

## [Products Liability Law Daily Wrap Up, TOP STORY—DRUGS—5th Cir.: Chemotherapy drug-related hair loss claims were time-barred under Louisiana law, \(Apr. 22, 2021\)](#)

Products Liability Law Daily Wrap Up

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The state's equitable tolling doctrine did not save the patients' failure to warn claims.

In an appeal arising out of the multidistrict litigation (MDL) against the label holders and distributors of the drug Taxotere, the U.S. Court of Appeals for the Fifth Circuit affirmed a federal district court in Louisiana's ruling that claims by three of the MDL patients were prescribed under Louisiana's one-year prescription period and that the state's equitable tolling doctrine of *contra non valentem* did not save their claims. The court found that the one-year period to bring suit began six months after the claimants ceased chemotherapy and that they failed to perform reasonable due diligence into their continuing hair loss (*Thibodeaux v. Sanofi U.S. Services, Inc.*, April 21, 2021, Southwick, L.).

Sanofi U.S. Services, Inc. and Sanofi-Aventis U.S., L.L.C. (collectively, Sanofi) label and distribute Taxotere, a chemotherapy drug used to treat breast cancer. Numerous women claimed to have suffered permanent chemotherapy-induced hair loss after taking Taxotere. The patients alleged that Taxotere caused their permanent chemotherapy-induced alopecia. Their cases were consolidated into an MDL in October 2016. Sanofi filed a motion to dismiss many of the MDL claims as time-barred, which was denied as premature. Sanofi then filed a motion for summary judgment for those claims on the same grounds. The court accepted the master complaint's definition that hair loss which persisted six months after the completion of chemotherapy was permanent, and it determined that the claims were facially prescribed under Louisiana's one-year prescription period. The court also ruled that because the patients had enough information to begin pursuing their claims six months after completing chemotherapy, the doctrine of *contra non valentem* did not save their claims. Therefore, the district court granted Sanofi's motion for summary judgment. The three patients subsequently appealed.

**Claims were facially prescribed.** The appellate court first determined that the claims were facially prescribed. Louisiana law provides a one-year liberative prescription period by statute for products liability cases. The prescription period begins to run from the date an injury is sustained. An injury is considered to have been sustained on the date it manifested with sufficient certainty to support accrual of a cause of action. The prescriptive statute does not contain an equitable tolling clause or a date of discovery provision. The court, therefore, determined that as a matter of law, the injury defined by the master complaint as "an absence of or incomplete hair regrowth six months beyond the completion of chemotherapy" by definition was sustained six months after the completion of chemotherapy. Because the three claimants brought suit some number of years after they completed chemotherapy, the court found that their claims were prescribed by the terms of the master complaint.

***Contra non valentem* did not toll the prescription period.** The appeals court held that the claimants did not perform the reasonable investigation necessary for the prescription period to be tolled. *Contra non valentem* is a common law doctrine which halts the prescription period until a claimant becomes aware that she could bring suit. The doctrine is only applied in four "exceptional circumstances," including when the defendant prevented the claimant from availing herself of the cause of action and when the cause of action was not known or reasonably known to the claimant. The patients argued that the latter two circumstances applied. The Fifth Circuit addressed the latter category, the "discovery rule," first. The discovery rule is only applied when a claimant's ignorance was neither willful nor negligent. Constructive notice is sufficient for the cause of action to accrue. Further, while mere suspicion that something is wrong is insufficient to trigger the rule, claimants are

not entitled to wait until they are certain of the identity of the cause of their injury. Also, claimants must exercise due diligence to uncover the cause of their injuries. The appellate court determined that *contra non valentem* tolled the prescription period until the claimants should have reasonably considered Taxotere as a potential root cause of their injury. The court noted that the three claimants did not discuss their hair loss with their doctors. Moreover, the court found that individuals on the internet were linking their hair loss with Taxotere in 2006, that the medical literature was exploring the link at that time, and that the causal connection was being discussed in the media in 2010. Consequently, the appeals court found that the claimants should have diligently explored the potential causal link between Taxotere and their hair loss, which a reasonable inquiry into their injury would have uncovered. The court concluded that the claimants could not rely on the discovery rule to toll the prescription period. Finally, the court stated that the claimants were not prevented from availing themselves of their causes of action so that *contra non valentem* exceptional circumstance did not apply.

The cases are Nos. [20-30104](#) and [20-30107](#).

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Companies: Sanofi U.S. Services, Inc. f/k/a Sanofi-Aventis U.S., Inc.; -Aventis, U.S., LLC

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