Products Liability Law Daily Wrap Up, STATUTES OF LIMITATIONS AND REPOSE—DRUGS—E.D. Penn.: Consumer's claims that he developed chickenpox from shingles vaccine was time-barred, (Apr. 18, 2017)

Products Liability Law Daily Wrap Up

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By Sara Cracau, J.D.

A personal injury action brought by a consumer who developed chickenpox after receiving a shingles vaccination was time-barred because the suit was brought more than two years after he had an "unrebutted suspicion" and other information that there was a "reasonable possibility" that the vaccine caused his symptoms, a federal district court in Pennsylvania ruled in granting summary judgment to the manufacturer. The consumer failed to provide a factual basis for invoking the discovery rule that would have tolled commencement of the limitation period (*Juday v. Merck & Co., Inc.,* April 13, 2017, Bartle, J.).

The consumer, a resident of Indiana, received the Zostavax vaccine at a pharmacy in Indiana on March 2, 2014, which had been prescribed to him a week earlier by his primary care physician. By March 10, he began experiencing a fever of 101 degrees Fahrenheit and a rash on his abdomen and neck that looked like chickenpox. On March 12, the consumer and his wife visited a nurse practitioner, who was not sure what the consumer's illness was or its cause. On March 13, the consumer informed his employer that he would not be at work and completed a disability form in which in indicated that he had had a "severe allergic reaction to Shingles" which he later clarified in his deposition that he meant "shingles vaccination." On March 24, the consumer visited the nurse practitioner again and, although she did not reach a conclusion concerning the cause of the consumer's illness, she did note that the vaccine was a possible cause even though she had understood from the manufacturer that it had no recorded cases of chickenpox from the vaccine.

On April 1, the consumer visited a physician who told the consumer that his illness may have resulted from the vaccine and referred him to an infectious disease specialist. The specialist confirmed on April 9 that the vaccine was the cause of his symptoms.

On April 5, 2016, the consumer brought suit in federal court in Pennsylvania against Merck Sharp & Dohme Corp. and Merck & Co., Inc., the manufacturer of the vaccine. The complaint contained claims for negligence, failure to warn, breach of express warranty, breach of implied warranty, negligent misrepresentation, unjust enrichment, a loss of consortium claim made by the consumer's wife. Merck filed for summary judgment, claiming that the action was barred by the two-year statute of limitations.

Applicable statute of limitations. Applying a choice-of-law analysis, the court concluded that the applicable statute of limitations for claims accruing outside Pennsylvania was either that provided by the law of the state where the claim accrued or by Pennsylvania law, whichever first barred the claim. The limitations periods for negligence, design defect, failure to warn, negligent misrepresentation, and loss of consortium were the same in both states. For the breach of warranty and the unjust enrichment claims, Pennsylvania adopted the Indiana two-year statute of limitations because the Indiana statute barred those claims before Pennsylvania's four-year limitations period. As a result, all of the consumer's claims were subject to a two-year time bar.

Tolling inapplicable. The court found no basis for tolling the statutes of limitations based on the discovery rule as urged by the consumer for his claims of negligence, design defect, failure to warn, negligent misrepresentation, and loss of consortium. Again applying the choice of law analysis, the court found that the Pennsylvania discovery rule, which provided a less onerous standard than the Indiana standard to spark running of the limitations period, applied because it would bar these consumer's claims first. In Pennsylvania, tolling under the discovery rule ends when the consumer, in the exercise of reasonable diligence, has an "unrebutted

suspicion" that there is a connection between the injury and the symptoms, whereas Indiana requires the consumer to have information that provided a "reasonable possibility" of such a connection.

Similarly, the court found no basis for tolling the statute of limitations for the consumer's claims for breach of express and implied warranties or for unjust enrichment. Indiana applies a two-year statute and permits tolling based on the discovery rule, whereas Pennsylvania provides for a longer four-year statute of limitations for such claims but allows tolling only for the unjust enrichment claims. In this case, Indiana's limitations period applied because it would bar them first.

The consumer not only had an "unrebutted suspicion" on at least March 13, 2014, that he had suffered an injury from the vaccine but also had information that there was a reasonable possibility that there was a causal connection. He developed a rash eight days after the vaccine. He filed a disability claim with his employer noting that his illness resulted from a severe allergic reaction to shingles, which he explained in his deposition to refer to the vaccine. His medical records for March 24 and April 1, 2014 confirmed the court's conclusion.

Fraudulent concealment claim failed. The court rejected the consumer's final argument that the discovery rule should toll the commencement of the limitation period because the manufacturer engaged in fraudulent concealment because there was no evidence that Merck concealed any material fact from or deceived the consumer or violated any duty owed to him and his wife. There also was no evidence that Merck knew of another case where the vaccine had caused chickenpox or that it had misled the consumer. Therefore, there was no basis for this claim to justify tolling the statute of limitations. As a result, his claims were untimely because they were filed more than two years after March 13, 2014.

The case is No. 16-1547.

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Companies: Merck & Co., Inc.; Merck Sharp & Dohme Corp.

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