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Zimmer's Expert Takedown Poses Hurdles For Knee Patients

By **Sindhu Sundar**

Law360, New York (November 12, 2015, 5:43 PM ET) -- Zimmer won the first bellwether trial in the federal multidistrict litigation over its NexGen knee implant series in part by successfully curbing its adversary's expert testimony on the adequacy of its warnings, which means the plaintiffs now must fight harder for such testimony in future trials or retool their strategy, attorneys say.

An Illinois federal jury rejected on Nov. 6 bellwether plaintiff Kathy Batty's negligent design and failure to warn claims against Zimmer Inc. This outcome leaves the plaintiffs with some tough decisions about their strategy moving forward, attorneys say.

"The dynamics of the MDL have certainly changed now — the loss of expert testimony about the warnings was clearly very detrimental to the plaintiffs," said Max Kennerly, of counsel at Tor Hoerman Law. "As they go forward in the MDL, they're going to have to find a way to make their case compelling."

Losing on a failure to warn claim can be a particularly tough blow for plaintiffs in a trial as such claims are generally considered to be their major battleground in the courtroom. While design defect claims can be harder to prove to a jury, since they are more technical, plaintiffs can count on failure to warn claims as a way to appeal more easily to a layperson's sense of fairness, attorneys say.

"With design defect, everything you're going to present there is complicated medical testimony about how medical devices are designed and should be designed, as compared to the cleaner, simpler claim that the company didn't tell the doctor about the real risks of the product, which is easier to prove in front of jury," Kennerly said.

"Legally, a failure to warn claim is also less susceptible to dispositive motions like summary judgments, because of the standards courts apply, and in the end, your jury is given a wide berth to decide the facts of what is an adequate warning," he added.

The court presiding over the case had previously rejected expert testimony submitted by Batty on whether there were adequate warnings on the NexGen devices that allegedly tend to loosen, which can impair flexibility and cause pain in patients.

As a result, she advanced the testimony of her surgeon, Alan Klein, who said he had previously seen the package insert containing warnings for the NexGen Flex device. As her treating surgeon, Klein testified about his knowledge of the potential risks of knee surgery, but not that Zimmer didn't warn about the product's risk, Zimmer had argued during the course of the trial.

Batty claimed that both her knee implants had gotten loose just two years after undergoing surgeries, while Zimmer argued that was because Batty's operating surgeon hadn't properly secured the implants

in place.

Before the trial, Batty had proposed experts Joseph Fetto, an orthopedic surgeon, and George Samaras, a medical device consultant, to testify that Zimmer's warning was not enough to alert her surgeon about the device's risks. But as a result of the court's earlier rulings on Zimmer's Daubert motions to restrict their testimony, neither of those experts testified about the warnings at trial, according to an October memorandum by the device maker.

Fetto was blocked from testifying about warnings after the court ruled that his methodology was vague, and that he had not properly reviewed Zimmer's package inserts and surgical technique instructions.

The outcome of the Batty trial leaves plaintiffs with some options moving forward. One would be to appeal the Illinois federal court's decision to curb the warnings testimony by Fetto — if the appeal succeeds, he would likely be allowed to testify in future trials.

If the appeal fails, the plaintiffs could try to persuade the court to allow Fetto to review those materials and offer a more knowledgeable opinion about the warnings, according to Kennerly.

"The plaintiffs could do that in future cases regardless of any appeal or any results of such an appeal," he said.

Batty's loss is an especially resonant defeat given that it came in a case that the plaintiffs chose as a bellwether. U.S. District Judge Rebecca Pallmeyer, who is presiding over the MDL, is expected to select three more bellwether trials from pools of cases selected separately by the plaintiffs and Zimmer.

It is not clear whether she will select an equal number of picks by plaintiffs and Zimmer for the bellwethers, though she has indicated that the next bellwether trial will be a case selected by Zimmer.

The stakes are higher now for the plaintiffs because another defeat for them would substantially weaken their leverage in any potential settlement discussions, defense attorneys said. Even one defense verdict in such bellwethers can add an extra year or two to the arc of a mass tort litigation, said Matt Keenan of Shook Hardy & Bacon.

"From a defense perspective, winning the first trial is the antithesis of negotiating a resolution," he said.

Batty is represented by Jim Ronca of Anapol Weiss, Tim Becker of Johnson Becker PLLC, Tobias Millrood of Pogust Braslow & Millrood LLC and Peter Flowers of Foote Meyers Mielke & Flowers PC.

Zimmer is represented by Andrea Roberts Pierson, James A. O'Neal, Bruce Jones, Amy R. Fiterman, James Stephen Bennett and Abigail M. Butler of Faegre Baker Daniels.

The case is Batty et al. v. Zimmer Inc. et al., case number 1:12-cv-06279, in the U.S. District Court for the Northern District of Illinois.

The MDL is In re: Zimmer Nexgen Knee Implant Products Liability Litigation, case number 1:11-cv-05468, in the same court.

--Additional reporting by Jessica Corso. Editing by Christine Chun and Kelly Duncan.
