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TEXAS SUPREME COURT ISSUES IMPORTANT OPINION CONCERNING PLAINTIFF'S BURDEN OF PROOF IN PRODUCTS LIABILITY MATTERS

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The Texas Supreme Court recently issued an important opinion concerning products liability. *Merck & Co. v. Garza*, 2011 Tex. LEXIS 638 (Tex. 2011) stemmed from litigation involving the diet drug Vioxx. The court held that plaintiffs seeking to prove general causation with epidemiological evidence must provide at least two independent case studies demonstrating that subjects who used the product under circumstances substantially similar to those encountered by the plaintiff doubled their risk of injury. The plaintiff must also demonstrate that other plausible causes of the injury that could be negated are excluded with reasonable certainty. Only if a plaintiff satisfies these threshold requirements may a court go on to conduct the secondary reliability inquiry that examines the soundness of a study's findings using the totality of the evidence test.

The plaintiffs in this case sued Merck, the manufacturer of Vioxx. The plaintiffs claimed that Vioxx caused Leonel Garza's fatal heart attack. Garza had a long history of heart trouble, including a previous heart attack. He took Vioxx for less than a month before he died. The autopsy found that the immediate cause of death was a probable myocardial infarction.

The trial was held in Starr County, Texas, which is generally considered a plaintiff-friendly venue. The jury returned a verdict in favor of Garza's family, awarding $7 million in actual damages, plus $25 million in punitive damages. The trial court reduced the judgment to the statutory maximum of $750,000. Merck appealed the verdict to the Fourth Court of Appeals in San Antonio, arguing that Garza's family had failed to meet the requirements set forth in *Merrell Dow Pharm. Corp. v. Havner*, 953 S.W.2d 706 (Tex. 1997) for proving causation because it had not produced two statistically significant epidemiological studies showing that Vioxx at the dose and duration taken by Garza more than doubled his risk of heart attack. The Court of Appeals rejected Merck's argument. Subsequently, the Texas Supreme Court granted Merck's petition for review.

The Texas Supreme Court agreed with Merck, reversing the Court of Appeals and rendering a judgment in Merck's favor. The court held that its previous guidelines regarding scientific reliability stated in *Havner* apply to all epidemiological evidence, including the type of causation evidence that Garza's family presented at trial, which were clinical trials.

The court also held that even if a plaintiff reaches the totality of evidence phase of proof, that evidence cannot prove general causation if it does not meet the standards set by *Havner*. The court specifically rejected an argument by Garza's family that the risk doubling required by *Havner* can be extrapolated from studies finding a doubling of risk at much higher doses and longer durations. The court observed that Garza's family could not point to any scientific basis for such extrapolation, thereby applying a strict standard to extrapolative evidence as well. In sum, the court concluded that "a plaintiff cannot prove causation by presenting different types of unreliable evidence."

Garza expands the Texas Supreme Court's strict jurisprudence regarding the admissibility of scientific evidence. From an insurance defense standpoint, *Garza* may add another line of defense against claims by buyers and users of products. This may in turn reduce settlement costs or even discourage new litigation by plaintiffs.

To discuss any questions you may have regarding the issues discussed in this alert, or how they may apply to your particular circumstances, please contact Ronald E. Tigner at 832.214.3935 or rtigner@cozen.com and Karl A. Schulz at 832.214.3933 or kschulz@cozen.com.