Products Liability Law Daily Wrap Up, WARNINGS ISSUES—DRUGS—N.J. Super. App. Div.: Claims by 514 Accutane plaintiffs thrown out, (Jul. 27, 2015)

Products Liability Law Daily Wrap Up

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By John W. Scanlan, J.D.

Hoffman-La Roche, Inc. and Roche Laboratories provided adequate warnings after April 10, 2002, of the risk of developing Inflammatory Bowel Disease (IBD) from ingesting the drug Accutane, the New Jersey Products Liability Act, the New Jersey Superior Court handling multicounty litigation for Accutane ruled in an omnibus motion granting summary judgment to the manufacturers in 514 claims arising in 44 jurisdictions. In the event its order of dismissal is found to be in error, the court also made a ruling in the alternative in which it made a choice-of-law analysis for each of the 44 jurisdictions that would dismiss with prejudice the claims by the plaintiffs in most of them (*In re Accutane Litigation*, July 24, 2015, Johnson, N.).

Background. 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. Two of the then-outstanding 68 cases had been filed by residents of New Jersey; currently, 35 out of more than 4,600 cases are known to have been filed by New Jersey residents. In April 2015, the court dismissed with prejudice all failure to warn claims brought by New Jersey residents because the warnings were adequate under New Jersey law (see Products Liability Law Daily's April 3, 2015 analysis). At that time, the court declined to rule on claims from plaintiffs in other states until counsel could brief the court on the law and required levels of proof in those jurisdictions.

Application of New Jersey law. Applying New Jersey law led to the same result as in the previous order—the claims were dismissed with prejudice because the warnings were adequate. The court observed while reviewing the case materials that the original letters from the plaintiffs' attorney petitioning for MCL designation that the primary reason for their request to consolidate the cases was the need for a determination as to "whether defendant violated the New Jersey Products Liability Act (NJPLA) in its marketing and sale of Accutane." The plaintiffs' attorney had not requested a choice of law analysis for each state in which there were plaintiffs. Apologizing for not having noticed this earlier, the court stated that because the plaintiffs asked the court to consolidate all claims on the question of whether the defendants had violated the NJPLA in marketing and selling Accutane, the court must consider all remaining claims and issues under New Jersey law.

It also observed that trying to resolve more than 4,600 cases by applying the law of each state would be complex and impractical and would place jurors in Atlantic County in the position of hearing claims under the laws of other states. The plaintiffs argued that adequacy of labeling is a subjective question that must be considered "plaintiff-by-plaintiff, doctor-by-doctor," but the court found this to be inconsistent with the philosophy of establishing an MCL and creates the potential for a quagmire. Furthermore, it is unfair for out-of-state plaintiffs to petition New Jersey to create an MCL and then insist on having their claims adjudicated under the laws of their home states. By contrast, application of New Jersey law to all outstanding claims would advance New Jersey's interest in uniformity and predictability.

Alternative ruling

Choice of law. The court also issued an alternative ruling in which it made a state-by-state choice of law analysis to determine whether to apply New Jersey law or the law of the state from which the claims arose. The court said that it was "at a loss to comprehend why/how any jurisdiction could fail to acknowledge its obligation to apply the [Learned Intermediary] Doctrine when considering the adequacy of a label for a prescription

medication," and as a result the plaintiffs must demonstrate why New Jersey law should not control in a given jurisdiction that has not yet acknowledged this doctrine.

Subjective vs. objective standard. The plaintiffs repeatedly argued that each and every prescribing physician must be deposed prior to the entry of summary judgment in order to learn whether those physicians might have done something different regarding their patients if they had received additional information. However, this amounted to a blanket rejection of any objective standard that would make uniformity and predictability impossible because a manufacturer could never fulfill its duty to warn as long as there was at least one physician who testified that additional warnings would have affecting his or her decision to prescribe.

Rejecting a subjective standard urged by the plaintiffs that would always give plaintiffs "the last card," the court found that "enlightened courts" have determined that in order to be adequate as a matter of law, a manufacturer's warning must indicate the scope of the danger, communicate the extent or seriousness of the danger, alert a reasonably prudent practitioner, and be conveyed in a satisfactory manner. While adequacy generally is a fact question to be decided by a jury, the court found "untenable" the proposition that adequacy should always go to a jury even if there is no genuine dispute as to whether the manufacturer had explicitly warned of the precise risk at issue.

State-by-state summary judgment rulings. The court first discussed 13 states (plus Puerto Rico) that had adopted the learned intermediary doctrine and authorized a trial court to determine as a matter of law the adequacy of a drug label. For each of these jurisdictions, the court applied the law of the state of injury and dismissed with prejudice the claims of all of the plaintiffs residing there. The court could not categorize the remaining jurisdictions because the laws were too varied, but in most of them the manufacturers' motion for summary judgment would be denied in the alternative because the plaintiffs' experts may create a genuine issue of material fact for the jury under that jurisdiction's laws or because additional findings of fact would be necessary. In several other states, application of that state's law would result in the dismissal of the claims.

The claims of Louisiana plaintiffs were dismissed with prejudice because Louisiana had an apparent policy of giving the prescribing physician an effective veto on the adequacy of a label, and the court stated that it must apply New Jersey law because it would not "subject a New Jersey corporate resident to such an irrational standard." New Jersey law also was applied to dismiss the claims of Nebraska and South Dakota plaintiffs because the sparse nature of the case law in those states made a result difficult to predict, but New Jersey's approach was rational and fair and must control.

The case is No. 271 (MCL).

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

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