UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

	:	**MDL NO. 1355**
IN RE: PROPULSID	:	
PRODUCTS LIABILITY LITIGATION	:	**SECTION "L"**
	:	
	:	**JUDGE FALLON**
.. ..	:	

THIS DOCUMENT RELATES TO CIVIL ACTION NO. 01-1300

ORDER & REASONS

Before the Court is the motion of defendant Forshag's Drug Store, Inc. ("Forshag's") in consolidated civil action No. 01-1300 captioned *Yvonne Adams, et al. v. Forshag's Drug Store, Inc., et al.* In its motion, Forshag's seeks dismissal of all claims asserted against it pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. For reasons set forth below, the motion is DENIED IN PART AND GRANTED IN PART.

I. *Background*

This litigation concerns the alleged harmful side-effects of the prescription drug Propulsid which was developed, manufactured, and distributed by Johnson & Johnson, Co. and its wholly owned subsidiary, Janssen Pharmaceutica, Inc. In this consolidated case plaintiffs have named as defendants

both the manufacturers of the drug as well as certain Louisiana pharmacies which allegedly sold Propulsid to the plaintiffs. Plaintiffs initially filed this action in the Civil District Court for the Parish of Washington, State of Louisiana. On April 27, 2001, the action was removed to this Court on the basis of diversity jurisdiction. The defendants argued that there was complete diversity believing the non-diverse pharmacies to be fraudulently joined. Plaintiffs did not seek remand. Subsequently, the action was consolidated with *In re Propulsid Products Liability Litigation* MDL-1355. On December 12, 2001, defendant Forshag's Drug Store, Inc. filed the present motion to dismiss.

Plaintiffs allege that the prescription drug Propulsid carries the risk of serious side effects including heart rhythm disorders, such as ventricular tachycardia, ventricular fibrillation, torsades de point and QT prolongation. Plaintiffs contend that they have suffered physical and emotional damages from their use of the drug and assert numerous theories of liability against the various defendants including products liability, negligence, breach of implied warranty, negligent misrepresentation, and fraud. With regard to the pharmacy defendants in particular, plaintiffs allege that (i) the pharmacies offered objective professional opinions and advice to physicians and intentionally and/or negligently misrepresented the effects and side effects caused by the drug, and (ii) that in selling the drug, the pharmacies breached an implied warranty that the drug was reasonably safe for the purpose for which it was intended. In support of its motion to dismiss, Forshag's argues that under Louisiana law the duty of a pharmacist is limited in scope and the pharmacist cannot be held liable for failing to tell patients of the harmful side effects of a drug.

II. ***Analysis***

The Federal Rules of Civil Procedure permit a defendant to seek dismissal of a complaint based on the "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). When considering a motion to dismiss under Rule 12(b)(6), a district court should construe the complaint liberally in favor of the plaintiff, assuming all factual allegations to be true. *See Leleux v. United States*, 178 F.3d 750, 754 (5th Cir. 1999). A complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Lowrey v. Texas A & M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997)).

1. Claims Based on Louisiana Products Liability Act

Under the Louisiana Products Liability Act ("LPLA"), La. R.S. § 9:2800.51, *et seq.*, a manufacturer is liable to consumers if a condition of its product caused harm to the consumer, the condition made the product unreasonably dangerous to normal use, and the condition existed at the time the product left the manufacturers control. *Klem v. E.I. DuPont De Nemours Co.*, 19 F.3d 997 (5th Cir. 1994).

The LPLA defines "manufacturer" as follows:

> (1) "Manufacturer" means a person or entity who is in the business of manufacturing a product for placement into trade or commerce. "Manufacturing a product" means producing, making, fabricating, constructing, designing, remanufacturing, reconditioning or refurbishing a product.
>
> "Manufacturer" also means:
> (a) A person or entity who labels a product as his own or who otherwise

> holds himself out to be the manufacturer of the product.
> (b) A seller of a product who exercises control over or influences a characteristic of the design, construction or quality of a product that causes damages.
> (c) A manufacturer of a product who incorporates into the product a component or part manufactured by another manufacturer.
> (d) A seller of a product of an alien manufacturer if the seller is in the business of importing or distributing the product for resale and the seller is the alter ego of the alien manufacturer....

La. R.S. §9:2800.53(1).

The LPLA defines "seller" as a "person or entity who is not a manufacturer and who is in the business of conveying title to or possession of a product to another person or entity in exchange for anything of value." La. R.S. § 9:2800.53(2).

In the present case, plaintiffs allege in Count Eight of their complaint that the pharmacy defendants "kept in stock, ordered and sold the Propulsid drug, a defective product, to the [p]laintiffs serving as a seller and/or conduit for the defective drug" and thereby breached both express and implied warranties that the drug was "safe for the purpose for which it was intended." However, based on the facts alleged, defendant Forshag's does not meet the criteria under which a seller may be treated as a manufacturer according to the LPLA. Forshag's did not make the product nor did it have any input into the design of the product nor did it have any control over either the construction or quality of the product. Accordingly, as a mere seller in this matter, Forshag's is not subject to the liability for defective products established by the LPLA. These claims, therefore, must be dismissed.

2. Claims Based on Negligent and Intentional Misrepresentation

In Count Eight of the complaint, plaintiffs claim that the pharmacies made express warranties that the drug was safe for its intended use. Defendant contends that there is no basis for holding a pharmacy liable for dispensing an FDA-approved drug to the plaintiff in accordance with a lawful prescription from a licensed physician in the dosage and amount properly prescribed. Plaintiffs correctly note that the Louisiana courts impose a duty upon pharmacists to do more than accurately fill prescriptions. Indeed, the Louisiana courts have held that pharmacists have a limited duty not only to fill prescriptions correctly, but also to inquire with the prescribing physician when clear errors or mistakes are apparent on the face of the prescription, such as when excessive dosages have been prescribed. *See Gassen v. East Jefferson Gen. Hosp*., 628 So.2d 256, 258-59 (La. App. 5th Cir. 1993). However, a pharmacist does not have a duty to warn a patient of adverse reactions. *See id.*; *Guillory v. Dr. X*, 679 So.2d 1004 (La. App. 3rd Cir. 1996); *Pilet v Ciba-Geigy Corp*., 1996 WL 89262 (E.D. La.).

In the present case, plaintiffs allege that the pharmacies affirmatively misrepresented the side effects of the drug. In particular, plaintiffs claim that the pharmacies acted as "independent advisors" to the prescribing physicians and "offered objective professional opinions and advice" concerning the possible side effects of the drug. Further, plaintiffs claim that the pharmacies misrepresented to the plaintiff themselves the possible side effects of the drug. The misrepresentation claims asserted are not based on a failure to warn, rather the claims are based on an alleged affirmative misrepresentation. Assuming the truth of the allegations, which the Court must do in 12(b)(6) motions, the pharmacies may

have voluntarily assumed a duty of care which is not ordinarily imposed and accordingly, they may be liable in negligence for a breach of that duty. *See generally, Baker v. Arbor Drugs, Inc*., 544 N.W.2d 727 (Mich. Ct. App. 1995). Thus, these claims survive a 12(b)(6) motion. They may, however, encounter a significant challenge in sustaining a subsequent motion for summary judgment.

3. Claims Based on Redhibition

In Count Six of their complaint, plaintiffs allege that the pharmacy defendants knew or should have known that the drug they dispensed and sold was defective and unreasonably dangerous. While this claim is cast in terms of negligence, the claim may be construed as one in redhibition. Louisiana Civil Code article 2545 provides that "a seller who knows that the thing he sells has a defect but omits to declare it, or a seller who declares that the thing has a quality that he knows it does not have, is liable to the buyer for the return of the price with interest from the time it was paid, for the reimbursement of the reasonable expenses occasioned by the sale and those incurred for the preservation of the thing, and also for damages and reasonable attorney fees." In contrast, Article 2531 provides that "a seller who did not know that the thing he sold had a defect is only bound to repair, remedy, or correct the defect. If he is unable or fails so to do, he is then bound to return the price to the buyer with interest from the time it was paid, and to reimburse him for the reasonable expenses occasioned by the sale, as well as those incurred for the preservation of the thing . . . ." Article 2520 defines a redhibitory defect as one that "renders the thing useless, or its use so inconvenient that it must be presumed that a buyer would not have bought the thing had he known of the defect. The existence of such a defect gives a

buyer the right to obtain recission of the sale." Insofar as the plaintiffs have alleged that the defendants knew of the defect, plaintiffs have stated a claim in redhibition under which they may seek damages.

III. *Conclusion*

For the reasons set forth above, the motion is DENIED IN PART AND GRANTED IN PART. To the extent the present motion seeks dismissal of the claims asserted against Forshag's which are based on alleged affirmative misrepresentations and those which are based on redhibition, the motion is DENIED. As to all other claims asserted against Forshag's the motion to dismiss is GRANTED.

New Orleans, Louisiana this 26th day of June, 2002

/s/ Eldon E. Fallon
UNITED STATES DISTRICT JUDGE