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In Hip Implant MDL, Preemption Cuts Across State Lines

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Geographical pride. A feeling of community. Belonging. Being one of the locals. We all experience it to some degree. Sometimes you take it with you. Like wearing your favorite Roll Tide t-shirt while listening to jazz in New Orleans. While Pennsylvanians may not take kindly to out-of-state sports jerseys, they welcome Maine lobster and Delaware Dogfish Head 90-Minute IPA. And if you're driving a little red corvette on the Jersey turnpike, you better be prepared to move over for pink cadillacs.

That's just how it is. We defend our homes, our traditions, our customs. We're all different. And the differences hardly stop with food, music and sports. Sometimes, it's those little differences that make all the difference in the world. Like whether a state recognizes the discovery rule for triggering the running of a statute of limitations.

For instance, both Alabama and Oregon have two-year statutes of limitations for products liability actions, but the statute starts to run in Alabama once a plaintiff is injured.[1] Whereas, in Oregon, the clock doesn't start ticking until "the plaintiff first discovers or, in the exercise of reasonable care, should have discovered that the injury or other damage complained of exists and was the result of a product defect."[2]

The difference can be considerable. Pulling an example completely at random, take a hip implant. It's implanted; the plaintiff suffers a side effect; the implant is removed. In Alabama, the explant surgery was the trigger for the statute of limitations. In Oregon, we need to know a whole lot more before we can decide whether the plaintiff has made it to the starting line yet. That's pretty much how the court decided the issue in In re Smith & Nephew Birmingham Hip Resurfacing Hip Implant Products Liability Litigation.[3] So maybe our example wasn't completely randomly selected.

It's an MDL, so it involves plaintiffs from all over the country. Lebron jerseys mixing with Curry jerseys. Bourbon mixing with Sam Adams Lager. Cats and dogs living together. You get the point. The defendant filed a motion to dismiss 50-plus cases on statute of limitations grounds, primarily arguing that regardless of the whether a state has a discovery rule, the statute started running at the time of the revision surgery. The plaintiffs countered similarly to the contrary — that the revision surgery never started the statute running.

The court drew a fairly bright line distinction down the middle — and right along the discovery rule. The reason the discovery rule was so important to the court was that applying the discovery rule requires a factual inquiry beyond the face of the complaint, and therefore beyond the confines of a motion to dismiss.

For states that recognize discovery rule tolling, the question of when the statute starts to run depends on "when the plaintiff knew or, with due diligence, reasonably should have known of the wrong."[4] In the case of a hip implant, the revision surgery identifies that there has been a complication, "but is silent as to the cause of that complication" — malpractice, a unique medical condition, or perhaps a product defect.[5]

What the plaintiff did, and whether he/she acted reasonably in learning the cause, is the subject of a factual investigation that prevents a dismissal on the pleadings. The court went on to examine and explain that concept in 12 states that recognize the discovery rule (Alaska, Arizona, Arkansas, California, Indiana, Massachusetts, New Jersey, Ohio, Oregon, Pennsylvania, Utah and Wisconsin).[6]

Only four claims in discovery rule states were exempt from the above ruling. In each of those cases, the court used the latest possible date for plaintiffs to have discovered their cause of action — the date of the product recall — and found that even using that date, the plaintiffs had filed outside the applicable statute of limitations period. Those cases were dismissed.[7]

That left cases in four states that do not recognize the discovery rule, at least in this context. Alabama, Idaho and Michigan have not adopted the rule and the cause of action accrues at the time of injury.[8] And New York's discovery rule provides that the statute starts running "when a plaintiff first noticed symptoms, rather than when a physician first diagnosed those symptoms."[9]

In each of these cases, the revision surgery would be the latest date that triggered the statute, time-barring the claims unless a plaintiff sufficiently pleads fraudulent concealment or equitable tolling — which they didn't.[10] While there are variations among the states, the basic concept is that if the defendant fraudulently conceals the existence of a cause of action, the limitations period is tolled.

Here the plaintiffs argued that defendant failed to disclose that it had lost its PMA status, and failed to warn that the device was defective and unsafe.[11] But those allegations were either untrue or preempted:

But the plaintiffs' arguments cannot support a claim of fraudulent concealment [because defendant] was not federally required to disclose adverse incidents concerning the [] device to any person or entity other than the [U.S. Food and Drug Administration], and [defendant] never lost its PMA. And the decision as to whether [defendant] should have lost its PMA is left solely to the FDA. Thus, the plaintiffs' arguments either misstate the facts or are expressly preempted because they would impose requirements different from, or in addition to, those imposed by the FDA.[12]

Good old preemption. It doesn't matter if you bleed Michigan blue, if you remember the Alamo or if you live where a grizzly bear is your only neighbor — preemption unites us all.

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[1] Ala. Code §6-2-38.

[2] Or. Rev. Stat. Ann. §30.905 (emphasis added).

[3] In re Smith & Nephew Birmingham Hip Resurfacing (BHR) Hip Implant Products Liability Litigation, 2018 WL 606705 (D. MD. Nov. 19, 2018).

[4] Id. at *3 (citation omitted).

[5] Id.

[6] Id. at *3-10.

[7] Id. at *3.

[8] Id. at *10.

[9] Id. (citation omitted).

[10] Id. at *11.

[11] Id.

[12] Id.