I suggest the following simple ten ways to avoid malpractice in litigation:

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PRODUCT LIABILITY

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IN THIS ISSUE

The authors discuss the four recent decisions that impact product liability litigation from the United States Court of Appeals for the Sixth Circuit.

Recently Issued Opinions of Interest to Product Liability Lawyers from the United States Court of Appeals for the Sixth Circuit

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The United States Court of Appeals for the Sixth Circuit has recently rendered four opinions of interest to product liability practitioners.

The first three of those opinions were all rendered on the same day, August 23, 2011, and all were not recommended for full-text publication. Those opinions grew out of the multi-district litigation in the Middle District of Tennessee, MDL No. 06-1760 (M.D. Tenn.), involving the prescriptions drugs Aredia and Zometa. In each case, the Sixth Circuit affirmed either a dismissal or a summary judgment. Each has a slightly different lesson for the practitioner.

In the case of *M. Margaret Patterson, et al. v. Novartis Pharmaceuticals Corporation*, No. 10-5886, 2011 WL 3701884 (6th Cir. Aug. 23, 2011), the Court of Appeals affirmed a dismissal on *Twombly* and *Iqbal* grounds. In that case, the plaintiff alleged in the complaint that she had been infused with “Aredia and/or generic Aredia (pamidronate).” The District Court dismissed, holding that the complaint did not contain sufficient facts to allege that she had taken Aredia manufactured by Novartis. The Court noted that the substantive law of Massachusetts governed and that Massachusetts law requires that a plaintiff suing a manufacturer in a product liability action be able to prove that the injury can be traced to that specific manufacturer. Since the complaint alleged only a possibility that the infusions were of Aredia manufactured by Novartis, it did not satisfy that requirement.

The Sixth Circuit, in affirming, noted that the federal pleadings standard set forth in *Twombly* and *Iqbal* requires that Patterson have pled enough facts to state a claim for relief that is plausible on its face. It should be noted that after the Court granted the motion to dismiss, the plaintiff sought leave to amend the complaint, which the trial court denied. The Sixth Circuit noted that it could only reverse the trial court’s decision on this issue for abuse of discretion, unless the motion was denied on grounds of futility, in which case the court reviews *de novo*. The obvious lesson is that it is important to review the complaint for compliance with the *Twombly* and *Iqbal* pleading standards and for compliance with state law requirements, as the federal courts will enforce those requirements.

The second case involved three different cases, consolidated for appeal, *Punnose K. Thomas, Patricia Melau, individually and as personal representative of Edwin Melau, deceased, and Terry Anderson v. Novartis Pharmaceuticals Corporation*, Nos. 09-6147, 09-6272, 09-6274, 2011 WL 3701816 (6th Cir. Aug. 23, 2011). In that case, the trial court granted summary judgment in favor of Novartis after granting the defendant’s motions to exclude the expert testimony of the plaintiffs’ non-retained treating physicians on the question of specific causation.

The Sixth Circuit upheld the exclusion of each of the plaintiffs’ proposed testifying experts applying the abuse of discretion standard and upheld the summary judgment on the basis that the plaintiffs did not have evidence of specific causation. The Court noted that a treating physician can provide expert testimony with respect to the cause of an illness without being among the world’s foremost authorities on the subject but noted that that testimony is still subject to the requirements in *Daubert*. In each case, the treating physician had testified that they did not consider themselves to be an expert and the Sixth Circuit noted that that did not necessarily disqualify their opinion, but was only a factor to consider in determining whether the proposed testimony meets the requirements of Rule 702 and the relevant
It was clear that two of those treating physicians were well-qualified to treat the alleged condition, osteonecrosis of the jaw, but the court still held that did not mean they were qualified to address the cause of that condition. The lesson from that decision is that even if the proposed plaintiffs’ expert disclaims expertise, it is still important to explore the remaining Daubert factors if you expect to exclude the expert’s opinion.

The third decision is in the case of Trina Emerson v. Novartis Pharmaceuticals Corporation, No. 09–6273, 2011 WL 3701835 (6th Cir. Aug. 23, 2011). In that case, the trial court granted summary judgment on the grounds that the plaintiff failed to rebut Florida’s statutory presumption that drugs properly approved by the Food and Drug Administration were not defectively dangerous. The Sixth Circuit held that neither the trial court nor the Sixth Circuit needed to interpret the Florida statute or determine exactly how the presumption operated. The plaintiff’s response was to argue that Novartis was not entitled to the benefit of the statutory presumption because it had defrauded the Food and Drug Administration in order to gain regulatory approval. The court held that that argument was preempted pursuant to Buckman Co. v. Plaintiffs’ Legal Comm., 531 U.S. 341, 347 (2001). In addition to the fraud on the FDA argument, the plaintiff, in its responsive brief, adopted “the memorandums of law and fact, expert witnesses’ testimony and reports, and the entirety of the case wide discovery and pleadings, as if each were specifically set forth in the Memorandum.”

The Sixth Circuit held that even though there may have been evidence in the record sufficient to rebut the presumption and create a material question of fact, it was not the District Court’s duty to track down those facts. They held that the plaintiff failed to meet its burden under Rule 56 to “cit[e] to particular parts of materials in the record, “or to show that the facts cited by the movant do not establish the absence of a genuine dispute.” The lesson from that case is that even if your motion for summary judgment may be weak, it is important to put the plaintiffs to the test, particularly given the fact that many states are adopting a presumption against defectiveness if the product meets federal and state statutes and regulations.

The fourth opinion from the Sixth Circuit, decided September 28, 2011 is recommended for full-text publication. The case is Olwen Moeller, Individually and as Executrix of the Estate of Robert L. Moeller v. Garlock Sealing Technologies, LLC, No. 09-5670, 2011 WL 4469819 (6th Cir. Sept. 28, 2011). The Moeller case is an asbestos case appealed from the United States District Court for the Western District of Kentucky at Louisville. The jury returned a verdict against Garlock, after which Garlock filed post-trial motions for judgment as a matter of law and for new trial. The District Court denied both motions and the Sixth Circuit reversed the trial court on its denial of the motion for judgment as a matter of law. The case was tried under Kentucky law which requires that a plaintiff prove a defendant’s conduct was a substantial factor in bringing about the harm. The Sixth Circuit carefully analyzed the evidence presented by the plaintiff’s experts and held that the testimony did not establish that exposure to Garlock gaskets in and of itself was a substantial factor in causing the plaintiff’s injury.

It is important to note that there was no question that the plaintiff’s deceased had substantial exposure to asbestos products through the years and developed mesothelioma. In fact, most of the defendants had already settled. Garlock put on evidence of the plaintiff’s substantial exposure to
asbestos insulation products through the years, but challenged whether any exposure he might have had to Garlock gaskets was a substantial factor in causing his mesothelioma. The Sixth Circuit stated in making its ruling “on the basis of this record, saying that exposure to Garlock gaskets was a substantial cause of Robert’s mesothelioma would be akin to saying that one who pours a bucket of water into the ocean has substantially contributed to the ocean’s volume.”
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