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The Cobalt and Chromium Conundrum: A Survey of Hip Implant Litigation, Part II

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In re Zimmer Durom Hip Cup Products Liability Litigation – MDL 2158

Zimmer's Durom Acetabular Cup (Durom Cup) received FDA clearance for marketing via the 510(k) process and entered the U.S. market in 2006.[86] After only two years on the market, Zimmer suspended its sales because of mounting complaints from patients and doctors concerning the component's propensity for premature failure.[87] However, the company did not issue a recall and put the device back on the market a few months later.[88]

While Zimmer initially indicated in a follow-up study that up to 5.7 percent of implants would need to be replaced in the U.S. and Europe, alternative investigations have suggested a higher rate of failure. Plaintiffs have contended in lawsuits that the actual failure rate is upwards of 24 percent. Zimmer permanently discontinued sales of the device in 2010. The Durom Cup was implanted in over 12,000 patients in the United States since it was first sold on the U.S. market in 2006.

Lawsuits concerning Zimmer's Durom Acetabular Cup component were the first MoM-related cases to receive MDL treatment. In June 2010, the JPML transferred federal Zimmer hip cases to the District of New Jersey for pretrial coordination.[89] As seen in other MoM litigation, the federal Zimmer cases in the MDL are being pursued in coordination with state court actions, most notably with state court cases pending in New Jersey.

The Zimmer MDL is presided over by Judges Susan D. Wigenton and Madeline Arleo. Since the MDL's inception, Zimmer has settled with numerous plaintiffs on an individual basis, mostly through court ordered mediation. To date, Zimmer has allocated approximately $400 million for settlement purposes. In its most recent annual report, Zimmer stated that it expects to spend an additional $200 million to settle pending lawsuits by the end of 2014.[90]

Currently, parties in the MDL are feverishly attempting to complete discovery in advance of the first two bellwether trials scheduled to take place in March and May 2015.[91] Discovery disputes have risen concerning the sufficiency of fact sheets, potential spoliation on the part of Zimmer, depositions of corporate reps and experts, and the admissibility of expert testimony.

Notably, Zimmer announced in April 2014 that it was acquiring Biomet.[92] When the sale is completed in early 2015, it will make Zimmer the number two manufacturer of orthopedics in the country.

The Future of MoM Hip Implant Litigation

It appears that litigation concerning metal-on-metal hip implant devices will persist – certainly, at least, for the

foreseeable future. Viewed in relation to more traditional mass torts involving medical devices, the current MoM litigation is relatively young. New cases continue to be filed and thousands of cases remain unresolved. Moreover, the cases that have been filed represent only a fraction of the potential cases involving the devices currently at issue. For instance, out of the aforementioned devices that have been recalled, only a small percentage of implanted patients have filed claims. And it is possible for complications associated with MoM implants to take several years to develop.

"The use of MoM implants has decreased dramatically since their distribution peak in the mid-2000s. Then, almost one in every three THA implants utilized a MoM configuration. Today, MoM devices account for less than 3 percent of hip implant units sold in the United States."

Of course, this is not to say that MoM litigation will go on in perpetuity. The use of MoM implants has decreased dramatically since their distribution peak in the mid-2000s. Then, almost one in every three THA implants utilized a MoM configuration. Today, MoM devices account for less than 3 percent of hip implant units sold in the United States. Further, should the FDA's new rule become finalized and subject the majority of new MoM implant technology to the PMA process, subsequent litigation concerning new MoM products may be barred based on preemption grounds.

Yet, as the aforementioned verdicts and settlements suggest, these cases presently have substantial value. Therefore, they are attractive cases to pursue. But these cases also present the possibility of requiring considerable investment in terms of both time and expense for their successful prosecution. Plaintiff practitioners may find it wise to note some of the potential limitations derived from the existing MoM litigation in assessing each case. The specific device at issue and the potential client's medical history are of obvious importance. And, whether the potential client has had a revision procedure performed, or has been diagnosed or is suspected of having related complications, are questions that must be asked. Forum selection and the propensity for merits-based and jurisdictional defenses are also key considerations. For example, a client's past revision surgery or heightened metal-level report may trigger a statute of limitations defense if the revision surgery or metal-levels report occurred outside of the time constraints for the particular cause(s) of action asserted. This is of particular concern for causes of action based on state law.[93]

The next few years of MoM litigation should provide significant guidance on all of these issues. It will be very interesting to see how future developments unfold.

Endnotes

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Author Bios

For more on this month's commentary authors, visit Johnson & Vines, PLLC or the American Injury Attorney Group, a network of law firms that helps clients by associating them with qualified and experienced attorneys,

enhancing the legal team behind each case and giving clients confidence that their cases will be handled effectively.

Anthony C. Johnson is a managing partner attorney at Johnson & Vines, PLLC (johnsonvines.com) and the CEO and co-founder of the American Injury Attorney Group (attorney-group.com). He received his BA at the University of Arkansas in Computer Engineering and his Juris Doctor from the University of Arkansas at Little Rock. His law practice started as a general practice but has since shifted towards mass torts, medical device litigation & other serious personal injury cases. Johnson's interests expand beyond the practice of law especially in the fields of business and technology. He was recently featured on the 2014 Empact Showcase of Top 100 entrepreneurs under 35 across the country. He is on The National Trial Lawyers 40 Under 40 list. He was listed by Arkansas Business as one of the "20 in their 20's" to look out for in 2012. He was also featured in the April 2012 cover story of the American Bar Association's Journal as one of "America's Techiest Lawyers."

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