IADC Committee Newsletter

PRODUCT LIABILITY

June 2013

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Often when a product liability plaintiff's failure to warn claims seem unquestionably time barred, the plaintiff will assert fraudulent concealment (i.e., that the manufacturer somehow prevented her from learning of her claims) to save her otherwise untimely claims. A close examination of the applicable law provides weapons to help you combat a vague assertion of fraudulent concealment and save your limitations defense.

Can You Save Your Limitations Defense From an Assertion of Fraudulent Concealment?

ABOUT THE AUTHORS

Stephanie M. Rippee is a member of Watkins & Eager, PLLC in Jackson, MS. For more than 20 years she has focused her practice on product liability and commercial litigation, seeking to creatively and efficiently resolve matters for clients. She is AV rated by Martindale-Hubbell and listed as one of The Best Lawyers in America in several areas including product liability and commercial litigation. In 2011 and 2012, she was recognized by Mid-South Super Lawyers® as one of the top 50 lawyers in Mississippi and one of the top 50 female lawyers in the Mid-South. She currently serves as the Vice Chair of Webinars for the IADC Product Liability Committee. She can be reached at srippee@watkinseager.com.

Robert B. Ireland, III is a member of Watkins & Eager, PLLC in Jackson, MS. He routinely handles a wide variety of litigated matters in state and federal court and in arbitration proceedings. Much of his time has been spent defending drug and product manufacturers in litigated matters in Mississippi and the Southeast. Robert is AV rated by Martindale-Hubbell and, in 2011 and 2012, was recognized by Mid-South Super Lawyers® as a Rising Star. He can be reached at rireland@watkinseager.com.

ABOUT THE COMMITTEE

The Product Liability Committee serves all members who defend manufacturers, product sellers and product designers. Committee members publish newsletters and *Journal* articles and present educational seminars for the IADC membership at large and mini-seminars for the committee membership. Opportunities for networking and business referral are plentiful. With one listserv message post, members can obtain information on experts from the entire Committee membership.

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Mollie F. Benedict
Vice Chair of Newsletters
Tucker Ellis LLP
(213) 430-3399
mollie.benedict@tuckerellis.com

I. Introduction

We defense lawyers love a simple, straightforward statute of limitations defense. Plaintiff waited too long to pursue claims against our client. Case dismissed. So it is frustrating when plaintiff tries to circumvent that defense by claiming fraudulent concealment, i.e., your client somehow prevented plaintiff from learning of her claims. In Mississippi, as in other jurisdictions, such behavior tolls the running of the statute of limitations. *See* Miss. Code Ann. §15-1-67 (West 1972). Thus, if successful, fraudulent concealment means that plaintiff's claims will not have accrued when she was injured or diagnosed, but instead, much later - when she discovered, or with reasonable diligence should have discovered, your client's alleged acts of concealment. *Id*.

Fraudulent concealment allegations are common in pharmaceutical product liability cases. The typical scenario is as follows. A plaintiff ingests a drug and experiences a side effect or gets a disease. Neither she nor her doctors are aware of an association between the drug and her condition. She files no lawsuit. Many years later, a new, high profile epidemiological study suggests a possible link. Plaintiff seizes upon that potential link and wants to sue the drug manufacturer for failure to warn. To save her otherwise untimely claims, plaintiff alleges that the company knew years earlier of the "true risk" of her particular side effect or disease but concealed that "true risk" from the public by including no warning (or an inadequate one). Thus, she argues, her claims did not accrue until the "true risk" was brought to light by the new epidemiological study.

In the complex world of drug research and development, when and how a drug manufacturer obtained knowledge of a risk can be a murky, difficult subject. Even if years have passed and plaintiff has done *nothing* to discover the cause of her injuries, she will seize upon this uncertainty by vaguely alleging that the "true risk" was uncovered by the company "somewhere" in the ongoing years of research and development efforts for the drug, but yet was not disclosed in the drug's warnings.

There is, however, a vast difference between an alleged failure to warn of a risk plaintiff says the company knew or should have known about, which is a damages claim, and the alleged fraudulent concealment of a known risk, which is a tolling argument. Under Mississippi law, there are a number of ways to attack vague assertions of fraudulent concealment to salvage a statute of limitations defense.

II. Hold Plaintiff To the Heavy Burden of Proof

A plaintiff will often assert her fraudulent concealment claim in response to a dispositive motion such as a summary judgment motion. In ruling on such a motion, the judge must view the evidence presented "through the prism of the substantive evidentiary burden." *Stevens v. Lake*, 615 So. 2d 1177, 1181 (Miss. 1993) (quoting *Haygood v. First Nat'l Bank of New Albany*, 517 So. 2d 553, 555 (Miss. 1987)). Mississippi law sets a "high standard" in order to "prov[e] fraudulent concealment." *Windham v. Latco of Miss., Inc.*, 972 So. 2d 608, 614 n.8 (Miss. 2008). The plaintiff must prove fraudulent concealment for tolling purposes by clear and convincing evidence, even at the summary judgment stage, just as she would if she asserted a fraud claim. *Lake*, 615 So. 2d at 1181; *Estate of Smiley*, 530 So. 2d 18, 26 (Miss. 1988). To withstand

summary judgment, plaintiff's evidence of the company's alleged fraudulent concealment must be "so clear that no hypothetical reasonable juror hearing the proof could conclude otherwise." *Windfield v. Dover Corp.*, 740 F. Supp. 1230, 1236 (S.D. Miss. 1990) (Lee, J.). Essentially, the court must find that the defendant "lied" to the plaintiff about some wrong it committed that gave rise to her claims. *See Stevens v. Lake*, 615 So.2d 1177, 1181 (Miss. 1993). The court should be apprised at the outset of plaintiff's heavy burden and that vague allegations of concealment are not legally adequate to toll the statute of limitations.

III. Use the Elements of Fraudulent Concealment To Defeat Plaintiff's Assertion

Under Mississippi law, the two elements plaintiff must establish to prove fraudulent concealment can provide key weapons to fend off her assertion. First, she must show "an affirmative act to conceal the underlying tortious conduct." *Smith v. First Family Fin. Services, Inc.*, 436 F. Supp. 2d 836, 840-41 (S.D. Miss. 2006) (Lee, J.). The act must have been specifically designed to prevent her discovery of the claim and, further, must actually have done so. *Windham*, 972 So. 2d at 614 n. 8; *Ill. Cent. R. Co. v. Guy*, 682 F.3d 381, 394 (5th Cir. 2012). It also "must have occurred after and apart from the discrete acts upon which the cause of action is premised." *Smith*, 436 F. Supp. 2d at 840-41. That is, the act of concealment cannot be both a basis of the plaintiff's substantive claims and a basis for fraudulent concealment too. *See, e.g., Whitaker v. Limeco Corp.*, 32 So.3d 429, 438 (Miss. 2010) ("The trial court aptly stated the law that an act cannot be both an act of fraud in the inducement and an act of fraudulent concealment."). Second, plaintiff must demonstrate that she was unable to discover "the factual basis for [her] claims despite the exercise of due diligence." *Smith*, 436 F. Supp. 2d at 840-41. Plaintiffs often cannot satisfy these two prongs of the test with the requisite level of proof.

A. Plaintiff Must Come Forward With Clear And Convincing Evidence Of Affirmative Acts Of Concealment

It is not enough for a plaintiff simply to generally allege "affirmative acts" by the company that occurred subsequent to her diagnosis. Rather, to establish the fraudulent character of the company's alleged concealment of her warnings-related claims, a plaintiff must prove that the company actually knew of an established risk of the disease or side effect *at the time* she was taking the medication, failed to disclose it, *and then* intentionally and successfully concealed it from her *after the fact*. *See Scharff v. Wyeth*, No. 2:10-CV-220, 2011 WL 3320501, at *11 (M.D. Ala. Aug. 2, 2011) (holding that "a breach of the duty to warn by a manufacturer does not toll the statute of limitations" because "a mere failure or refusal to warn, without more, while actionable, does not rise to the level of fraudulent concealment") (quoting *Cazales v. Johns-Manville Sales Corp.*, 435 So. 2d 55, 58 (Ala. 1983)).

Demonstrating that a risk became known (or should have become known) to the company later, as science evolved, yet remained undisclosed (or inadequately disclosed), simply is not fraudulent concealment sufficient to toll the statute of limitations. Yet that is very often exactly what has occurred when a new, high profile epidemiological study is published years later. This subsequent study alone cannot demonstrate that *at the time* plaintiff ingested the drug, there were established risks of the disease or side effect which the company knew but concealed from her *after* her diagnosis. To

the contrary, in most instances, the evidence will be that neither plaintiff nor her doctors, nor the medical and scientific communities knew the specifics of the "real risks" of the side effect or disease until years later when the study was published. Allegations that might support a damages claim based on failure to warn of "knowable," but unknown risks are simply not pertinent to a fraudulent concealment tolling argument.

Each "subsequent affirmative act" plaintiff offers to the court beyond the study itself should be properly scrutinized. Often, none of the acts will be both subsequent to the company having knowledge of the "true risk" and designed to conceal the known or established risks of disease or side effect when plaintiff was taking the medication. For example, studies performed or published findings made after plaintiff's ingestion of the drug cannot be evidence of a cover-up of the company's knowledge as it existed at the time plaintiff ingested the drug. Any medical articles, "Dear Doctor" letters or proposed label changes based on such study data are also irrelevant.

Similarly, acts related only to the company's continued interaction (as the science developed) with FDA and the medical community to support, monitor, and defend its products are not acts concealing past conduct. In an analogous situation, Mississippi federal courts have held that, in the face of an ever changing legal environment, a manufacturer does *not* engage in "fraudulent concealment" by continuing to promote and defend its products in the market. In *Zeigler v. Ford Motor Co.*, the plaintiff's son died in a rollover accident in a Ford Bronco II. Later, alleged defects in the Bronco II were publicized in the national media. No. 3:95-CV-161, Slip Op. (S.D. Miss. Dec. 7, 2005), *aff'd* 99 F.3d 1134, 1996 WL 595602 (5th Cir. 1996). However, plaintiff claimed she did not learn of these problems until she read a newspaper article more than seven years after her son died. She contended that the limitations period was tolled because Ford had fraudulently concealed information regarding defects in its Bronco II by "defend[ing] its vehicles in the media and in court" and by "acknowledg[ing] that a cause of action existed" but "assert[ing] that potential litigants would not prevail." *Zeigler*, No. 3:95-CV-161, Slip Op. at 4.

The Court categorically found that this type of conduct on the part of Ford could not possibly constitute fraudulent concealment and that to hold otherwise "would *eviscerate the statute of limitations." Id.* at 4 (emphasis added). The Fifth Circuit affirmed, holding that plaintiff's claim "that Ford defended the safety and quality of the Bronco II in the news media at a time when Ford was aware of the vehicle's defects" could not be considered fraudulent concealment. The Fifth Circuit also held that plaintiff's claim "that Ford did not disclose certain inculpatory internal documents to her before she filed suit" was not fraudulent concealment. *Zeigler*, 1996 WL 595602, at *2. ("As noted by the district court, if it were to accept [plaintiff's] theory that Ford's defense of the Bronco II constituted fraudulent concealment, then fraudulent concealment could be raised successfully against any manufacturer that defended allegations that its product was defective. *Such a result would effectively subsume the statute of limitations.*") (emphasis added).

Thus, if the medication at issue in the case remained on the market, the company was legally entitled – and indeed required – to continue to support and monitor it. This duty necessitates ongoing evaluation of the evolving science as new articles and studies are published and, where appropriate, reinforcement of the basis of the warnings.

As a matter of law, such acts are not affirmative acts of concealment of past conduct.

B. Plaintiff Must Demonstrate Failure Despite Reasonable Diligence

Plaintiff must also establish that she was unable to discover "the factual basis for [her] claims despite the exercise of due diligence." *Smith*, 436 F. Supp. 2d at 840-41; *accord Stephens v. Equitable Life Assurance Soc'y*, 850 So. 2d 78, 83 (Miss. 2003). A plaintiff who does not undertake ***any*** investigation into the cause of her disease or side effect from the time of her diagnosis to the time of her "discovery of her illness" cannot successfully claim fraudulent concealment tolling for at least two distinct reasons. First, in such a situation, she has ***no*** proof that she exercised any "diligence" in investigating her cause of action. Second, harkening back to the first element of fraudulent concealment, plaintiff cannot demonstrate, in the face of her own inaction, that anything the company did prevented her from discovering her claims.

The Fifth Circuit has held that, as a matter of law, "[c]omplete inaction cannot be considered reasonable diligence" in the specific context of fraudulent concealment of a claim:

> Despite the loss of her son in a one-car accident, at no time during the seven and one-half years following decedent's tragic death did Zeigler do anything at all to determine if she might have a cause of action. Yet Mississippi law required her to exercise reasonable diligence. ***Complete inaction cannot be considered reasonable diligence.***

Zeigler, 1996 WL 595602, at *3 (emphasis added); *see also Trevino v. Wyeth*, No. 1:05cv329, Slip Op. at 2 (S.D. Miss. Feb. 14, 2013) (a drug product liability case). Moreover, if a plaintiff's failure to discover her claims was not caused by concealing acts by the defendant, then she cannot establish fraudulent concealment. *Zeigler*, No. 3:95-CV-161, Slip Op. at 4-5 (plaintiff's failure to learn of her cause of action due to the rural isolation of her hometown held *not* to be concealment due to any affirmative acts by Ford).

Therefore, plaintiff must establish both that she looked for her claims and that she could not discover them *because the defendant concealed them*. *See Robinson v. Cobb*, 763 So. 2d 883, 888-89 (Miss. 2000). Simply put, plaintiff must first search for a claim in order to allege that she is unable to find it due to the actions of another. In the face of total inaction, plaintiff would simply be asking the court to assume that, *if* she had searched for potential claims, the company's actions would have stopped her from finding them. That hypothetical assumption is not an adequate basis to toll the statute of limitations.

Thus, evidence such as "Dear Doctor" letters and purportedly "ghostwritten articles" should be disregarded by the court if plaintiff has admittedly not reviewed them. As a matter of law, they could not have affected her ability to discover her claims and file suit.

IV. Conclusion

When pressed for actual evidence to support a fraudulent concealment allegation, plaintiff often will simply not be able to come forward with the proof truly necessary to back up that claim. Using the elements of fraudulent concealment and the heavy burden of proof, you can protect your limitations defense.

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