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But Is It Retroactive? Michigan Repeal of Drugmaker Immunity Statute Set to Go Into Effect February 2024

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Major changes are on the horizon in Michigan for manufacturers and sellers of FDA-approved pharmaceutical products. Since 1995, such manufacturers and sellers have enjoyed immunity from product liability suits pursuant to the Michigan Product Liability Act (MPLA), which shielded them from liability. The statute, Mich. Comp. Laws Ann. § 600.2946, has successfully barred thousands of plaintiffs from obtaining recovery[1] and discouraged countless others from being filed.

But no more.

Effective February 13, 2024, blanket immunity will be lifted, and pharmaceutical manufacturers and sellers will be subject to product liability for defective products pursuant to changes to the MPLA approved by the Michigan legislature in Senate Bill 410. While undoubtedly a welcome change for plaintiffs, drug manufacturers and sellers are now grappling with the scope of their liability.

While it is clear that there is no longer drugmaker immunity in cases where the plaintiff is injured after February 13, 2024, there is a question as to whether the new law applies to cases already filed or cases where the plaintiff is injured before the effective date but files suit after the effective date. This question of retroactivity appears to be a perennial concern to the Michigan Supreme Court. Michigan recognizes a presumption against retroactivity and has set forth four factors (*LaFontaine* factors) a court must consider when determining whether a new statute applies retroactively:

1) A court should give effect to any specific language in a new statute stating that it should be given retrospective or prospective application.

2) A statute is not regarded as operating retrospectively solely because it relates to an antecedent event.

3) Retrospective application of a law is improper where the law takes away or impairs vested rights acquired under existing laws, creates a new obligation, or imposes a new duty.

4) A remedial or procedural act not affecting vested rights may be given retroactive effect.

See, e.g., *LaFontaine Saline, Inc. v. Chrysler Grp., LLC*, 852 N.W.2d 78, 85-86 (Mich. 2014); *In re Certified Questions from the U.S. Court of Appeals for the Sixth Cir.*, 331 N.W.2d 456, 463 (Mich. 1982).

1) Intent of the Legislature

The Michigan Supreme Court has held that "[t]he primary and overriding rule is that legislative intent governs" the question of retroactivity. *Frank W. Lynch & Co. v. Flex Techs., Inc.*, 624 N.W.2d 180, 182 (Mich. 2001). With respect to the MPLA provisions, there is no indication that the legislature intended the statute to apply retroactively; indeed, S.B. 410 indicates only that the statute will become effective February 13, 2024. Moreover, the sponsor of S.B. 410 has acknowledged that he does not believe there is a way to receive retroactive payouts pursuant to it. "*Michiganders may soon be able to sue drug manufacturers, sellers for first time in 28 years*," R. Just, Sinclair Broadcast Group (last accessed Jan. 2, 2024) (indicating that Senator Jim Irwin "said he did not believe there would be a way to retroactively receive payouts for opportunities Michiganders have missed because of the law"). In such cases, Michigan recognizes that "providing a specific, future effective date and omitting any reference to retroactivity supports a conclusion that a statute should be applied prospectively only." *Johnson v. Pastoriza*, 818 N.W.2d 279, 287 (Mich. 2012). Lack of such language in S.B. 410 regarding retroactivity weighs in favor of prospective application only.

2) Antecedent Events

This factor pertains only to revised statutes specifically related to an antecedent event (a specific event that has already occurred), and therefore does not apply here. *See LaFontaine*, 852 N.W.2d at 85-86.

3) Creation of New Obligation or New Duty

If applied retroactively, the MPLA revisions would impose a new duty on pharmaceutical drug manufacturers and sellers at the time the injury occurred where none had existed before. In such cases where a duty has been created, Michigan courts have recognized that "because plaintiff's claim had already accrued on the day she was injured, the retroactive application [of the revised statute] would effectively rewrite history as to the duty defendant owed plaintiff . . . . This is precisely what the third factor disallows." *Buhl v. City of Oak Park*, 968 N.W.2d 348, 354 (Mich. 2021). Thus, this factor likewise weighs against retroactivity.

4) Remedial or Procedural Act

Generally, a statute that can be characterized as merely remedial or procedural should be given retroactive application. *See LaFontaine*, 852 N.W.2d at 86. However, where a statute "imposes a new substantive duty and provides a new substantive right that did not previously exist . . . it cannot be viewed as procedural, and the presumption against retroactivity applies." *Kia Motors Am., Inc. v. Glassman Oldsmobile Saab Hyundai*, 706 F.3d 733, 740 (6th Cir. 2013) (applying Michigan law). Since retroactive application of the MPLA revisions would impose a new substantive duty on defendants as discussed above, this factor also does not favor retroactive application.

Effective Date of February 13, 2024

Even if not retroactive, it does not appear that the new law will apply to every case filed on or after February 13, 2024. Rather, Michigan courts are clear that – consistent with the disfavor of rewriting history as to the duty of the defendant at the time the cause of action accrued – they focus on which law applied on the date of the injury rather than the date of filing the complaint. *See Schilling v. City of Lincoln Park*, No. 342448, 2019 WL 2146298, *9 (Mich. Ct. App. May 16, 2019) (declining to apply new law where cause of action accrued before effective date, but case filed after effective date); *Brewer v. A.D. Transport Express, Inc.*, 782 N.W.2d 475, 479 (Mich. 2010) (noting that revisions to a new workers' compensation statute "applies only to injuries *occurring on or after* the effective date of the amendment") (emphasis added). Accordingly, drugmakers and sellers should anticipate that they will no longer be immune from suit relating to any injuries occurring on or after February 13, 2024.

[1] MDL courts and other consolidated proceedings routinely have granted such motions, resulting in dismissal of large inventories of cases at once. *See In re Taxotere (Docetaxel) Prods. Liab. Litig.*, No. 16-md-2740, 2021 WL 1285087 (E.D. La. Apr. 7, 2021) and Doc. 13327 (Oct. 12, 2021) (granting summary judgment in one case, then proceeding with show cause process resulting in dismissal of 358 additional plaintiffs); *In re Proton Pump Inhibitor Prods. Liab. Litig.*, No. 2:17-MD-2789, 2022 WL 5265300 (D.N.J. Sept. 20, 2022) (dismissing 197 cases); *In re Risperdal Litig.*, 175 A.3d 1023 (Pa. 2017) (dismissing 13 cases); and *In re Depakote*, No. 12-cv-52, 2017 WL 4348052 (S.D. Ill. Sept. 28, 2017) (dismissing 18 cases).

Additional Information

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