



Getty Images

Plaintiffs build case against diabetes drug

By Reni Gertner
 Staff writer

In the wake of a new study linking the Type II diabetes drug Avandia to a 43 percent increase in the risk of a heart attack, the plaintiffs' bar is building its failure-to-warn case against GlaxoSmithKline, the drug's manufacturer.

Although no personal injury suits had been filed at press time, a shareholder class action was filed on behalf of investors, claiming that GlaxoSmithKline issued multiple "false and misleading" statements about the drug.

Meanwhile, personal injury lawyers have been fielding a steady stream of calls since the study came out. Both Thomas Kline of Kline & Specter in Philadelphia and Karen Barth Menzies of Baum Hedlund in Los Angeles are currently evaluating cases.

The potential for litigation is vast, because more than a million people have taken the drug in the U.S. alone – and 6 million worldwide.

Like Vioxx, the major claims by Avandia plaintiffs will be failure-to-warn and aggressive marketing despite risks the drug maker knew or should have known existed.

"Similar to Vioxx, Avandia is one of those drugs that has been [heavily] promoted with direct-to-consumer advertising," said Kline, who was a member of the plaintiffs' steering committee for Vioxx.

But it's also true that both drugs have been prescribed to vulnerable populations that would already have an increased risk of heart attacks. That means there's no guarantee that these cases will be winners for the plaintiffs, because juries will be forced to weigh whether the disease or the drug caused the heart attack.

"When we get down to specific cases, the individual risk factors will be present and strong and probably overwhelming," said Philadelphia pharmaceutical defense attorney Nathan Schachtman, a partner with McCarter & English.

A hearing before the House Oversight and Government Reform Committee on June 6 – scheduled immediately after the study results surfaced – focused on the FDA's role in evaluating the safety of Avandia once it hit the market.

Plaintiffs' lawyers said the un-

precedented race to hold a congressional hearing was a political move to push pending drug safety legislation to the front burner.

Members of Congress were "trying to use Avandia as an illustration to justify legislation to reform the FDA," said Menzies, who attended the hearing.

GlaxoSmithKline did not return a call requesting comment.

The evidence mounts

Dr. Steven Nissen, a well-known cardiologist from the Cleveland Clinic, conducted a meta-analysis, evaluating the results of 42 previous studies of Avandia.

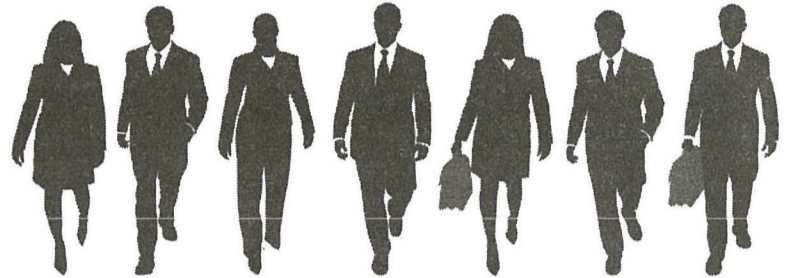
The study – which was published in the *New England Journal of Medicine* on May 21 – concluded that Avandia increases a patient's risk of a heart attack by 43 percent and the risk of death from cardiovascular causes by 64 percent.

During his testimony at the Senate hearing, FDA Commissioner Andrew von Eschenbach announced publicly the agency's

Avandia: What lies ahead?

Continued on page 27

Limit on disparate pay claims roils employment bar



©iStockphoto.com/Jason Benedict

By Reni Gertner
 Staff writer

A recent U.S. Supreme Court decision holding that the statute of limitations on a Title VII disparate pay claim begins to run when the original decision on salary is made – and that there is no new violation each time a paycheck is issued – is already making waves.

A group of Senate Democrats – including Sens. Edward Kennedy, D-Mass., and Hillary Rodham Clinton, D-NY – have introduced a bill that would reverse the impact of the decision, and a companion



Joe Sellers

measure has been introduced in the House.

ABA President Karen J. Mathis

recently voiced her support for these efforts in a statement, arguing that the ruling makes Title VII "almost useless in combating pay discrimination."

The Court held – in a 5-4 decision written by Justice Samuel Alito Jr. – that "[a] new violation does not occur, and a new charging period does not commence ... upon the occurrence of subsequent non-discriminatory acts that entail adverse effects resulting from the past discrimination."

This means that plaintiffs will have to file a disparate pay charge within 180 days, as required under federal law, or 300 days, under some state employment statutes, from the date the pay decision was made and "communicated" to them.

Management attorneys are hailing the decision for rejecting a re-

Pay: Rush of suits could result.

Continued on page 32

Fair Credit case makes waves

By Correy E. Stephenson
 Staff writer

The recent decision from the U.S. Supreme Court holding that actions taken in reckless disregard of a consumer's rights can constitute a willful violation of the Fair Credit Reporting Act has both sides of the bar claiming victory.

In a ruling authored by Justice David Souter, the Court held:

- A defendant that engages in reck-

less disregard of a consumer's rights willfully violates the Act, meaning that victorious plaintiffs can receive statutory damages from \$100 to \$1,000, as well as punitives – a huge increase over the actual damages available for standard violations.

- Although the Act only allows claims based on an "increase" in rate, first-

Fair Credit: New standard isn't "slam dunk."

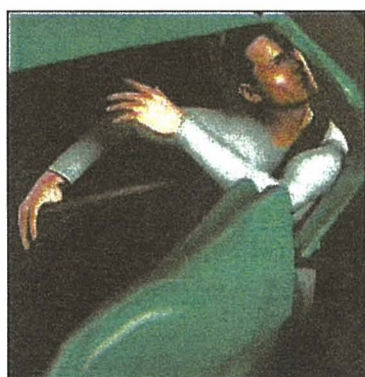
Continued on page 26

INSIDE

Immigration

Immigration bill stalls

The sudden derailment of the immigration reform bill after weeks of heated, headline-making debate has left lawmakers and others disappointed and unsure about whether the measure can be revived.Page 3



Verdicts & Settlements

Failed seatbelt yields \$32.5 million verdict

Three trials and 11 years after a head-on automobile collision, a Florida man was awarded \$32.5 million for severe brain injuries sustained when the seatbelt shoulder restraint in his Ford Escort failed.Page 9

Practice Management

'Black belt' quality control

For the last few years, attorney Richard Sabat has been preaching a management philosophy called Six Sigma – a quality-control program to improve manufacturing processes by eliminating errors, waste and duplication.Page 14

The Profession

FTC warns states of anti-competitive risks of restricting attorney ads

States looking to beef up rules restricting how attorneys advertise can almost certainly expect a warning from Washington: proceed with caution.Page 17

See index on page 4

VERDICTS & SETTLEMENTS

\$184M divorce verdict

A Chicago energy magnate's estranged wife was awarded \$184 million in what appears to be one of the biggest divorce verdicts in U.S. history.

Michael and Maya Polsky emigrated from the Soviet Union in 1976 with only four suitcases and \$500 in cash. Over the years, Michael Polsky founded an energy company and became a multi-millionaire while Maya stayed home and raised the kids.

Citing irreconcilable differences, Maya filed for divorce in 2003 and last October, Judge William Boyd ruled that Maya Polsky was entitled to half of the Chicago couple's cash and assets, with her share valued at \$176 million. Earlier this month, the judge amended his decision to include previously omitted assets that increased the value of her award to \$184 million.

Maya Polsky's attorney, Howard Rosenfeld, said more than \$170 million of the award is nontaxable cash.

Judges in Illinois have some leeway in determining how to split marital assets. Rosenfeld successfully argued that Maya Polsky was her husband's trusted confidant and therefore entitled to half of the estate.

"They would walk together after dinners, and Michael would share details of his work, looking for empathy, advice or merely an open ear," Rosenfeld wrote in court filings. "For many years, their marital partnership flourished. Michael provided sustenance and security, and Maya provided love, support, advice and counsel."

Michael Polsky's attorneys contended that he was responsible for the couple's great wealth and said they will likely appeal the decision.

"He intends to test this decision on appeal because he's always believed that this shouldn't have been a 50-50 split," attorney Joseph Tighe said.

\$5M in gastric bypass death

A Pittsburgh jury awarded \$5 million to a man who sued a medical equipment company after his wife died of complications following gastric bypass surgery.

Daniel Selepec, 53, sued Ethicon Endo-Surgery Inc., which made the stomach stapler used in his wife's surgery in 2002.

Sandra Selepec, 40, had the surgery because she weighed 350 pounds. She died 20 days later.

The jury concluded that she died because two staples didn't close completely, allowing her stomach to leak. The woman had surgery to fix the problem, but never regained consciousness.

Ethicon officials said they plan to appeal. The Cincinnati-based company argued that the doctors should have used larger staples and that the equipment itself wasn't to blame.

Quadriplegic teen awarded \$16M for diving injury

A Kansas jury has awarded \$16 million to a teenager who was left quadriplegic after diving into a lake.

Bradley Hudspeth, 18, was injured in August 2005 while diving into a lake in a private residential community. Instead of diving from the end of the dock, Hudspeth dove from the side, unaware that the water there was less than 4 feet deep. He broke his neck and, although he has some use of his arms, he has been diagnosed quadriplegic and will be wheelchair-bound for the rest of his life.

Hudspeth's family sued Quivira Inc. — the corporation that owns the common areas of the lake — as well as a company that had been hired to provide lifeguard services.

The jury awarded Hudspeth \$20 million in compensatory damages. But the jury found Hudspeth 20 percent at fault, reducing the verdict to \$16 million.

Quivira Inc. was held responsible for about \$15 million of the award and the life-

Failed seatbelt yields \$32.5 million verdict

By Nora Lockwood Toher
Staff writer

Three trials and 11 years after a head-on automobile collision, a Florida man was awarded \$32.5 million for severe brain injuries sustained when the seatbelt shoulder restraint in his Ford Escort failed.

An Orlando jury found Ford Motor Co. and Mazda Motor Corp. negligent for failing to warn consumers about the seatbelt defect that caused severe head injuries to plaintiff Mark Force, now 37.

The first trial in the case — held in 2003 — ended in a defense verdict. But the Florida Court of Appeal ruled in 2004 that the jury had been improperly instructed, and ordered a new trial. (*Force v. Ford Motor Co.*, 879 So.2d 103 Fla.App. 5 Dist. (2004.))

A second trial ended in a hung jury last year.

The most recent trial lasted eight days, with a six-person jury deliberating half a day before unanimously finding Ford and Mazda — which designed the seatbelt system — liable.

According to the plaintiff's attorney, R. Ben Hogan III of Birmingham, Ala., the lawsuit's long journey actually strengthened his case by giving him more time to unearth key documents and other evidence.

"This case built up evidence as we went along," he said. "We didn't have near as much evidence in the first trial as we did in the second — or in the second as we did in the third."

Key evidence included internal documents from Ford and Mazda, including 45 complaints about the Ford Escort's seatbelt system. The evidence helped convince jurors that the seatbelt retractor on Escorts sold in the U.S. was defective and lacked the safety features used on the same vehicle in Canada.

Defense attorney Francis McDonald Jr. said he is "obviously not happy with the verdict," and is considering an appeal.

"Mr. Force's seatbelt did all it could, and in fact, saved his life by preventing him from being ejected from the vehicle," he said.

Force's severe head injury "didn't happen because of our seatbelt," he said.

But Hogan responded: "They said it was just a big wreck and people get hurt, but in this wreck he had no other injury. The lap belt worked fine; the shoulder belt spooled out."

Ford documents cited

On July 1, 1996, Force's 1993 Escort was struck head-on by a Ford Mustang that crossed into his lane while trying to pass another car. Force was wearing a motorized shoulder belt and a manual lap belt. There were no air bags in the car.

Hogan alleged that although the lap belt locked as intended, the retractor on the shoulder restraint failed to operate properly. Force's head was thrown forward and slammed into a roof post in the

left front of the car.

In the 1980s, many car manufacturers installed "web grabber" devices, which guarantee lockup of seatbelt systems. The shoulder restraint in the 1993 Ford Escort Force was driving was not equipped with a web grabber.

A web grabber would have prevented the shoulder restraint from spooling out, Hogan told jurors.

Plaintiff's expert Steven Meyer, an engineer, testified that the Escort's seatbelt system "could be fooled by vertical forces in an accident so that the seatbelt could become unlocked or fail to lock," Hogan said. The expert concluded that about 10 inches of the shoulder belt had unspooled at the time of the accident.

Hogan also showed the jury Internal Ford documents indicating that the Escort model sold in Canada had a web grabber.

"Ford documents showed they were interested in saving money, and that originally the U.S. Escort was supposed to

"The injury looked like he had been hit with a crowbar."



— Ben Hogan

have a web grabber," Hogan said.

McDonald argued that the seatbelt designs differed because of different regulations in the United States and Canada — not because of cost-saving concerns.

"He can suggest what he wants, but to say Ford sold unsafe vehicles — that's ludicrous," McDonald said.

Hogan said the results of two test crashes conducted by Ford were also significant. The first test, which did not have a dummy in the car, showed vehicle damage similar to the damage done to Force's car. The second crash — conducted recently — did have a dummy inside. The seatbelt locked up and the dummy's head did not hit the roof.

Surprisingly, Hogan said the results of the second crash actually "benefited our case more than Ford's," because it proved



The plaintiff's team contended that if his shoulder belt had worked, his head never would have slammed into the A-pillar.

there was "spoolout" in the accident and that Force would not have suffered a head injury if the shoulder strap had locked up properly.

"We thank them for running it, and we used it in our case," said Hogan, adding that in his argument he emphasized that "if there had been a lockup we don't reach the A-pillar."

Force's injuries were so severe that 20 percent of his brain was removed. He requires around-the-clock supervision and is subject to sudden outbursts.

"The injury looked like he had been hit by a crowbar," Hogan said.

Force's parents and caretaker testified about his condition, which includes short-term memory loss.

During the closing argument on damages, plaintiff's co-counsel Kevin Cannon told jurors: "[S]ometimes we've all ... walked into a room and ... forget why we were there, what we were looking for. Imagine spending the rest of your life ... in that state, being able to see the dots but not connect the dots."

The jury of five men and one woman found Ford and Mazda negligent for marketing the 1993 Escort with a defective restraint system. Force's father and legal guardian, Francis Force, was awarded \$8.9 million for medical care, \$1.6 million for lost earnings and \$22 million for pain and suffering. There were no punitive damages.

Plaintiff's attorneys: R. Ben Hogan III of Hogan and Glover in Birmingham, Ala. and Kevin Cannon in Orlando, Fla.

Defense attorneys: Francis M. McDonald Jr. and Scott Richman of Carlton Fields in Orlando, Fla., and Christina Alonso of Carlton Fields in Miami.

The case: *Force v. Ford Motor Co.*; May 18, 2007; Orange County, Fla.; Judge George A. Sprinkel IV.

Questions or comments can be directed to the writer at: nora.tooher@lawyersusaonline.com

guard company for the rest.

The plaintiffs' main argument during the trial was that the defendants failed to establish clear and consistently enforced rules about diving off the dock. "No Diving" signs that had been posted in the late 1990s were not replaced when the dock was resurfaced.

\$5.7M awarded for skin cancer malpractice

A California jury awarded \$5.7 million to a bedridden man who claimed a doctor failed to diagnose his skin cancer.

The verdict is the largest medical-malpractice award in California this year, but

will be cut to \$1.9 million under a state statute limiting damages in malpractice suits.

Regis M. Reilly, 53, claimed dermatologist James C. Powers failed to biopsy a cyst that later metastasized into cancer. Reilly has a family history of skin cancer.

Reilly went through several surgeries to

Continued on page 10