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Device Maker Prevails In Pain Pump Suit

By Leigh Kamping-Carder

Law360, New York (June 29, 2009) -- In the first decision to come out of dozens of similar suits, a federal judge has ruled in favor of medical device manufacturer Breg Inc., finding that an individual who suffered a breakdown of his shoulder cartilage did not provide enough evidence to link the condition to the defendant's shoulder pain pump.

Judge K. Michael Moore granted summary judgment to Breg in the U.S. District Court for the Southern District of Florida on Thursday, finding that Douglas Kilpatrick could not demonstrate "highly persuasive scientific evidence" regarding the cause of his injury.

Kilpatrick's expert witness, orthopedic surgeon Dr. Gary Poehling, testified that it was not only the pain pump — a kind of drug delivery system — that could have caused Kilpatrick harm, but also anesthetic delivered via the pain pump, according to the order.

Additionally, Poehling relied on medical journal articles rather than controlled studies or independent research, prompting Judge Moore to rule that his testimony should be excluded.

"We very much intend to challenge all of the plaintiffs medical causation experts on the Daubert basis, and my client is looking forward to trying these cases and obtaining defense verdicts," said Breg's national counsel, Kim M. Schmid, a partner at Bowman and Brooke LLP.

The decision could "foreshadow" what might happen in the roughly 300 suits and claims pending against pain pump manufacturers in state and federal courts, Schmid added.

But Kilpatrick's attorney, C. Calvin Warriner of Searcy Denney Scarola Barnhart & Shipley PA, contended that Judge Moore's order would not necessarily affect cases before other trial courts.

"We believe in the end that this will work out in my client's favor. We have full confidence in the federal judicial system, and we feel that different judges will see this differently," Warriner said.

Kilpatrick is planning to appeal the decision, he added.

In his suit, Kilpatrick claimed that after using a Breg pain pump to administer local anesthetic directly into his shoulder joint, he developed post-arthroscopic glenohumeral chondrolysis, a condition that causes cartilage to rot away.

The causes of chondrolysis remain disputed, and experts in the medical community have pointed to autoimmune deficiencies, certain kinds of sutures, thermal energy procedures and contrast dyes made from gentian violets as possible risk factors.

Patients first started to report chondrolysis in the mid-2000s, well after doctors stopped the frequent use of thermal energy and gentian violets, according to Warriner.

Kilpatrick underwent arthroscopic shoulder surgery in 2004 after an orthopedic surgeon discovered a tear in the ring of tissue that surrounds the shoulder socket.

To limit postoperative pain, the surgeon inserted a pain pump into Kilpatrick's shoulder, allowing the doctor to administer an anesthetic for the next 48 hours via a catheter in the man's arm.

Kilpatrick, who owns a charter fishing guide service in the Florida Keys, said he began experiencing severe pain in his shoulder in 2006. An orthopedic surgeon diagnosed the pain as glenohumeral chondrolysis, and Kilpatrick underwent shoulder replacement surgery.

Kilpatrick's complaint accused Breg of negligence, violations of Florida's Deceptive and Unfair Trade Practices Act and five counts of strict liability. The case was set to go to trial on July 6.

In other suits, plaintiffs have taken on surgical centers and anesthetic manufacturers.

Previously, a pain pump suit went to trial in Oregon state court, but by the time the jury heard the case, all the patient plaintiffs had settled, Schmid said. A doctor plaintiff pursued litigation, which resulted in a hung jury and a mistrial.

Kilpatrick is represented by Searcy Denney Scarola Barnhart & Shipley PA and The Alvarez

Law Firm.

Breg is represented by Bowman and Brooke LLP and Arnstein and Lehr LLP.

The case is Kilpatrick v. Breg, Inc., case number 4:08-cv-10052, in the U.S. District Court for the Southern District of Florida.

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