COA Opinion: Michigan's monetary losses from Medicaid payments for the drug Vioxx constitute "damage to property" bringing the Attorney General's claim against the drug manufacturer within the products liability statute, which immunizes drug companies from suit for FDA-approved drugs.

19. March 2011 By Layla Kuhl

In *Attorney General v Merck Sharp & Dohme Corp*, the Court of Appeals panel majority held that "plaintiffs' allegations fall within the statutory definition of "product liability action," because plaintiffs have asserted legal and equitable theories of liability for damage to property resulting from the production of a product. MCL 600.2945(h)." The Court determined that "plaintiffs' claim of monetary loss based on alleged misrepresentations regarding the safety and efficacy of Vioxx constitutes 'damage to property.'" Judge Fitzgerald dissented stating that the trial court property determined that plaintiffs' claim under the MCFA is not a product liability action subject to the absolute defense established by the product liability statute MCL 600.2946(5).

Merck is the manufacturer of the prescription pain reliever Vioxx, which the Food and Drug Administration (FDA) approved in May 1999. After approval, clinical trials and independent studies showed an increased risk of heart attack in persons who used Vioxx. Merck voluntarily removed Vioxx from the market in 2004.

Michigan's attorney general and Carbology Inc filed this action under the Medicaid False Claims Act (MFCA) against Merck for the expenses Michigan incurred through Medicaid payments for the drug Vioxx. The complaint alleged that as early as 2000, Merck knew that Vioxx was associated with an increased risk of heart attack, and Merck concealed or misrepresented the scientific data. Plaintiffs asserted that if Merck had been truthful about the safety and efficacy of Vioxx, they would not have paid all or part of the cost of Vioxx prescribed to Michigan Medicaid beneficiaries, which cost them more than $20 million. Plaintiffs also sought recovery under a theory of unjust enrichment. Merck moved for summary disposition pursuant to MCR 2.116(C)(8) claiming that plaintiffs' claims were a "product liability action" pursuant to MCL 600.2945(h) and therefore barred by MCL 600.2946(5). The trial court denied summary disposition stating that Plaintiffs claims did not constitute a products liability action because they did not require proof of a defective or unsafe product. In a split decision the Court of Appeals reversed, concluding that Plaintiffs claims were indeed a products liability action because the monetary loss alleged constitutes "damage to property."

MCL 600.2946(5) exempts drug companies from product liability suits regarding FDA-approved drugs. A "product liability action" is subject to the immunity provision of MCL 600.2946(5) if (1) the action is based on a legal or equitable theory of liability, (2) the action is brought for the death of a person or for injury to a person or *damage to property*, and (3) that loss was caused by or resulted from the construction, design, formulation, development of standards, preparation, processing, assembly, inspection, testing, listing, certifying, warning, instructing, marketing, selling, advertising, packaging, or labeling of a product.

The Court of Appeals majority and dissent agree that the plaintiffs' claims are legal and equitable in nature and result from the marketing and advertising of the product, satisfying factors (1) and (3). The panel members also agree that plaintiffs' claims can only be considered a products liability action if the monetary losses alleged are "damage to property."

To supports its conclusion that "damage to property" includes "Medicaid overpayments wrongfully received," the panel majority relied on a 1979 United States Supreme Court case, which stated that "[a] person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Reiter v Sonotone Corp*, 442 US 330, 340; 99 S Ct 2326; 60 L Ed 2d 931 (1979). The majority also found the unpublished opinion *Duronio v Merck & Co, Inc* persuasive. In *Duronio*, the Court of Appeals affirmed that trial courts grant of Merck's motion for summary disposition of an individual's fraud and violation of the Michigan Consumer Protection Act claims based allegations that Merck misrepresented or concealed the risks associated with Vioxx.

In contrast, the dissent states that when "damage to property" is examined in the context of the product liability statute it is clear that it means *physical* damage and does not include the monetary losses alleged in the instant case. The dissent relies on Prosser & Keeton, Torts (5 th ed), § 95, p 678, which outlines the five categories of losses and the economic loss doctrine to support his view that "damage to property" should not be given a broad definition as it would immunize drug companies for losses not contemplated by the Legislature.

This case may be of interest to the Michigan Supreme Court as it addresses a matter of first impression and the resolution of this issue will have significant affects on Medicaid and the prescription drug industry.