

FEBRUARY 11, 2011

DAILY REPORT

A SMART READ FOR SMART READERS

An ALM Publication



ZACHARY D. PORTER/DAILY REPORT

“Our investigation indicates that 100 percent of these things are going to fail,” plaintiffs’ attorney C. Neal Pope said of the DePuy hip replacement devices.

Suit targets hip implants

DEKALB LAWSUIT IS ONE OF HUNDREDS of state and federal cases filed over recalled hip replacement system

JANET L. CONLEY | jconley@alm.com

LAWYERS FROM Pope, McGlamry, Kilpatrick, Morrison & Norwood have filed what is likely the first Georgia product liability action in a state court against the makers and distributors of an allegedly defective hip replacement device that already has cost its manufacturer millions of dollars in recall and litigation expenses.

C. Neal Pope said his firm has about 50 other clients who have had the hip replacements, and those matters are in various stages of investigation. The suit, filed in DeKalb State

Court on Feb. 4, alleges that two companies owned by Johnson & Johnson—Warsaw, Ind.-based DePuy Orthopaedics Inc. and DePuy Inc.—are at fault. The companies designed, manufactured and marketed a hip replacement system with a high premature failure rate that can release toxic levels of chromium and cobalt into patients’ bodies, the complaint alleges.

Potential consequences of metallosis, as the poisoning that can result from this exposure is called, include tissue and nerve damage in the short term and cognitive decline, convulsions and heart failure in the long term.

The suit also names DePuy’s exclusive Georgia distributor, Decatur-based DC Medical, as a defendant.

The DeKalb suit is one of hundreds of state and federal cases—185 federal suits, as of Monday, are part of multidistrict litigation in Ohio—filed over the hip replacement devices. Pope, who has two Georgia and two Tennessee MDL cases, said he is pursuing this case in a state court because both the plaintiff and one of the defendants, DC Medical, are from Georgia, meaning the parties lack the complete diversity required to trigger federal court jurisdiction in cases of this type. The advantage of state court over the MDL, he said, is that a state case remains within his control and can be resolved faster than MDL cases.

In the MDL, for case management purposes, the judge appoints an executive committee of plaintiffs’ lawyers to make major decisions on the litigation for all parties; none of the six executive committee members in the DePuy MDL are from Georgia, although there is a Georgian on the discovery committee—Hezekiah Sistrunk Jr. of The Cochran Firm. Also, Pope said, the MDL, which covers pretrial proceedings only, can take years to complete. Then cases are sent back to their originating jurisdictions for disposition.

Johnson & Johnson, which is not a party to the DeKalb suit, reported in its most recent 8-K filing with the U.S. Securities and Exchange Commission that it had after-tax charges of \$922 million “representing the net impact of litigation settlements, product liability expense and costs associated with the DePuy ASR Hip recall.”

A footnote later in the filing attributed expenses of \$280 million subtracted from “as reported earnings” to the hip device recall.

Pope said he could not yet put a value on

the case he has filed on behalf of a Monroe County couple—Mary Bedgood, who had two hip replacements using the DePuy devices and is making negligence, conspiracy and fraud claims; and her husband, who is claiming loss of consortium. If the plaintiffs prevail, and if the suit is the first to reach a verdict in Georgia, it qualifies for an exception to the state's \$250,000 punitive damages cap, allowing—theoretically, at least—unlimited punitives. The legislative rationale behind that exception, Pope said, is that a defendant should only be punished once in the form of unlimited damages; all other verdicts in state cases with similar claims would be subject to the \$250,000 cap.

Pope did say that the suits against DePuy nationwide are likely to be significant in dollar value. Similar suits have proven costly in the past. Swiss company Sulzer AG in 2002 agreed to pay \$1 billion to settle suits alleging hip and knee implants made by one of its U.S.-based units were defective, according to news reports in *The New York Times* and other publications.

“Our investigation indicates that 100 percent of these things are going to fail,” Pope said of the DePuy hip replacement devices.

DePuy's local counsel, N. “Kay” Karen Deming at Troutman Sanders, said she had received copies of the DeKalb suit but had not read them, and declined to comment. She said lawyers from Drinker Biddle & Reath and Tucker Ellis & West are national counsel on the hip replacement suits. Calls to partners at each firm who are involved in the Ohio multidistrict litigation were not returned. Media relations representatives at DePuy and DC Medical and investor relations representatives at Johnson & Johnson also did not return calls seeking comment.

The lawsuits over the hip replacement devices began last year after the DePuy companies in August issued a voluntary recall of their ASR XL Acetabular System, as well as another device that was not sold in this country. Pope said those devices were earlier recalled in the United Kingdom and Australia.

He also said the U.S. Food and Drug Administration, which approved the U.S. device less than a decade ago, has received roughly 400 complaints about it since 2008. Many of the complainants, he said, had to have surgery to remove and replace the devices.

According to information from DePuy, 93,000 devices were implanted, 37,000 of those in the United States. Based on calculations from those numbers, according to Pope, about 4,000 to 5,000 of the devices were implanted in Georgia patients.

Federal suits involving the devices were granted multidistrict litigation status in December and have been consolidated before Judge David A. Katz of the U.S. District Court for the Northern District of Ohio in Toledo.

Similar suits have proven costly in the past. Swiss company Sulzer AG in 2002 agreed to pay \$1 billion to settle suits alleging hip and knee implants made by one of its U.S.-based units were defective, according to news reports.

To date, there are four Georgia suits in the MDL. Pope is handling two of them, along with Derric Crowther of Crowther Law Firm on one case; the plaintiff's lawyers on the other cases are H. Craig Stafford of Arnold Stafford Randolph in Hinesville; Jane Lamberti Sams of The Cochran Firm; Alan S. Lowe of Alan S. Lowe & Associates in Savannah; and John C. Bell Jr. of Bell & Brigham in Augusta. Troutman's Deming is listed as defense counsel in all these cases.

The Bedgoods' suit, which is not eligible to join the MDL because it is a state action, is pending before DeKalb State Court Judge Alvin T. Wong. Plaintiff Mary Bedgood alleges that DePuy and DC Medical knew for years that the hip replacement devices were defective, but failed to warn doctors and the public.

Bedgood, who has two artificial hips, alleged that one failed less than eight months after implantation because the metallic cup that fit into her hip socket had a design flaw and had to be removed and replaced via additional surgeries. The other artificial hip, which she still has, suffered “metal-on-metal” wear from her movements and has released poisonous chromium and cobalt into her system, the complaint alleges.

“For more than two years prior to the recall, the FDA had received complaints that the DePuy ASR Hip Implant Device

failed early in some patients. ... In addition, reports were received that the ‘ball’ and ‘socket’ that make up the hip joint—both are metal bearings—generate metal debris over time from wear which can spread throughout the surrounding bone tissue and cause severe inflammation and damage,” the complaint alleges.

Bedgood's suit does not specify a current or prospective dollar value for her medical treatment, nor does it offer specific detail on her injuries. It says she suffered “unnecessary pain, debilitation, infection, hospitalization and the need to undergo subsequent revision surgery,” and that “patients like Plaintiff Mary Bedgood ... have endured, or will endure ... debilitating lack of mobility; inflammation causing damage or death to surrounding tissue and bone; [and] infection.”

Mary Bedgood's “suffering could easily have been prevented ... had Defendants either warned the public of the dangers ... in 2007 when dozens of complaints regarding the devices began being made to the Food and Drug Administration ... or taken the affirmative step of recalling ... the [d]evices at that time,” the complaint says.

Pope is a veteran of large product liability cases, including those involving Ford Motor Co. and Toyota. The firm, with offices in Atlanta and Columbus, represents Bedgood and her husband along with colleagues M. Gino Brogdon Sr., Michael L. McGlamry and N. Kirkland Pope at Pope McGlamry, and John Christopher Clark at Clark & Smith in Macon.

The Georgia suit is *Bedgood v. DC Medical LLC*, No. 11-A-34981-1; the Ohio MDL action is *In re: DuPuy Orthopaedics Inc. ASR Hip Implant Product Liability Litigation*, No. 1:10-md-02197.

THE GATE CITY BAR CELEBRATES BLACK HISTORY MONTH

Curtis J. Martin II, Esq.
Chair, President-Elect, Gate City Bar Association

On February 23, 2010, the Gate City Bar Association held its Black History Month Program at the State Bar of Georgia.

The Gate City Bar Association's 2010 theme is the Dawn of a New E.R.A. E.R.A. is an acronym for three Latin words – Erudio, Retribuo and Auctus. Erudio means to instruct, edu-

cate or train; Retribuo means to give back or give what is due; and Auctus means to grow or increase. Consistent with this year's theme, the Black History Month Program began by spotlighting the career and achievements of The Honorable Clarence Cooper of the United States District Court.

The Gate City Bar Association also presented four awards in recognition of distinguished service to the legal community and the greater community at large.

Three of the awards were named in honor of founding members of the Gate City Bar Association. These founding members were giants in the legal community and were instruments of change for the progress of African American attorneys. The R. E. Thomas Civil Rights Award was presented to Mawuli Mel Davis, Esq. The R. Pruden Herndon Service Award was presented to Dawn M. Jones, Esq., and Derric Crowther, Esq. was the recipient of the A. T. Walden Outstanding Lawyer

Award. The fourth award, The Presidential Award, was presented to Keenan R. S. Nix, Esq.

The Gate City Bar Association also held a Past Presidents Reception and recognized its past leaders for their tireless service and commitment to the organization.

The event was sponsored by Mozley, Finlayson & Loggins LLP and the Atlanta Business Journal. The Gate City Bar Association sincerely thanks each of its Black History Month Program sponsors.

