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Semiconductor Birth Defect Cases Keep Unraveling In Del.

Law360, New York (March 12, 2014, 5:23 PM ET) -- A series of increasingly suspect birth defect cases targeted at semiconductor manufacturers have continued to unravel in 2014 as two of plaintiffs' key expert witnesses have been excluded for lack of reliability and the claims of three families have been completely dismissed for asserting noncognizable claims and for filing amended complaints that negate plaintiffs' own theory of causation.

Specifically, on Feb. 5, 2014, Delaware state court trial judge Jan R. Jurden issued a decision in Anderson v. ATMI Inc., finding that the opinions of Drs. Linda Frazier and Cynthia Bearer were inadmissible because they "do not pass muster under Daubert."

Judge Jurden found that Dr. Frazier "does not adequately 'articulate her thought process, evaluation methods and conclusions to establish reliability.'" Judge Jurden also found that the studies relied on by Drs. Frazier and Bearer "simply do not support their opinions and do not 'fit' the case."

This decision was issued shortly after the Delaware Supreme Court's decision in Tumlinson v. Advanced Micro Devices Inc., a case that affirmed a different Delaware state trial court's decision to exclude plaintiffs' expert witness for similar reasons.[1] The finding that the two experts' opinions were "irrelevant, unreliable, and, therefore, inadmissible" presents a significant hurdle for plaintiffs to overcome in the upcoming March 31, 2014, Anderson trial, which will be the first of the semiconductor birth defects cases in Delaware to go to trial.

Judge Jurden's Anderson decision highlights several apparent fundamental flaws in plaintiffs' core theory that chemical exposure during the semiconductor manufacturing process caused birth defects. So far, the key experts employed by plaintiffs in these cases have been unable to point to published scientific studies demonstrating a link between the two and, instead, have relied on "inapposite" studies or "untested extensions of" such studies. Among other things, this raises substantial questions about whether plaintiffs have a viable theory of causation in any of these cases.

The Anderson decision came in the wake of three other significant Delaware decisions that dismissed nearly identical birth defect claims brought by children born to workers of semiconductor manufacturers: Rodriguez v. Intel Corp., Smith v. Freescale Semiconductor Inc. and Manspeaker v. Intel Corp.

All three cases, though filed in Delaware, were decided under Arizona law and presented what are known as "preconception" tort claims — claims that seek recovery on behalf of persons who allege that they were injured prior to being conceived. As the court explained in Rodriguez, plaintiffs were asking the court to recognize a noncognizable action "arising at some nebulous time before a person is even

conceived," one which would "cause a wake of potentially endless litigation and unintentional ramifications."

The Rodriguez court also found that — at most — the allegations in the operative complaint would "only support the argument that a relationship existed between [d]efendants and [the father], not between [d]efendants and [minor plaintiff]." This finding serves as a critical and logical endpoint to the duty manufacturers owe to workers on their premises.

Put simply, manufacturers owe some duties to their employees or workers — indeed, this is evidenced by myriad workers' compensation systems, but extending the relationship between employers and employees to create a relationship between employers and the potential unborn offspring of their employees or contract workers goes too far. The repercussions of so dramatically expanding tort law are far-reaching and implicate the butterfly effect Justice Cardozo warned of in the seminal case of Palsgraf v. Long Island RR Co. (1928).

In finding that the plaintiffs in the Rodriguez, Smith and Manspeaker decisions "failed to allege cognizable claims under Arizona law," the court also found that the plaintiffs "negated causation as a matter of law by affirmatively denying the only possible causal link between [the plaintiff] and chemical exposure at [d]efendants' facilities."

The court's finding that plaintiffs negated causation created a domino effect for all of plaintiffs' claims. It meant that not only were the negligence claims against the semiconductor manufacturers dismissed, but also that the strict liability claims could not survive, given the "lack of causation between [d]efendants' use of chemicals and [minor plaintiff's] birth defects."

Independent from the lack of causation finding in Rodriguez, Smith and Manspeaker, strict products liability claims also do not seem to be the right fit for the types of claims being asserted by plaintiffs.

Courts traditionally view products liability claims within the framework of whether a product is defective when introduced into the stream of commerce. See, e.g., Menendez v. Paddock Pool Construction Co., (Ariz. Ct. App. 1991). But in these semiconductor birth defects cases, which are being brought on behalf of the minor plaintiffs and not their parents, the injuries to the minor plaintiffs did not occur as a result of the minor plaintiffs coming into contact with the finished product.

Instead, the defective product is alleged to be the manufacturing process itself, and the alleged exposure occurred — in the preconception cases — before the minor plaintiffs even came into existence. It is difficult to see how or why strict products liability claims should apply in such cases. And, again, going back to the point made by the court in Rodriguez, it is difficult to understand why plaintiffs' counsel are asserting such claims on behalf of the minor plaintiffs instead of the parent plaintiffs.[2]

Taken together, the decisions in Anderson, Rodriguez, Smith and Manspeaker provide more challenges to plaintiffs in the semiconductor birth defect suits and demonstrate that the novel theories and arguments presented by plaintiffs' counsel in these cases clash with critical traditional tort law principles.[3]

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[1] Indeed, Delaware Superior Court Judge Jan R. Jurden agreed with the court in Tumlinson, finding that plaintiffs' theory, that "an adult's exposure to clean room chemicals caused their child's birth defects" was "untestable for Daubert purposes." The court found serious deficiencies in the methods employed by both experts, noting that neither had "been subjected to the rigors of peer review and publication." Moreover, the court found that "Drs. Frazier and Bearer failed to perform a complete differential diagnosis, but instead rely on ipse dixit reasoning." For previous coverage of the Tumlinson decision, see Patrick Dennis, Perlette Michele Jura and Beth Coombs, The Outer Limits of Expert Testimony Gatekeeping, Law 360, http://www.law360.com/articles/423146/the-outer-limits-of-expert-testimony-gatekeeping (last visited March 4, 2014).

[2] It appears that the reason for doing this is an attempt to avoid workers' compensation exclusivity.

[3] Anderson v. ATMI Inc., is case number 10C-07-271 in the Delaware Superior Court. Rodriguez v. Intel Corp., is case number N11C-08-029 in the Delaware Superior Court. Manspeaker v. Intel Corp., is case number N11C-04-026 in the Delaware Superior Court. Smith v. Freescale Semiconductor Inc., is case number 10C-07-273 in the Delaware Superior Court. Gibson Dunn does not represent parties in Tumlinson, Smith or Anderson. Gibson Dunn represents one of the defendants involved in Rodriguez and Manspeaker.
