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PRODUCTS LIABILITY NEWSLETTER

Selected Case Summaries
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I. SUMMARY

1. In this products liability case, the Supreme Court of the United States decided two separate but related issues regarding federal preemption. The Court: (a) clarified the applicable “clear evidence” standard for preemption questions, and (b) determined whether this preemption question was for a judge or a jury to decide. The Court refused to define “clear evidence” like other evidentiary burdens but clarified that a judge must simply determine whether the relevant federal laws “irreconcilably conflict” with state law. If the federal law cannot be reconciled with state law, then preemption applies. *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019).

2. In a unanimous opinion, the Texas Supreme Court ruled that civil conspiracy is not an independent tort but one that is derivative of an underlying wrong. The Court was presented with the question of whether a claim for civil conspiracy has its own statute of limitations. The Supreme Court held: “[h]aving determined that civil conspiracy is not an independent tort, it follows that the claim does not have its own statute of limitations.” Thus, a civil conspiracy claim will live and die by the limitations period of the underlying tort. In that same regard, the accrual period for civil conspiracy is also controlled by the underlying tort. *Agar Corp. v. Electro Circuits Int’l, LLC*, 2019 WL 1495211 (Tex. April 5, 2019).

3. In this negligence action, the Fifth Circuit Court of Appeals decided whether under Texas law the Walgreens pharmacy chain was liable for a death and injuries caused by a customer who was given the wrong prescription. The Court acknowledged that it had never recognized a duty in such circumstances and “the plaintiffs instead ask us to extrapolate a duty from other areas of Texas tort law.” The Court did not find the analogous areas of law applicable to these facts. Further, in the core of its analysis, the Court ruled it was not foreseeable to Walgreen’s that such injuries to third parties would occur. *Martinez v. Walgreen Co.*, 2019 WL 3851733 (5th Cir. Aug. 16, 2019).

4. II. DISCUSSION

1. *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019).

In this products liability case, the Supreme Court of the United States decided two separate but related issues regarding federal preemption. The Court: (a) clarified the applicable “clear evidence” standard for preemption questions, and (b) determined whether this preemption question was for a judge or a jury to decide. The Court refused to define “clear evidence” like other evidentiary burdens but clarified that a judge must simply determine whether the relevant federal laws “irreconcilably conflict” with state law. If the federal law cannot be reconciled with state law, then preemption applies.

The Petitioner in this case, Merck Sharp & Dohme Corp., manufactures Fosamax, a drug that treats and prevents osteoporosis in postmenopausal women. Fosamax, after years of use, can cause patients to suffer “atypical femoral fractures,” that is, a rare type of complete, low-energy fracture that affects the thigh bone.

When the Food and Drug Administration first approved of the manufacture and sale of Fosamax in 1995, the Fosamax label did not warn of the then-speculative risk of atypical femoral fractures associated with the drug. But stronger evidence connecting Fosamax to atypical femoral fractures developed after 1995. And the FDA ultimately ordered Merck to add a warning about atypical femoral fractures to the Fosamax label in 2011.

The Respondents sued Merck seeking tort damages on the ground that state law imposed upon Merck a legal duty to warn respondents and their doctors about the risk of atypical femoral fractures associated with using Fosamax. Merck, in defense, argued that respondents’ state-law failure-to-warn claims should be dismissed as preempted by federal law.

The Court decided the two related questions in a combined analysis. It found this preemption question to be rooted in law—better suited for judges—because it would “produce greater uniformity among courts.” Also, the Court noted that when a question “falls somewhere between a pristine legal standard and a simple historical fact” the better positioned judicial actor should determine the outcome. Here, the court found that actor to be a judge.

Next, the Court clarified the impossibility defense first espoused in *Wyeth v. Levine*. The Court acknowledged “[i]mpossibility preemption is a demanding defense.” *Wyeth* held that a state-law failure-to-warn claim is pre-empted where there is “clear evidence” that the FDA would not have approved a change to the label. In defining what “clear evidence” actually entails the Court stated:

We do not further define [the] use of the words “clear evidence” in terms of evidentiary standards, such as “preponderance of the evidence” or “clear and convincing evidence” and so forth, because ... courts should treat the critical question not as a matter of fact for a jury but as a matter of law for the judge to decide. And where that is so, the judge must simply ask himself or herself whether the relevant federal and state laws “irreconcilably conflict[.]”

In sum, it should be encouraging that judges, not juries, will resolve preemption motions in the future, and that the Court clarified what it meant by “clear evidence” in *Wyeth v. Levine*.

2. *Agar Corp. v. Electro Circuits Int’l, LLC*, 2019 WL 1495211 (Tex. April 5, 2019).

In a unanimous opinion, the Texas Supreme Court ruled that civil conspiracy is not an independent tort but one that is derivative of an underlying wrong. The Court was presented with the question of whether a claim for civil conspiracy has its own statute of limitations. The Supreme Court held: “[h]aving determined that civil conspiracy is not an independent tort, it follows that the claim does not have its own statute of limitations.” Thus, a civil conspiracy claim will live and die by the limitations period of the underlying tort. In that same regard, the accrual period for civil conspiracy is also controlled by the underlying tort.

In this case, the Plaintiff, a manufacturer in the oil and gas industry, argued “that the applicable statute of limitations for a civil conspiracy claim should be that of the underlying tort because that limitations period more accurately reflects civil conspiracy’s status as a vicarious liability theory that hinges on an underlying tort.”

The Defendant responded “that civil conspiracy is not a vicarious liability theory but rather an independent cause of action in the nature of a trespass to which section 16.003’s two-year statute of limitations applies.” The Court summed up the disagreement as “[t]he parties thus disagree about whether civil conspiracy is an independent tort or merely a theory of vicarious tort liability derivative of an underlying wrong.”

For background, the Court stated a civil conspiracy arises when “the plaintiff seeks to hold the defendant liable for an injury caused by a third party who has acted in combination with the defendant for a common purpose.” The Court then embarked on a review of the elements of civil conspiracy and whether those elements indicated that the claim was an independent tort. It stated:

Our case law on civil conspiracy leaves Texas’s position on the debate arguably unclear. Although we have not expressly said whether a civil conspiracy claim is in the nature of a vicarious liability theory or an independent tort, we have at various times used language implying that it was one or the other.

In reviewing its past decisions, the Court found “the damages element refers not to the entire conspiracy itself but to some tortious act committed by a co-conspirator pursuant to the conspiracy.” Thus, the damages element was not contingent on the civil conspiracy claim, further proving that civil conspiracy is a vicarious liability theory. Accordingly, “[t]hese cases thus do not contradict those that more clearly indicate that civil conspiracy is a theory of vicarious liability and not an independent tort.”

Since “civil conspiracy is not an independent tort, it follows that the claim does not have its own statute of limitations.” Stated differently, “[b]ecause civil conspiracy is a derivative tort that depends on participation in some underlying tort, we conclude that the applicable statute of limitations must coincide with that of the underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable.”

Further, the Court rejected a separate accrual period for civil conspiracy actions. “Because a civil conspiracy claim is derivative of an underlying tort, the claim accrues when the underlying tort accrues.” The Court also rejected

the last-overt-act rule and found the civil conspiracy claim begins at the same time as the direct claims for those torts.

Going forward, it is clear, when filing a claim for civil conspiracy the limitations period is controlled by the underlying tort. And, the accrual period is going to be the same as the underlying tort. Thus, attorneys should be aware of the underlying tort’s statute of limitations and accrual period when filing. But, this decision should not be construed to hamper the ability to bring a civil conspiracy claim against multiple defendants.

3. *Martinez v. Walgreen Co.*, WL 3851733 (5th Cir. Aug. 16, 2019).

In this negligence action, the Fifth Circuit Court of Appeals decided whether under Texas law the Walgreens pharmacy chain was liable for a death and injuries caused by a customer who was given the wrong prescription. The Court acknowledged that it had never recognized a duty in such circumstances and “the plaintiffs instead ask us to extrapolate a duty from other areas of Texas tort law.” The Court did not find the analogous areas of law applicable to these facts. Further, in the core of its analysis, the Court ruled it was not foreseeable to Walgreen’s that such injuries to third parties would occur.

Texas law instructs that “[a] negligence cause of action has three elements: 1) a legal duty; 2) breach of that duty; and 3) damages proximately resulting from the breach.” Here, the District Court stopped at the first prong and found Walgreens did not have a legal duty. Further, the District Court found “[w]hen a duty has not been recognized in particular circumstances, the question is whether one should be.”

The Fifth Circuit noted that the Texas Supreme Court had not answered the question of whether a pharmacy owed duties to third parties. Stating, the “Texas Supreme Court has not yet addressed whether a pharmacy’s duty of care is limited to that pharmacy’s own patients.” And, “the plaintiffs instead ask us to extrapolate a duty from other areas of Texas tort law.”

First, the Plaintiffs relied on *Gooden v. Tips*, an intermediate appellate case holding that where a doctor had prescribed a patient Quaaludes without warning her about the risks of driving under their influence, the doctor owed a duty of care to a third party who was struck by the patient.

But, the Court found this argument unpersuasive, explaining that “foreseeability is paramount to the duty analysis, and there are relevant differences between failing to warn a patient of the risks of medication that the healthcare professional knows the patient will take, on the one hand, and giving a patient a bottle of prescription medication intended for someone else, on the other.”

Next, the Plaintiffs argued that tort liability in this case “is simply an analogue of ‘dram shop’ liability under Texas law.” The Court also found this argument to be unpersuasive due to the differences between a pharmacy and a typical dram shop establishment. “It does not follow that because the Texas Supreme Court recognized a duty of care between a licensee and third parties foreseeably injured by drunk driving—in a move promptly superseded by statute—it would recognize a duty between pharmacies and third parties injured as the result of mis-filled prescriptions.”

Finally, the “core of the duty analysis” in this case was whether a duty existed under Texas Tort law. To determine whether a duty exists, the Fifth Circuit found that “Texas courts ask whether such a duty ‘should be’ recognized.” This involves,

social, economic, and political questions and their application to the facts at hand, and weighing the risk, foreseeability, and likelihood of injury against the social utility of the actor’s conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the defendant, along with considering whether one party would generally have superior knowledge of the risk or a right to control the actor who caused the harm.

The Court found that the Texas Supreme Court “described foreseeability as the foremost and dominant consideration in the duty analysis.” Thus, the Court examined the harm caused to determine whether it was a foreseeable consequence of Walgreens’s alleged conduct. “To be sure, the foreseeability inquiry does not require Walgreens to have foreseen the precise harm to third parties that in fact resulted from giving [the driver] someone else’s prescription. But where Texas courts have found the risk of harm to a third party to have been foreseeable, the possibility of harm was significantly less attenuated.”

Here, the Court found that the possibility of harm was too attenuated. “Looking to the factors the Texas Supreme Court would consider—in particular, the foreseeability of the harm, the presence of other protections, and the danger of interference with the legislature’s balancing of public policies—we conclude that the Texas Supreme Court would not recognize a duty between a pharmacy and third parties injured as a result of a customer taking the incorrect prescription.”

In closing, the Court refused to acknowledge a duty existed under these facts. The Court felt, that under Texas law, a duty could not be imposed on a pharmacy for the injuries caused to third parties by a customer who was negligently given someone else’s prescription.