WINTER 2005

A NEWSLETTER FROM THE LAW OFFICES
OF MARTIN & JONES

# MJ notes

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TRIAL LAWYERS

## *Academy President Spencer Parris Pledges to Protect Your Rights*

By Spencer Parris

I was elected this year to serve as President of the North Carolina Academy of Trial Lawyers. The Academy is a 3,600-member association of North Carolina trial lawyers who are committed to protecting the rights of the men, women and children of our state. Our members represent their clients in a wide range of areas, including medical malpractice, personal injury, workers compensation, product liability, social security, family law and many others. The Academy was formed in the 1960s to make sure that working men and women have access to the best legal representation possible.

The lawyers in our firm have been active in the Academy for more than 20 years. In the early 1980s, John Alan Jones of our firm was asked to present seminars to Academy members after only a few years of law practice. He appeared on behalf of the Academy at the North Carolina legislature to fight against proposed laws that would have taken away the rights of personal injury victims. Since then, other lawyers in our firm have given their time to the Academy by teaching seminars for new lawyers, helping with community projects sponsored by the Academy, and sharing information with other lawyers who represent clients in circumstances similar to our clients. We have worked with many other lawyers and firms throughout the state to make the Academy one of the most influential groups in North Carolina.

The Academy is presently preparing for yet another difficult legislative year in 2005. Many insurance companies and corporations want to take away the rights of those injured by the negligence of others. They plan to either completely eliminate your rights, or place arbitrary "caps" on awards juries can make. By doing this, they hope to avoid paying compensation to people injured through no fault of their own. These companies – and medical doctors — want to be given special privileges that the rest of us do not enjoy. The Academy and our firm will be fighting next year to make sure this does not happen. We will do everything necessary to protect your rights, and the rights of your children.

As President of the Academy, and a lawyer in the firm who represents you, I may need to ask your help in the coming year. When you hear the words "tort reform" this year it will be used by those who will take your rights away. The most powerful weapon we have against tort reform is your voice. The companies and legislators who will be trying to pass laws against you fear your stories and your votes most of all. They don't want the public to know what you have gone through, because the voters would then be less willing to take away your rights. They also don't want you to write letters or come to the legislature to speak, because your words are the most effective argument against placing limits on the ability and amount men, women and children can be compensated when they or their loved ones are hurt or killed.

My year as President of the North Carolina Academy of Trial Lawyers will be spent doing my best to make sure that no one takes away your rights. These rights, including your right to a trial by jury, were given to us by our founding fathers in our Constitution. They are what make America the greatest country in the world. Our law firm is committed to fight any attempt to take those rights away from you.

## *Weakened Regulations Harm Patients*

By Greg Martin

On September 30, 2004, pharmaceutical giant Merck announced that it was withdrawing its arthritis medication Vioxx from the market. Approved by the FDA in May of 1999, Vioxx quickly became a blockbuster drug for Merck and generated $2.5 billion in annual sales. By the time the drug was withdrawn from the market more than 20 million Americans had been exposed to Vioxx, and the FDA has estimated that as many as 140,000 of them may have had suffered heart attacks, strokes or other serious cardiovascular problems as a result of the drug.

What happened with Vioxx, unfortunately, is not an isolated occurrence. In the early 1990s, major pharmaceutical companies lobbied Congress aggressively to reduce the time it takes to bring a drug to market. In the case of Vioxx that meant the drug was approved in only six months, when it would have taken years under the previous regulations. The problem with quick approval is that clinical trials are limited in both size and duration. If a side effect of a drug is not going to be apparent before 18 months — the length of time Merck claims is necessary before the cardiovascular risks of Vioxx become apparent — it is simply not going to be discovered during briefer clinical trials. Essentially, after a new drug is approved for marketing the general public serves as guinea pigs, at risk for serious side effects that went undetected in clinical trials. That problem is exacerbated when drug companies intentionally design their studies so that the results will *understate* the risks of a drug, as happened with Vioxx.

Perhaps the most egregious problem with prescription drugs today is the relatively recent phenomenon of direct-to-consumer marketing. Until the late 1990s, drug companies primarily marketed their drugs through sales visits to doctors. Doctors can ask the important questions about side effects that their patients probably would not think to ask. In the case of Vioxx, Merck spent over $500 million per year in an aggressive television advertising campaign that was targeted directly to the general public. That advertising campaign was a huge success for Merck and an important driver of the billions of dollars of profit Vioxx generated for the company. The problem is that it is difficult to accurately describe the risks of side effects in a 30-second television commercial, and in fact the FDA sent a reprimand letter to Merck warning that its television ads were understating the cardiovascular risks of Vioxx.

U.S. laws regulating drug companies have traditionally been among the strongest in the world, but those safety regulations have been significantly weakened in recent years. Given the current political climate and the huge amounts of money pharmaceutical companies can pour into lobbying efforts, the situation seems unlikely to improve in the near future. Patients taking new prescriptions drugs will continue to serve as guinea pigs and will continue to experience serious side effects that could have been avoided if adequate regulations were in place, or if drug companies acted in a more responsible manner to protect the public health. It is ironic that one of the few remaining guarantees of public safety is precisely the tort system which has come under attack in recent years: if drug companies will not voluntarily act in an ethical manner to protect the public health, one of the last remaining safeguards is the threat of lawsuits. Merck faces billions of dollars in liability from the lawsuits that will be filed over the next few years. It can only be hoped that the risk of being held financially accountable for injuries caused by bad drugs will serve as some deterrent for other drug companies in the future, because the safety regulations that currently exist in this country are no longer getting the job done.

## *Merck Finally Withdraws Vioxx*

Vioxx, Merck's blockbuster arthritis drug, was recalled from the market last September after questions were raised about the cardiovascular risks associated with the drug. In a press release after the recall, Merck's CEO Raymond Gilmartin claimed that his company was "putting patient safety first" and called the heart attack risk that led to the recall "unexpected." Internal company documents, however, suggest that Merck was aware of the cardiovascular risks associated with Vioxx years ago, even before the drug was approved for the general public.

Vioxx was one of a new class of painkillers called COX-2 inhibitors. These drugs reduce the pain and inflammation associated with arthritis without the side effects (primarily stomach upset) associated with older non-steroidal anti-inflammatory drugs like aspirin and Aleve (naproxen). NSAIDs worked by blocking both of the enzymes involved in causing inflammation, COX-1 and COX-2. Unlike those drugs, Vioxx inhibits only production of COX-2 and therefore is easier on the stomach, since blocking the COX-1 enzyme can lead to stomach irritation in some patients. Thus, the advantage of Vioxx (and similar drugs like Celebrex) was that it might offer a benefit to arthritis sufferers who couldn't tolerate standard NSAIDs. The problem is that blocking COX-1 also has cardiovascular benefits, by lowering the incidence of blood clots. The dilemma Merck faced in the mid 1990s was how to conduct clinical trials to prove that Vioxx was gentler on the stomach, without highlighting the fact that it might also increase cardiovascular risks.

Internal company documents suggest that Merck was well aware that clinical trials might show significantly higher rates of cardiovascular problems in patients taking Vioxx, as compared to aspirin or other NSAIDs. A Merck email dated February 25, 1997, argued that unless patients taking Vioxx in clinical trials also got aspirin "you will get more thrombotic events (blood clots) and kill the drug." In 1999, Merck began a 3,000-patient trial of Vioxx called the VIGOR (Vioxx GI Outcomes Research) study, comparing patients on Vioxx with control patients taking naproxen. The Vioxx patients did not take aspirin or other NSAIDs, so the study was designed to highlight the GI benefits of Vioxx — but the study also *excluded* any patients who were at high risk for cardiovascular problems. The results of that study were published in March of 2000 and demonstrated significantly more blood clot-related problems in the Vioxx group than in the controls taking naproxen, even though patients who had appeared to be at risk were excluded from the study. Specifically, the rate of heart attacks in the Vioxx group was *four times higher* than in the naproxen group.

Despite these early findings, Merck continued to claim that Vioxx was safe. A Merck press release before the publication of the VIGOR results in 2000 was headlined "Merck Confirms Favorable Cardiovascular Safety Profile of Vioxx" and claimed there was "NO DIFFERENCE in the incidence of cardiovascular events" between Vioxx and NSAIDs. When the VIGOR results were formally published in the New England Journal of Medicine in November of 2000, the article — which was co-written by Merck employees — discussed the benefits of Vioxx for the stomach and assured doctors that the difference in the rate of heart attack between Vioxx and naproxen was "not significant." After the FDA's own drug-safety office presented data in August 2004 showing that Vioxx at high doses tripled the risk of heart attack or sudden cardiac death, Merck issued a press release saying that the company "strongly disagreed" with the FDA's analysis and that "Merck stands behind the efficacy, overall safety and cardiovascular safety of Vioxx." But less than a month later, outside researchers working on another study Merck had funded to see whether Vioxx might lead to a reduction of polyps in the colon (APPROVe) asked Merck to halt the study because patients on Vioxx were suffering significantly more heart attacks than the control group after 18 months of exposure to the drug. It was only at that point that Merck finally made the decision to recall the drug from the market.

notes
LAW OFFICES OF MARTIN & JONES

## Help Expedite Your Social Security Claim

By Chasity Everett

One of the most common questions regarding Social Security Disability is: "What can I do to help expedite my claim"?

Every application must go through Social Security's review process. There are no real shortcuts or guarantees as to when or if benefits will be received until the Social Security Administration makes a proper determination. However, there are some measures you can take to help expedite your claim.

First, don't delay in signing up for Social Security benefits. If you become disabled and unable to work you should file for disability benefits immediately. By filing early, your paperwork will be processed and you can receive past-due payments from the earliest possible date, as there is no waiting period for Supplemental Security Income disability benefits.

When you apply, you can shorten processing time for your claim by having the following medical and vocational information available:

- medical records from doctors, therapists, hospitals, clinics and caseworkers
- the names, addresses, phone and fax numbers of your doctors, clinics and hospitals
- the names of all medications you are taking; and
- the names of your employers and job duties for the last 15 years.

Another way to keep the process flowing is through timely filing of appeals. Social Security appeals must be filed within 60 days from the date stamped on your last denial letter. Keep in mind that every time an appeal is not timely filed, this can slow down the review process or require you to begin the process again. If your 60 days has expired, you may need to contact the Social Security Administration to file a new application.

Also, if you are being represented for your Social Security and/or Supplemental Security Income Disability claim, it is imperative to stay in contact with your representative. Keeping in touch every couple of months with updated medical visits, changes in doctors and any emergency room and/or hospital visits will allow your representative to maintain current information and request any pertinent medical records that may be vital to approve your claim.

Keep in mind that from start to finish the overall process can be lengthy. Social Security's definition of "disabled" may differ from that defined by other individuals and even various doctors who may indicate that you are disabled. This doesn't mean you will automatically qualify for benefits under Social Security rules, as their rules differ from those of other private plans or government agencies.

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## Social Security Benefits Aid Disabled, Retired, and Spouses of Deceased Workers

By Brenda Clark

The Social Security Administration mandates various disability programs for qualified individuals and/or their families. Varying criteria must be met for eligibility in each disability program. Should you find yourself not at full retirement age but unable to work due to physical or mental impairment(s), you may be eligible for disability benefits.

To apply for disability benefits, the first step is to contact your local Social Security office or operators at the nationwide toll-free telephone number, 800-772-1213. Request an application for disability benefits, or file an application online at www.ssa.gov. Remember to retain a copy of your completed application and any correspondence with Social Security. Usually within six months of your filing date, a written decision will be received from Social Security. The majority of disability applications are denied. Martin & Jones believes that qualified representation is critical in order to properly present any appeal of a denial of benefits.

Originally, Social Security was initiated in 1935 and was limited to paying retirement benefits to eligible workers, mostly men age 62 and older. Today's Social Security Administration processes various claims for workers, disabled persons, spouses and children. It still processes workers' retirement benefits and also oversee portions of the Medicare program for disabled and retired workers.

The Social Security Administration's workload includes recording earnings benefits. This information is utilized to calculate monthly retirement, disability, and eligible family benefits for insured workers. Social Security now sends individuals an "Earnings and Benefits Estimate Statement" to assist in retirement planning. This statement notes annual earnings for each year worked and estimates future monthly payments should the insured individual reach retirement age or become disabled. It is very important that all earnings are reported and recorded, as these earnings will affect your future benefits. Should the annual earnings posted on your benefit statement be incorrect, contact your local Social Security Administration office immediately; corrections may only be made for the most current three years with proper documentation. If your earnings have not been posted to your record, your benefit amount may be reduced.

Currently, workers may begin drawing their retirement benefits as early as age 62 with a 20 percent reduction in their full retirement benefit payments. Previously, retirement at 65 years of age with necessary quarters of coverage would qualify for a full retirement benefit payment. However, today's workers, beginning with those born in 1938 and later, will have to wait longer before they may draw their full retirement benefits. Since United States citizens are living longer and less workers are now "paying into Social Security," full retirement age is gradually increasing from 65 to 67 years old. Reduced retirement benefits may still be initiated at age 62, but with greater reductions than the current 20 percent penalty. Retirement benefits may also be available for workers' spouses, even though they have limited or no work history themselves. Survivors' benefits are available for the family of certain deceased workers. There may even be a limited death benefit in many cases. Some qualified ex-spouses of deceased workers may also be eligible for benefits.

# *Statutes of Repose Protects Manufacturers Not Consumers*

By Steve McCallister

A lot of people know about statutes of limitations: they set a date after which a person cannot bring a lawsuit. When a defective product injures someone, the statute of limitations often runs from when they discover or should have discovered their injuries. This gives people time to investigate their claims and file a lawsuit.

However, most people do not know about product liability "statutes of repose." They too set a date after which an injured person cannot bring a lawsuit. But they are very different from a statute of limitations because they often run from an arbitrary date – usually when the product is purchased. So a statute of repose can bar a lawsuit even before a defective product hurts someone. Because this is so unfair, especially with long-lasting durable goods, most states do not even have a statute of repose; those that do usually have very long ones – typically 10 or more years.

Unfortunately, North Carolina has the worst statute of repose in the entire nation: 6 years from initial purchase for use or consumption, though there is an important exception for "latent diseases" caused by products. For example, if someone took a drug like Vioxx or was exposed to asbestos, and then later developed a medical problem from it, the statute of repose would not apply to their claims and they could still sue the manufacturer.

But aside from the narrow "latent disease" exception, if a defective product hurts you in North Carolina 6 years and a day after purchase, you cannot sue the manufacturer. This is especially unfair when today's products last longer than ever. For example, while the average car driven in 1970 was only 4.9 years old, it was 8.6 years old in 2003. So if a defect in an average 8.6 year old car hurts someone in North Carolina today, the 6 year statute of repose prevents them from suing the manufacturer.[1]

It has been this way since 1979 when the North Carolina General Assembly passed N.C. General Statute 1-50(b). And though the law has been widely criticized, though it has denied justice to many injured people, it persists. Victims have unsuccessfully challenged it in court. Unsuccessful bills to extend it to 15 years were introduced in the General Assembly in 1997, 1999, and 2001, but they were buried in committees and never voted upon. These legislative efforts have failed because powerful corporate interests have quietly swept this issue under the rug, and most people do not know about this terrible law until they or a loved one are hurt by a defective product; only then do they discover that just because it was purchased more than 6 years ago, the manufacturer cannot be sued. Not even if the manufacturer knew about the defect, knew that it would hurt people, and did not care enough to do anything about it. Not even if they could have fixed it for a few pennies. Not even if they lied about it or covered it up.

But while the general public does not know about this unfair law, big corporations do, and they have fought for years to preserve it and protect their profits at the expense of injured North Carolinians. This unjust law must change and you can make a difference. Be heard! Contact your elected representatives and tell them to stand up against big corporations, and to stand up for you and your family, by reforming the products liability statute of repose.

[1] While this is the general rule, you should always consult an attorney in specific cases, even if you think that the statutes have already run. Statutes of limitations and repose are an extremely complex area of the law. There are important tolling provisions, choice of law issues, and a host of other matters that may apply to your specific case and may affect your particular statute dates. Never assume that the statutes have expired until an attorney has carefully examined your case.

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