmed for plaintiffs in California, Colorado, Indiana, Maryland, Mississippi, New York, Texas, and Virginia.

In jurisdictions in which the adequacy of the warning was viewed as determinable as a matter of law for other reasons, the appellate court reversed the summary judgment ruling for plaintiffs in Missouri, New Hampshire, North Dakota, Wisconsin, and Wyoming.

The appellate court declined to reverse the denial of summary judgment in cases brought by plaintiffs in 20 other jurisdictions, stating there was insufficient merit in the defendants' arguments to merit discussion.

The cases are Nos. A-4760-14T1 and A-0164-15T1.

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Companies: Hoffmann-La Roche, Inc.; Roche Laboratories Inc.

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