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Roger Williams University School of Law

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Newsroom

Dean Logan on Nexgen Litigation

Bloomberg spoke to Dean David Logan about hardball defense attempts to intimidate plaintiffs' lawyers in Nexgen mass-tort litigation.

From BLOOMBERG: "[Artificial-Knee Suits Targeting Zimmer Now Haunt Lawyers](#)" by Alex Nussbaum and David Voreacos

The story was also picked up by the [ABA JOURNAL](#), [Indianapolis Business Journal](#), and others.



August 8, 2011: Zimmer Holdings Inc. (ZMH), facing 78 product-liability lawsuits over its NexGen Flex artificial knees, has a rare strategy to defend the product: target lawyers representing the patients.

Attorney Brett Emison, who wrote a blog post about failures in NexGen knees, got a letter from Zimmer lawyers accusing him of “alarmist fear mongering” and demanding he stop.

“It’s a blatant attempt to try to frighten plaintiffs’ lawyers from pursuing these cases,” said Emison of Lexington, Kentucky-based Langdon & Emison.

He’s not alone in drawing the legal wrath of the world’s biggest maker of replacement knees and hips. The Warsaw, Indiana-based company has sued seven law firms this year and sent warning letters to at least three more, saying their ads and Internet postings distorted the safety record of its \$1.8 billion-a-year knee business.



The pre-emptive strikes, begun in January, are an unusually aggressive move, even in an orthopedics industry that's become rife with litigation, Zimmer is firing "a shot across the bow to these plaintiffs' firms," **said Logan, dean at Roger Williams University's law school in Bristol, Rhode Island**, in a telephone interview. "It's like putting a loaded gun on the table for negotiations. You're saying, 'Not only are we not going to give you money, we're going to go after you as well.'"

Correcting Record

The 84-year-old company is merely trying to correct the record about the 3 million NexGen knees implanted worldwide since 1994, said Garry Clark, a Zimmer spokesman. In contrast to the lawyers' claims, joint-replacement databases in the U.K., Sweden and Australia show the products have among the industry's lowest failure rates, he said by e-mail. (U.S. implant registries, started this year, haven't released data yet.)

Plaintiffs' lawyers "have a right to advertise truthfully," Clark said. "They don't have a right to lie about our products."

Zimmer fell \$3.66, or 6.4 percent, to \$53.90 at 4 p.m. in New York Stock Exchange composite trading, on a day the Standard & Poor's 500 Index tumbled 6.7 percent after S&P's downgrade of the U.S. credit rating. Before today, Zimmer had gained 7.2 percent this year.

The ads for the law firms followed a 2009 study that found one brand of NexGen knees had a high rate of revision surgeries, repeat procedures needed to fix a failing implant. That prompted a Michigan firm's Web campaign saying NexGen was "linked to pain, failure and revision surgery!"

Scarlet Letters

A Texas firm ran TV commercials warning in flashing scarlet letters of NexGen's dangers and inviting former patients to call a toll-free number for a free consultation, Zimmer's lawsuit said.

Zimmer may eventually face 1,000 NexGen suits, said James Ronca, a Philadelphia attorney representing patients.

The implant maker has also subpoenaed two firms, seeking information on their contacts with a network of personal-injury attorneys. Four firms sued by Zimmer have settled and issued retractions. The case against the remaining firms is ongoing.

Zimmer's NexGen line includes more than 40 products. The knees combine four primary components. Each has a tibial plate set on the lower leg bone, a femoral component attached to the upper leg, a weight-bearing plastic insert between the two, and a replacement kneecap. Most surgeons use a cement to attach the parts.

NexGen Component

The device that sparked the lawyers' warnings, the NexGen CR-Flex Porous Femoral Component, is designed for doctors who prefer not to use cement. Instead, the components have textured or coated surfaces that encourage bone growth to fuse the implant in place.

Zimmer, in a May 2010 regulatory filing, said it had sold more than 150,000 porous femoral components since the system's U.S. approval in 2003. The product accounted for 2 percent of knee revenue in 2009, the company said.

The CR-Flex's safety was questioned as early as 2006 by Richard Berger, an orthopedic surgeon at Rush University Medical Center in Chicago and a paid consultant to Zimmer, according to a June 2010 New York Times article. Berger told the Times that he had warned the company about cementless prostheses coming loose inside patients.

Two years later, Berger and a fellow Rush University surgeon, Craig Della Valle, released a 108-patient study that found nine instances of femoral loosening and pain requiring a repeat operation, a failure rate of 8.3 percent, according to Zimmer's 2010 filing. Thirty-nine patients showed evidence of loosening. The doctors said the problems "were not related to surgeon, approach or patient type," according to the filing.

Surgeons' Meeting

Berger and Della Valle presented the data to a meeting of the American Association of Orthopaedic Surgeons. The data haven't been published in a peer-reviewed journal. Neither man returned calls seeking comment.

Law firms pounced, publicizing the study in campaigns that suggested that all NexGen knees were a problem, Zimmer said in its lawsuit. The ads have tarnished the company's reputation and hurt sales, it said.

In February, Zimmer sued three firms in federal court in South Bend, Indiana. It would later add four more. The group included Houston-based Pulaski & Middleman LLC, whose TV ad said: "Reports show the ZIMMER NEXGEN KNEE IMPLANT may have a failure rate of 9%," according to the complaint.

Another firm, Weller, Green Toups & Terrell LLP of Beaumont, Texas, wrote to doctors around the U.S. in search of patients who might want to sue over Zimmer's "defective knee implants." Retractions Issued

Both firms agreed to issue retractions, as did Gordon, Edelstein, Krepack, Grant, Felton & Goldstein LLP of Los Angeles and Kresch Oliver of Southfield, Michigan.

"We have determined that the sources we previously relied upon to make claims about the Zimmer NexGen Knee System do not support the statements or implications" in the ads, according to a statement posted on Pulaski's website.

A series of U.S. Supreme Court rulings have given attorneys wide latitude in advertising and recruiting clients, **said Logan, the Roger Williams dean**. The campaigns can say anything that's not "provably false or misleading," he said.

As personal-injury lawyers have grown more bold and numerous, corporations have gotten more aggressive in their defense, **Logan said**.

Zimmer's strategy "opens up a new front in the product- liability wars," **he said**. "Their lawyers are trying to get their arms around not being sued by hundreds or thousands of consumers of their own products."

'Legitimate Discussion'

The lawsuit "is intended only to protect Zimmer and the patients and doctors who use its products," said Clark, the company spokesman. "Zimmer has not made any legal challenge to advertising that is truthful and welcomes legitimate discussion based on fact."

Zimmer's moves contrast with those of Johnson & Johnson (JNJ), whose recall last year of 93,000 hip implants has spurred more than 2,000 lawsuits and widespread legal advertising on the Internet.

The New Brunswick, New Jersey-based company hasn't sued law firms, though it says some advertising is "misleading and includes inaccuracies," said Lorie Gawreluk, a spokeswoman for J&J's DePuy orthopedics unit. "We regularly contact these attorneys and request that they correct such misinformation."

Medically Reversible

NexGen components and surgical tools have been the subject of at least 58 recalls since 2002, according to U.S. Food and Drug Administration records. None involved the CR-Flex or porous femoral components. All were listed as Class 2 recalls, a category of defects expected to cause only "temporary or medically reversible" health problems, the agency says.

Attorney Alyson Oliver of Kresch Oliver said she regrets that her firm agreed to the retraction. Zimmer still hasn't dropped the lawsuit, she said.

“It encouraged them because they were getting what they wanted,” she said in an interview. “They were getting the larger advertising firms to tone down their messages or stop delivering them.

“Our ads were legitimate,” Oliver said. “There was nothing erroneous about them.” The retraction was “a business decision to try to get on with things so that this didn’t consume our practice.”

Cease-and-Desist

The lawsuits and cease-and-desist letters may backfire, said attorney Sam Davis of Davis Saperstein & Salomon in Teaneck, New Jersey. The company’s campaign has become a hot topic at public seminars held by plaintiffs’ lawyers, he said.

“The strategic choice of attacking attorneys for minor inaccuracies is so counter-effective,” said Davis. “Now at the Zimmer NexGen seminars, which are taking place all over the country, they’re actually attracting more attorneys. Many plaintiffs’ lawyers believe it has attracted more attention.”

Ronca, the Philadelphia attorney, said he received a cease- and-desist letter as well, based upon an e-mail he sent to another plaintiffs’ lawyer.

“We told them that they could go jump in a lake because we didn’t misrepresent anything because it wasn’t public,” said the attorney, of Anapol, Schwartz, Weiss, Cohan, Feldman & Smalley.

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