IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Christine Dietz and Bradley Dietz, Plaintiffs, v. Allergan, Inc. f/k/a Inamed Corporation, Allergan USA, Inc., Allergan PLC, Michael Epstein, M.D., Northbrook Plastic Surgery, LLC, and Michael A. Epstein, M.D., S.C., Defendants, Abbvie, Inc., Respondent in Discovery.	)	No. 20 L 4813

MEMORANDUM OPINION AND ORDER

State common law causes of action are not preempted by federal law if they arise from violations of and are parallel to federally imposed requirements. Here, the plaintiffs' causes of action allege the defendant violated various Food and Drug Administration requirements related to manufacturing, marketing, and post-sale reporting of silicone breast implants. Since Illinois common law duties and requirements do not exceed those imposed by the FDA, the defendant's motion to dismiss must be denied.

Facts

On November 17, 2006, the United States Food and Drug Administration (FDA) issued premarket approval (PMA) letter

P020056 for Inamed silicone-filled breast implants. On January 26, 2011, the FDA reported instances of anaplastic large cell lymphoma (ALCL) in women with breast implants. The FDA stated it was investigating a possible association between breast implants and ALCL, and that women with breast implants may have a very small increased risk of developing the disease in the scar capsule adjacent to the implant. The announcement specified that, "if you have breast implants, there is no need to change your routine medical care and follow-up. ALCL is very rare; it has occurred in only a very small number of the millions of women who have breast implants."

On August 8, 2011, Christine Dietz met with Dr. Michael Epstein to discuss breast implant surgery. On September 6, 2011, Epstein posted on his website information about the FDA's investigation into a possible connection between breast implants and the increased risk of a rare form of cancer. Epstein wrote the number of women receiving an ALCL diagnosis is "extremely rare. In fact, the risk of having breast implants and getting this diagnosis is less likely than being hit by lightning." He also stated it was "not even completely certain" the 60 women who had been diagnosed with ALCL "truly have ALCL." He continued by writing: "I can assure you that . . . Allergan, in conjunction with the FDA[,] are voraciously investigating this matter and will have definitive answers as soon as possible."

On February 9, 2012, Christine and Bradley Dietz purchased BIOCELL Natrelle textured silicone-filled breast implants, style 115, designed and manufactured by Allergan, Inc.[1] The same day, Epstein surgically placed the breast implants into Christine's chest. On May 23, 2018, Christine informed Epstein of pain in her

[1] Allergan's Natrelle textured silicone-filled textured breast implants are also known as Inamed silicone-filled breast implants and were, therefore, approved under PMA P020056. The approval included style 115, BIOCELL textured round midrange projection gel filled breast implants. Aaron Sheinin, *Textured Breast Implants Recalled for Cancer Risk*, https://www.webmd.com/women/news/20190724/textured-breast-implants-recalled-for-cancer-risk.

chest. Studies confirmed the existence of a large tissue mass in Christine's chest, and she received a diagnosis of breast implant associated large cell lymphoma (BIA-ALCL), a form of non-Hodgkin's lymphoma. Christine underwent subsequent medical treatment at Rush University Medical Center.

On July 24, 2019, Allergan announced a worldwide, voluntary recall of its product. The announcement followed the FDA's request to initiate the recall based on the risk of BIA-ALCL associated with the breast implants.

On April 30, 2020, Christine and Bradley filed a 25-count complaint against the defendants and the respondent in discovery. Epstein, Epstein SC (collectively, Epstein), and Northbrook Plastic Surgery, LLC (Northbrook) filed a motion to dismiss the counts against them. Allergan, Inc. and Allergan USA, Inc. (collectively, Allergan) filed a separate motion to dismiss the counts directed against them. The parties briefed the motions, and on October 8, 2020, this court issued a memorandum opinion and order denying Epstein's and Northbrook's motion, but granting Allergan's motion with prejudice.

Christine and Bradley then filed a motion to reconsider. They argued, in essence, that they had failed to plead their best complaint, and sought leave to file an amended version. This court granted their motion.

On January 20, 2021, Christine and Bradley filed their first amended complaint. The complaint provides considerably more factual background as to the Allergan breast implants' manufacturing, approval, and marketing processes as a Class III medical device within federal statutory and regulatory guidelines. The amended complaint's factual underpinnings are of three types. First, Christine and Bradley allege Allergan's manufacturing process was defective and produced an adulterated product in violation of the PMA and the FDA's quality systems regulations (QSRs) and current good manufacturing practices (CGMPs), as well as Illinois law prohibiting the sale of

adulterated and misbranded products. 410 ILCS 620/3.1 & 3.3. Second, Allergan misrepresented BIOCELL in a marketing brochure as a "premium" product of "proven" quality. Third, Allergan allegedly violated federal regulatory requirements by failing to report adverse postmarket events. These failures also allegedly violated Illinois law requiring Allergan to furnish information to the FDA. 410 ILCS 620/3 & 3.18(1)(B). Based on these allegations, Christine and Bradley claim Allergan violated the Illinois Food, Drug and Cosmetic Act (ILFDCA) and the explicit requirements of the FDA's PMA.

These claims form the basis for 48 causes of action for direct negligence as well as Bradley's causes of action for loss of consortium. The claims fall into six basic groups. One group consists of causes of action for alleged manufacturing defects under both negligence and strict liability theories—counts 1-2, 9-10, 17-18, 25-26, 33-34, and 41-42. A second group comprises general negligence causes of action—counts 3, 11, 19, 27, 35, and 43. Causes of action based on alleged failures to warn based on both negligence and strict liability theories form a third group—counts 4-5, 12-13, 20-21, 28-29, 36-37, and 44-45. Fourth are negligent misrepresentation causes of action—counts 6, 14, 22, 30, 38, and 46. Fifth are causes of action for breaches of implied warranties of merchantability—counts 7, 15, 23, 31, 39, and 47. Sixth, are causes of action for breaches of express warranties—counts 8, 16, 24, 32, 40, and 48. Counts 49-61 are directed against Epstein, Northbrook, and Abbvie.

On February 19, 2021, Allergan filed its motion to dismiss all causes of action with prejudice. The parties fully briefed the motion. Christine and Bradley ultimately filed a supplemental reply brief based on a recent federal district court opinion.

Analysis

Allergan brings a combined motion to dismiss counts one through 48 based on Code of Civil Procedure section 2-619.1. 735 ILCS 5/2-619.1. A section 2-615 motion tests a complaint's legal

sufficiency, while a section 2-619 motion admits a complaint's legal sufficiency, but asserts a defense outside the pleadings to defeat the claim. *Bjork v. O'Meara*, 2013 IL 114044, ¶ 21; *Patrick Eng., Inc. v. City of Naperville*, 2012 IL 113148, ¶ 31. Such affirmative matter includes statutory preemption. *See* 735 ILCS 5/2-619(a)(9); *Joseph Constr. Co. v. Board of Trs. of Governors St. Univ.*, 2012 IL App (3d) 110379, ¶17. A court considering either motion must accept as true all well-pleaded facts and reasonable inferences arising from them, *Doe v. Chicago Bd. of Ed.*, 213 Ill. 2d 19, 23-24 (2004), but not conclusions unsupported by facts. *Pooh-Bah Enters., Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). *See also Hanks v. Cotler*, 2011 IL App (1st) 101088, ¶ 17.

Allergan's singular section 2-619(a)(9) argument is that federal law preempts Christine and Bradley's causes of action. Whether a federal statute preempts state law is a question of law, *Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 15 (2006), and is, therefore, for a court to decide. *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019). The preemption doctrine originates with the United States Constitution's supremacy clause providing that "Laws of the United States . . . shall be the supreme Law of the Land; and Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. In short, if state law conflicts with a federal statute, state law is preempted by the supremacy clause and application of the state law is unconstitutional. *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 388 (2000). A party claiming preemption must point specifically to constitutional text or a federal statute displacing state law. *Puerto Rico Dep't of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 503 (1988).

The foundation for Allergan's preemption argument lies with the medical device amendments (MDA) Congress enacted in 1978 to the Federal Food, Drug and Cosmetics Act (FDCA). 21 U.S.C. § 360c *et seq.* The MDA gave the FDA exclusive authority to regulate medical devices and established a "regime of detailed federal oversight." *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 316

(2008). Up to that point, states had generally regulated the use of medical devices. *Id.* at 315. Congress adopted the MDA in response to the undue burden imposed by various state regulations. H.R. Rep. No. 94-853, at 45 (1976). The post-MDA statutory and administrative scheme created a comprehensive federal regulatory system for medical devices. *See Riegel,* 552 U.S. at 316-17.

Under the MDA, innovative Class III devices "incur the FDA's strictest regulation" and must receive a PMA from the FDA before being marketed. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 344 (2001). Class III devices cover a variety of products, including those presenting "a potential unreasonable risk of illness or injury." 21 U.S.C. § 360c(a)(1)(C)(ii)(II). Such products include heart valves, cerebella stimulators, and pacemakers. *Riegel,* 552 U.S. at 317. It is undisputed the FDA reviewed the Inamed/Allergan Natrelle silicone-filled breast implants Christine received as Class III products.

Class III approval is a rigorous process. *Id.* The FDA reviews Class III devices first by determining whether the device may be classified as "substantially equivalent" to another device exempt from the PMA process. *Id.* (referring to the § 510(k) process). If the product is not substantially equivalent, the product must then go through the PMA process. *Id.* If a product receives a PMA, the manufacturer is prohibited from making any changes in specifications, manufacturing processes, or labeling that would affect the product's safety or effectiveness. *Id.* at 319 (citing 21 U.S.C. § 360e(d)(6)(A)(i)). All Class III products are also subject to extensive reporting requirements. *Id.* (citing 21 U.S.C. § 360i).

Federal preemption of state law may occur in three factual and legal circumstances: "(1) when the express language of a federal statute indicates an intent to preempt state law; (2) when the scope of a federal regulation is so pervasive that it implies an intent to occupy a field exclusively; and (3) when state law actually conflicts with federal law." *Village of Mundelein v.*

Wisconsin Cent. R.R., 227 Ill. 2d 281, 288 (2008) (citing *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990)). "The determination of whether state law is preempted turns on the intent of Congress." *Village of Mundelein*, 227 Ill. 2d at 288 (citing *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991)). Allergan does not specifically identify which tact it is taking. Based on the discussion below, it is fair to conclude that Allergan's argument implicates all three preemption possibilities.

First, as to express preemption, it is uncontested that Congress included in the MDA an explicit preemption clause. That provision states, in part:

> Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement —
> (1) which is different from, or in addition to, any requirement applicable under this [chapter] to the device, and
> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this [chapter].

21 U.S.C. § 360k(a). *Riegel*, 552 U.S. at 316 (observing section 360k(a) is an express preemption provision). Given this statutory framework, the *Riegel* court found express preemption is subject to a two-step analysis. A court must first decide if the federal government established requirements applicable to the particular medical device at issue. *Id.* at 321. If those requirements apply, a court must then determine if state law claims are based on requirements for the device that differ from or are in addition to the federal requirements relative to: (1) the device's "safety and effectiveness;" or (2) "any other matter included in a requirement applicable to the device under [the MDA]. . . ." *Id.* at 316.

As to the first step, *Riegel* makes plain that Class III devices are subject to a premarket approval process imposing federal

requirements within the meaning of the statute. *Id.* at 322-23. *Riegel* further explains that state common law duties also constitute "requirements" within the meaning of the statute. *Id.* at 324. As to the second step, it is plain that state common law causes of action imposing duties different from or in addition to those imposed by the MDA are expressly preempted. *Id.* at 324-26 (duties imposed as to claims of strict liability, breach of implied warranty, negligent design, testing, inspection, distribution, labeling, marketing, sale, and manufacture constitute state requirements) (citing cases).

In addition to the MDA's express preemption provision, state causes of action are impliedly preempted under the FDCA "no private right of action" provision. 21 U.S.C. § 337(a). That section directs all actions to enforce the FDCA "shall be made in the name of the United States. . . ." *Buckman*, 531 U.S. at 349 n.4. Thus, to avoid implied preemption, a state law claim may not "exist solely by virtue of the FDCA . . . requirements." *Perez v. Nidek Co.*, 711 F.3d 1009, 1119 (9th Cir. 2013) (quoting *Buckman*, 531 U.S. at 353). As explained elsewhere:

> This does not mean . . . a plaintiff can never bring a state-law claim based on conduct that violates the FDCA. Indeed. . . , the conduct on which the plaintiff's claim is premised *must* violate the FDCA if the claim is to escape express preemption by § 360k(a). Instead, to avoid being impliedly preempted under *Buckman,* a claim must "rely[] on traditional state tort law which had predated the federal enactments in question[]." *Buckman,* 531 U.S. at 353. In other words, the conduct on which the claim is premised must be the type of conduct that would traditionally give rise to liability under state law—and that would give rise to liability under state law even if the FDCA had never been enacted. If the defendant's conduct is not of this type, then the plaintiff is effectively suing for a violation of the FDCA (no matter how the plaintiff labels the claim), and the plaintiff's claim is thus impliedly preempted under *Buckman. Id.* at 349 n.4.

Riley v. Cordis Corp., 625 F. Supp. 2d 769, 777 (D. Minn. 2009) (emphasis in original).

It is plain that *Riegel*, through its interpretation of express preemption in section 360k(a), and *Buckman*, through its finding of implied preemption in section 337(a), "create a narrow gap through which a plaintiff's state-law claim must fit if it is to escape express or implied preemption." *Bryant v. Medtronic, Inc.*, 623 F.3d 1200, 1204 (8th Cir. 2010) (quoting *Riley*, 625 F. Supp. 2d at 777); *Perez*, 711 F.3d at 1120. Thus, to bring a valid state law tort claim,

> [t]he plaintiff must be suing for conduct that *violates* the FDCA (or else his claim is expressly preempted by § 360k(a)), but the plaintiff must not be suing because the conduct violates the FDCA (such a claim would be impliedly preempted under *Buckman*). For a state-law claim to survive, then, the claim must be premised on conduct that both (1) violates the FDCA and (2) would give rise to a recovery under state law even in the absence of the FDCA.

Riley, 625 F. Supp. 2d at 777 (emphasis in original). Or, as another court explained: "a state-law tort action despite compliance with FDA regulations is preempted by the MDA," but a cause of action "premised entirely on a violation of federal requirements" is not preempted. *Bass v. Stryker Corp.*, 669 F.3d 501, 509 (citing *Hughes v. Boston Sci. Corp.*, 631 F.3d 762, 768 & 770 (5th Cir. 2011)).

The narrow gap for non-preempted state law claims has been identified in certain instances. If, for example, a plaintiff can show a medical device manufacturer failed to follow FDA-approved processes and procedures and the plaintiff's injury resulted from those deviations, the plaintiff's claim is parallel and may proceed. *See Bass v. Stryker Corp.*, 669 F.3d 501, 510 (5th Cir. 2012) (hip-replacement components); *Chambers v. Osteonics*

Corp., 109 F.3d 1243, 1248 (7th Cir. 1997) (same). As the court in *Chambers* explained:

> The heart of Chambers' negligent manufacturing claim is that Osteonics did not follow the FDA requirements or agreed-upon procedures—that its negligence in the manufacture of the hip stem caused it to be of less than the agreed-upon hardness and to contain certain metallurgical defects that made the hip stem subject to stress cracks under reasonably expected forces. That claim would impose no greater requirements on Osteonics than the FDA itself imposed.

109 F.3d at 1248. The court concluded that "[s]uch a claim should not be preempted because there is no reason to protect a manufacturer who fails to follow the proscribed requirements and procedures for producing a device. . . ." *Id.* (citing *Slater v. Optical Radiation Corp.*, 961 F.2d 1330, 1334 (7th Cir. 1992) (the scope of preemption is limited to efforts by states to impose sanctions for noncompliance with federal regulations).

With this explanation of federal preemption, it is possible to address Allergan's arguments supporting its motion to dismiss. Allergan argues first that Christine and Bradley present general allegations of negligence, strict liability, and breach of implied warranty that do not state parallel claims. According to Allergan, Christine and Bradley claim the FDA should have never granted the PMA because of the breast implants' alleged defects. That argument misreads the amended complaint. Christine and Bradley do not contend the FDA should not have issued a PMA for Allergan's breast implants, rather that Allergan allegedly violated the PMA's design and manufacturing specifications as well as QSRs, CGMPs, and other federal requirements.

Allergan next argues Christine and Bradley cannot rely on the ILFDCA to support their parallel claims. In fact, they do not. It is true that neither the FDCA nor the ILFDCA provides a private right of action, but Christine and Bradley cite to the

federal and state statutes to establish parallelism, not as authorization for causes of action. Rather, each of Christine and Bradley's 48 causes of action are explicitly pleaded as state common law torts.

Allergan proceeds to argue the manufacturing defect claims are not parallel because Christine and Bradley claim Allergan should have used a different manufacturing process. Once again, Allergan misreads the amended complaint. Christine and Bradley do not allege Allergan should have used different methods to manufacture the breast implants, only that the one Allergan employed violated PMA design and manufacturing specifications, QSRs, CGMPs, and other federal requirements.

Finally, Allergan argues Christine and Bradley's failure to warn claims are not parallel to federal requirements and cannot be parallel based on the holding in *Norabuena v. Medtronic.* 2017 IL App (1st) 162928. *Norabuena* is, however, unhelpful based on Norabuena's omission of failing to identify a state law parallel to a federal one. As explained:

> [A]lthough plaintiffs have identified a federal requirement that their complaint alleges Medtronic violated, there is no Illinois requirement that parallels it. Plaintiffs asserted claims for failure to warn. Although Illinois recognizes that a manufacturer may satisfy its duty to warn by conveying information to third-party learned intermediaries (see *Kirk v. Michael Reese Hospital & Medical Center*, 117 Ill. 2d 507, 519 [ ] (1987)), this is not synonymous with an affirmative duty to warn a federal regulatory body.

Id. at ¶ 28. The problem with *Norabuena* is there exists a parallel state law, the ILFDCA, that Norabuena failed to cite. Christine and Bradley certainly may not be faulted for correcting Norabuena's error.

Although Allergan's arguments favoring dismissal are ineffectual, it is still necessary to assess independently whether Christine and Bradley's causes of action are federally preempted. The first two groupings of claims are also the largest and consist of the causes of action based on Allergan's alleged manufacturing defects. Under Illinois law, a plaintiff bears the burden of showing a product was: (1) in a dangerously defective condition when it left the manufacturer's or seller's control; and (2) was unreasonable in that it "went beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." *Mullen v. General Motors Corp.*, 32 Ill. App. 3d 122, 130-131 (1st Dist. 1975) (citing cases and Restatement (Second) of Torts § 402A, cmt. *i* (1965)). Christine and Bradley allege Allergan used non-standard brushes and unproven methods to scrub the breast implants' cured silicone layer. Such a process allegedly violated the FDA's own PMA requirements and resulted in a product that failed to comply with industry norms and was outside the scope of the approved design and manufacturing specifications. These alleged failings allegedly caused a chronic inflammatory response that, in turn, caused or contributed to Christine's BIA-ALCL. Since Christine and Bradley have sufficiently pleaded manufacturing defect causes of action under Illinois law that are not preempted, the motion to dismiss counts 1-3, 9-11, 17-19, 25-27, 33-35, and 41-43 must be denied.

The causes of action based on alleged failures to warn—counts 4-5, 12-13, 20-21, 28-29, 36-37, and 44-45—are also not preempted. In these counts, Christine and Bradley specifically allege Allergan failed to report postmarket adverse events as required under federal and state law. Such failures, if true, do not allege any requirement beyond those imposed by the FDA or by Illinois common law. Under Illinois law, a duty to warn depends on the parties' relationship and whether the law imposes an obligation of "reasonable conduct" for the benefit of the product user. *Solis v. BASF Corp.*, 2012 IL App (1st) 110875, ¶ 64 (citing *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 117 Ill. 2d 507, 525 (1987). "[F]ailure to warn of a product's dangerous propensities

may be a basis for strict liability in tort and that strict liability therefore may be imposed upon all parties within the chain of distribution, including suppliers, distributors, wholesalers, and retailers." *Venus v. O'Hara*, 127 Ill. App. 3d 19, 23, (1st Dist. 1984). Plainly, the common law duty to warn does not create a duty or responsibility beyond that of the MDA. The motion to dismiss these counts must, therefore, also be denied.

Christine and Bradley's negligent misrepresentation causes of action allege Allergan breached its statutory and regulatory duty to represent accurately BIOCELL implants to the public. *See* 21 U.S.C. § 352(a)(1), (f)(2) & (q); 21 C.F.R. §§ 801.6 & 814.39(d). Christine and Bradley further allege Allergan had a duty to monitor, investigate, and report adverse events and provide strengthened warnings, if necessary. *See* 21 C.F.R. §§ 814.20(14)(e), 814.39, 814.80 & 814.82. Allergan allegedly breached these duties. Since Illinois statutes, *see, e.g.*, 410 ILCS 620/2.11, 620/3.1 620/3.2, 620/3.5 & 620/20, impose no duties or requirements exceeding federal law, the negligent misrepresentation causes of action—counts 6, 14, 22, 30, 38, and 46—are not preempted and the motion to dismiss must fail.

Christine and Bradley present various implied warranty causes of action. As defined, an implied warranty "is derived from the interplay of a transaction's factual circumstances with the foreseeable expectations of a buyer or other person who is protected by law in those expectations." *Collins Co. v. Carboline Co.*, 125 Ill. 2d 498, 508 (1988). Specifically, a plaintiff claiming breach of an implied warranty of fitness for particular purpose must show: "(1) a sale of goods, (2) that the seller had reason to know of any particular purpose for which the goods are required, (3) that plaintiff, as buyer of the goods, was relying upon seller's skills or judgment to select suitable goods, and (4) that the goods were not fit for the particular purpose for which they were used." *Maldonado v. Creative Woodworking Concepts, Inc.*, 342 Ill. App. 3d 1028, 1034 (3d Dist. 2003) (citing *Crest Container Corp. v. R.H. Bishop Co.*, 111 Ill. App. 3d 1068, 1073-74 (5th Dist. 1985)). In counts 7, 15, 23, 31, 39, and 47, Christine and Bradley plead each

element necessary to allege Allergan's breach of an implied warranty of merchantability based on misrepresentations of the BIOCELL implants' condition and their manufacture in accordance with federal specifications. Breaches of implied warranties are, therefore, violations of Illinois common law and statute, *see* 810 ILCS 5/2-314, and do not exceed the duties imposed by the PMA.

Finally, counts 8, 16, 24, 32, 40, and 48 comprise Christine and Bradley's causes of action for breaches of express warranties. Express warranties are typically a product of contract. *Collins*, 125 Ill. 2d at 508 (1988) ("an express warranty is imposed by the parties to a contract and is part of the sale contract"). Since Allergan did not make the breast-implant contract part of the record, the fair inference at this point is that Christine and Bradley's claims are valid. Notwithstanding the lack of a contract, express warranties are defined more broadly as "a warranty created by the overt words or actions of the seller. . . ." Black's Law Dictionary (11th ed. 2019). That definition sets the legal backdrop for Christine and Bradley's allegation that the PMA warned Allergan its warranty statements must be truthful, accurate, and not misleading. Christine and Bradley identify various statements they claim violated the PMA, including: (1) breast augmentation is common and uncomplicated; (2) decades of experience have greatly improved safety; (3) Allergan's implants are tested and durable; (4) BIOCELL implants have enhanced technology; (5) Allergan implants are biocompatible and reliable, making them an appropriate choice; (6) BIOCELL implants are of premium and proven quality; and (7) the implants have a proven, textured surface. Such statements are arguably express warranties and are alleged to be misleading because, in part, they failed to warn the patient of known risks. In sum, the express warranty causes of action are not preempted and the motion to dismiss these counts must be denied.

The analysis above establishes that Christine and Bradley's causes of action are not preempted and are sufficiently pleaded.

As a result, this court need not address Allergan's motion pursuant to section 2-615.

Conclusion

Based on the foregoing, it is ordered that:

1. Allergan's motion to dismiss is denied; and
2. The parties are to submit an agreed case management order on or before June 15, 2021.

John H. Ehrlich, Circuit Court Judge

Judge John H. Ehrlich

JUN 04 2021

Circuit Court 2075