Products Liability Law Daily Wrap Up, STATUTES OF LIMITATIONS AND REPOSE—MEDICAL DEVICES—E.D. Ky.: Statute of limitations quashes most claims arising out of defective pelvic mesh, (Jan. 14, 2020)

Products Liability Law Daily Wrap Up

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By Sheryl Allenson, J.D.

A patient who was implanted with an allegedly defective pelvic mesh product failed to file suit within the applicable limitations period on most of the 18 counts alleged, but avoided summary judgment on other claims.

A federal district court in Kentucky held that pelvic mesh products liability claims were filed outside of the relevant statute of limitations. According to the court, when the patient and her husband filed suit as part of a multidistrict litigation in West Virginia against the manufacturer of the pelvic mesh products, more than a year had passed since the claims had "accrued," even when taking the discovery rule into account. However, some additional claims, which had longer statute of limitations periods, survived summary judgment (*Cutter v. Ethicon, Inc.*, January 9, 2020, Reeves, D.).

In April 2006, a gynecologist diagnosed the patient with several conditions and recommended that she be implanted with a posterior Prolift™, which is a polypropylene mesh enhancement device. The doctor had been initially trained on the Prolift in 2005 by the manufacturer's doctors. He learned about associated risks from a variety of means, though he admitted that he did not read or rely upon written communications about relevant risks.

Although he knew about the risks, the gynecologist nonetheless recommended implantation of the device, claiming that he thought the device was safe when he implanted it in the patient in June 2006. The patient claimed that she agreed to the implantation wholly on the gynecologist's recommendation, but that if she had known of the pain caused by the device, she would not have undergone the procedure.

After the device was implanted, the patient experienced pain and other symptoms. In October 2008, the gynecologist discovered that the "right arm" of the device had come loose. Although he performed a "revision surgery" to remove part of the mesh in December 2008, the patient continued to suffer from pain and other undesirable symptoms. She did not report the ongoing symptoms to any physician until August 2010, when a month later, another physician performed a second revision surgery.

After that surgery, the patient reported having continued pain during intercourse and told a third physician that her husband felt a "sharp scrape" during intercourse. In March 2011, that physician recommended she have another revision surgery, which was performed the same month by yet another doctor.

In November 2011, the patient saw a television ad regarding litigation arising from device defects, and in May 2012, she and her husband filed suit. In September 2012, the patient and her husband adopted the 18-count complaint filed by the MDL plaintiffs. The manufacturer filed a summary judgment motion, claiming that most of the claims were barred by the statute of limitations and, in some cases, were subject to dismissal on alternative theories.

Applicable law. At the outset, the parties agreed that Kentucky law was applicable to the substantive claims. Under Kentucky law, personal injury, products liability, and loss of consortium claims must be commenced within a year of when the claim accrues. In this instance, the discovery rule applied, which the court explained meant that tolling ceases when the plaintiff either actually or constructively knows that the defendant may have caused the injury. In certain circumstances, parties have a duty to inquire about the safety of a product. The court was tasked with finding when these claims accrued.

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Timeliness of claims. The patient asserted that the causes of action accrued when she saw the television advertisement. The court disagreed, finding that by March 2011, the patient and her husband had "sufficient knowledge of critical facts" such that they would have been on notice of possible defects that would have triggered a duty to inquire relating to the product liability, personal injury, and loss of consortium causes of action. Thus, those actions accrued no later than March 11, 2011. They were asserted in either May or September 2012 and, therefore, were barred by the Kentucky statute of limitations. The court also rejected the patient's argument claiming a lack of proximate cause.

The court also found that the breach of express and implied warranty claims were barred by a four-year statute of limitations. Those claims accrued on the date of implantation, because the discovery rule was inapplicable. Furthermore, there was a lack of privity. The constructive fraud, common law fraud, and negligent misrepresentation claims also fell short because the complaint lacked allegations that the manufacturer made affirmative misrepresentations.

Several claims survived. In addition to two claims that the manufacturer failed to specifically challenge, the court upheld two others. The court construed the patient's fraudulent concealment claim as one for fraud by omission, noting that it was based on a duty to disclose and not on a requirement for an affirmative misrepresentation. Moreover, negligent infliction of emotional distress (NIED) claims are subject to a five-year statute of limitations, and the discovery rule applies. Here, the NIED claim could not have accrued before October 2008, when the gynecologist informed the patient about the problem with the implant. Thus, summary judgment was denied on those claims.

The case is No. 5:19-cv-00443-DCR.

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Companies: Ethicon, Inc.; Ethicon Women's Health and Urology; Gynecare; Johnson & Johnson

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