



**PHARMACEUTICAL
AND
MEDICAL DEVICE
GROUP**

PARTNERS

DANIEL J. COHEN
NEIL M. DAY
TIMOTHY I. DUFFY
MICHAEL J. SULLIVAN

OF COUNSEL

LORNA A. DOTRO
H. LOCKWOOD MILLER, III

COUGHLIN DUFFY LLP

P.O. Box 1917
350 Mount Kemble Avenue
Morristown, New Jersey 07962
Tel (973) 267-0058
Fax (973) 631-6442

Wall Street Plaza
88 Pine Street, 5th Floor
New York, New York 10005
Tel (212) 483-0105
Fax (212) 480-3899

www.coughlinduffy.com

*An Update from the Pharmaceutical
and Medical Device Group at Coughlin Duffy LLP*

PRODUCTIVELY Thinking

June/2008, No. 6

NEW JERSEY SUPREME COURT HANDS DRUG AND DEVICE MAKERS TWO-PRONGED VICTORY

On June 4, 2008, in *Sinclair v. Merck & Co.*, ___ N.J. ___ (2008), the New Jersey Supreme Court held that the New Jersey Product Liability Act ("PLA") does not permit the recovery of medical monitoring damages if no manifest injury is alleged. The Court also held that the New Jersey Consumer Fraud Act ("CFA") is not an available remedy for plaintiffs whose underlying claim is one for harm caused by a product. The *Sinclair* decision thus represents a significant two-pronged victory for pharmaceutical and medical device manufacturers facing product liability suits in New Jersey.

Sinclair was a proposed class action on behalf of all people nationwide who ingested Vioxx for at least six weeks between its market introduction in May 1999 and its withdrawal in September 2004, and who had not yet sought to recover damages for personal injuries from Merck. Plaintiffs did not allege any personal physical harm, but instead sought to recover for medical monitoring for an increased risk of a so-called "silent heart attack" and for economic damages as a result of Merck's alleged violations of the CFA.

New Jersey courts have recognized that medical monitoring damages, also referred to as medical surveillance damages, constitute a special compensatory remedy designed to address the unique harm entailed by an increased risk of future injury often arising from environmental exposure to toxic chemicals. Our courts have held that medical surveillance damages may be awarded only if a plaintiff reasonably shows that medical surveillance is required because the toxic exposure caused a distinctive increased risk of future injury that would require a course of medical monitoring

independent of any other medical surveillance that the plaintiff would otherwise have to undergo.

Because the *Sinclair* plaintiffs claimed the need for medical monitoring not due to some kind of toxic environmental exposure, but instead from the ingestion of a prescription drug, the Court explained that plaintiffs' claims were governed by the PLA. Examining the language of the PLA, the Court noted that the PLA's definition of "harm" is "personal physical illness, injury or death[.]" and concluded that the PLA thus requires a physical injury. Specifically, the Court reasoned that the word "injury" is surrounded by "physical illness," which explicitly requires something physical, and "death[.]" which inherently also is physical. Because the plaintiffs did not allege any type of personal physical harm, the Court held that plaintiffs' claim for medical monitoring damages failed to satisfy the PLA's definition of harm and thus could not be sustained.

The Court also rejected plaintiffs' arguments with respect to the CFA, finding that the New Jersey Legislature expressly provided in the PLA that claims for harm caused by a product are governed by the PLA, irrespective of the theory underlying the claim, and that therefore plaintiffs could not sustain product-related claims under the CFA. In so doing, the Court noted that the language chosen by the Legislature in enacting the PLA is both expansive and inclusive, encompassing virtually all possible causes of action relating to harms caused by consumer and other products. The Court found that the language of the PLA represents a clear legislative intent that, despite the other-

PRODUCTively Thinking

June/2008, No. 6

wise broad reach to be given to the CFA, the PLA is paramount when the underlying claim is one for harm caused by a product. Because the crux of plaintiffs' case was the potential for harm caused by Vioxx, the Court concluded that the claim was for product liability and thus governed by the PLA and not the CFA.

IMPACT ON NEW JERSEY DEFENDANTS

The Sinclair decision is an important one for pharmaceutical and medical device manufacturers facing suit in New Jersey for two reasons. First, the opinion unambiguously holds that there can be no recovery for medical monitoring under the PLA in the absence of a manifest physical injury. Because damages awards for medical monitoring can potentially include medical surveillance for the balance of a plaintiff's life, or a class of plaintiffs' lives, the economic value of such damages can be very high. Second, Sinclair limits plaintiffs pursuing claims for product-related injuries, including drug and device-related injuries, to the PLA, and rejects plaintiffs' use of the CFA. This is significant because damages under the CFA, by which a successful plaintiff can recover attorneys' fees, costs, and treble damages, can also be quite substantial. Taken together, the two prongs of the Sinclair decision thus represent significant victories for defendants facing product liability suits in New Jersey.

Authored by H. Lockwood Miller, III and Jonathan F. Donath

Current Mass Torts in New Jersey

<i>Accutane</i>	<i>J. Higbee, Atlantic County</i>
<i>Asbestos</i>	<i>J. McCormick, Middlesex County</i>
<i>Bextra/Celebrex</i>	<i>J. Higbee, Atlantic County</i>
<i>Ciba-Geigy</i>	<i>J. McCormick, Middlesex County</i>
<i>Depo-Provera</i>	<i>J. Harris, Bergen County</i>
<i>Gadolinium</i>	<i>J. Happs, Middlesex County</i>
<i>HRT</i>	<i>J. Happs, Middlesex County</i>
<i>Mahwah Toxic Dump Site</i>	<i>J. Harris, Bergen County</i>
<i>Ortho Evra</i>	<i>J. Happs, Middlesex County</i>
<i>Risperdal/Seroquel/Zyprexa</i>	<i>J. Happs, Middlesex County</i>
<i>Vioxx</i>	<i>J. Higbee, Atlantic County</i>
<i>Zometa/Aredia</i>	<i>J. Higbee, Atlantic County</i>

The Coughlin Duffy Pharmaceutical and Medical Device Group

Coughlin Duffy LLP is one of the fastest growing law firms in the northeastern United States. The Firm's litigation attorneys offer a depth of experience across a broad range of industries and disciplines, including pharmaceuticals and medical devices, products liability, environmental and toxic tort, insurance and reinsurance, labor and employment, white collar crime and internal investigations, and commercial disputes. The members of the Firm's Pharmaceutical and Medical Device Group concentrate in the defense and management of both single-plaintiff suits and multi-plaintiff mass actions involving pharmaceuticals and medical devices in New Jersey and across the country. The Group also specializes in providing regulatory counseling and conducting internal investigations for clients in the pharmaceutical and medical device industries. For more detailed information about the Group's capabilities and experience, or if you have questions regarding the information in this Update, please contact the author(s), the Coughlin Duffy attorney with whom you regularly work, or any of the members of our Pharmaceutical and Medical Device Group.

© 2008 Coughlin Duffy LLP. All rights reserved. The materials presented herein are for informational purposes only and are not offered as legal advice. No reader should act on the basis of these materials without seeking appropriate professional advice as to the particular facts and applicable law involved. Any opinions presented herein are the opinions of the individual author(s), and do not necessarily reflect the opinion of Coughlin Duffy LLP or any of its attorneys or clients.