

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

RUSSELL BRUESEWITZ, et al.	:	CIVIL ACTION
	:	
v.	:	
	:	
WYETH, INC.	:	NO. 05-5994

MEMORANDUM

Baylson, J.

February 22, 2007

In the Complaint in this case filed on October 12, 2005 in the Court of Common Pleas of Philadelphia County and removed to this Court, Plaintiffs alleged a single cause of action entitled “negligence,” and alleged, inter alia in paragraph 19, “at all times herein mentioned, defendant negligently and carelessly researched, manufactured . . . manufactured for others . . . certain vaccines.” As a result of injuries suffered, Plaintiffs sought damages and other relief.

Defendant Wyeth, Inc. (“Wyeth”) filed a Motion for Summary Judgment on June 13, 2006 (Doc. No. 22), asserting that all of Plaintiffs’ claims were preempted by federal law because they were “based on defective design and inadequate warnings of FDA-approved childhood vaccines. Such preempted claims make up the entirety of Plaintiffs’ Complaint.”

Following briefing on the Motion for Summary Judgment, the Court was not certain whether Plaintiffs agreed that their claims were limited to defective design and inadequate warnings, and in a telephone conference with counsel, requested Plaintiffs to state their contentions in some detail. Plaintiffs filed an Amended Statement of Contentions on February 1, 2007 (Doc. No. 55) which asserted under the heading “strict liability (manufacturing defect)” that the vaccine given to Plaintiff Hannah Bruesewitz “contained a manufacturing defect that made it

extra hazardous. Defendant's manufacturing process and inadequate quality control resulted in recurrent problems. . . ."

Defendant Wyeth in its response to this statement, although asserting that its Motion for Summary Judgment based on statutory preemption is meritorious and should be granted, noted that Plaintiffs' Amended Statement of Contentions "attempts to recast the allegations of their Complaint in order to avoid summary judgment." Wyeth concedes that claims based on a manufacturing defect are not preempted.

Wyeth asserts that Plaintiffs' Complaint did not allege a manufacturing defect which is correct as to a strict liability claim, but incorrect as to a claim based on negligence under accepted principles of notice pleading. Wyeth asserts that Plaintiffs are trying to restate, as a manufacturing defect, Plaintiffs' contention that Wyeth should have used a different process for manufacturing its DPT vaccine.

The Court cannot ascertain from the filings whether it would be appropriate to allow this case to proceed under a claim of strict liability for manufacturing defect. Such a claim would not be encompassed within the negligence cause of action asserted in the original Complaint.

Plaintiffs have not sought any leave to file an amended complaint. Nonetheless, the Court is hesitant to strike Plaintiffs' contention of a claim for manufacturing defect without giving notice to Plaintiffs of the confused nature of the record, and to question, without any comment as to its ultimate resolution, whether Plaintiffs will promptly file a motion to amend their Complaint if it is their intention to proceed to trial on any strict liability claim relating to manufacturing. If so, the claim should be stated in some detail since extensive discovery has already taken place.

The Court also notes that there are a number of discovery issues pending. Although the

Court has considered Wyeth's Motion for Summary Judgment based on preemption, the Court is reluctant to decide that Motion without knowing whether, if granted, it will dispose of the entire case. If it will not, the Court is inclined to delay decision on the preemption motion until the filing of anticipated motions for summary judgment on all pending issues.

Because the Motion for Summary Judgment on preemption has been pending for over six months, and given the Court's confusion over Plaintiffs' claims in the context of the record, the Court has decided to deny Wyeth's Motion for Summary Judgment based on preemption, without prejudice. The Court will schedule a telephone conference with counsel to discuss the resolution of the issues presented in this Memorandum and Order, including unresolved discovery issues, and set a new date for the filing of dispositive motions on issues other than preemption. At that time, Wyeth's Motion for Summary Judgment based on preemption will be ordered refiled and the briefs and all papers currently on file will be considered.

An appropriate Order follows.

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ORDER

AND NOW, this 22nd day of February, 2007, based on the foregoing Memorandum, it is hereby ORDERED that Defendant Wyeth's Motion for Summary Judgment (Doc. No. 22) is DENIED without prejudice.

BY THE COURT:

s/Michael M. Baylson

Michael M. Baylson, U.S.D.J.