

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE: DIET DRUGS : MDL DOCKET NO. 1203
(PHENTERMINE, FENFLURAMINE, :
DEXFENFLURAMINE) PRODUCTS :
LIABILITY LITIGATION :
: :
THIS DOCUMENT RELATES TO: :
: :
LLOYD S. LIST :
: :
v. :
: :
AMERICAN HOME PRODUCTS CORPORATION, :
et al. : CIV. NO. 99-20331
: :
BARBARA NAUMANN :
: :
v. :
: :
AMERICAN HOME PRODUCTS CORPORATION, :
et al. : CIV. NO. 99-20345
: :

MEMORANDUM AND PRETRIAL ORDER NO. 1022

BECHTLE, J.

DECEMBER 28TH, 1999

Presently before the court are defendants American Home Products Corporation's ("AHP") Motions to Dismiss and for Extension of Time to Answer Remaining Counts in Lloyd S. List, Civ. No. 99-20331 and Barbara Naumann, Civ. No. 99-20345 and the responses thereto. For the reasons set forth below, the court will grant the motions.

Plaintiffs Lloyd S. List and Barbara Naumann ("Plaintiffs") bring separate civil actions against several defendants and allege several claims under Florida law against those defendants, including claims for negligence per se and breach of warranty. AHP seeks dismissal of Plaintiffs' breach of warranty claims.

Plaintiffs agree that the causes of action for breach of warranty may be dismissed. Thus, the court will dismiss Plaintiffs' claims for breach of warranty.

Plaintiffs in these cases also bring claims for negligence per se under Florida law based on violations of the federal Food, Drug and Cosmetic Act ("FDCA"). AHP asserts that, because the FDCA does not create a private right of action, there can be no action for negligence per se under Florida law. Plaintiffs assert that there is no relationship between private rights of action and negligence per se. AHP's position is supported by Florida caselaw. See Murthy v. Sinha Corp., 644 So.2d 983, 985-86 (Fla. 1994) (holding that legislative intent should be primary factor considered in determining whether cause of action exists when statute does not expressly provide for one); Freehauf v. School Bd. of Seminole County, 623 So.2d 761, 763 (Fla. 5th Dist. Ct. App. 1993) (stating that "[w]hether a statute creates a private cause of action for its breach, so that it is appropriate to instruct a jury that its breach is negligence per se, or evidence of negligence, turns on various considerations aimed at resolving what the Legislature intended when it passed the statute in the first place"); Jupiter Inlet Corp. v. Brocard, 546 So.2d 1, 2-3 (Fla. 4th Dist. Ct. App. 1988) (holding that violation of OSHA does not constitute negligence per se); Blinn v. Smith & Nephew Richards, Inc., 55 F.Supp.2d 1353, 1361 (M.D. Fla. 1999) (holding under Florida law that "Plaintiff cannot use a negligence per se claim to create a private cause of action for

Defendant's alleged violations of the FDCA"); Baker v. Danek Med., 35 F.Supp.2d 875, 878 (N.D. Fla. 1998) (holding same). Thus, the court will dismiss Plaintiffs' claims for negligence per se.

AHP further requests an extension of time in which to answer the Complaint pending disposition of the motion. The court will allow AHP twenty days from the date of this Order within which to respond to Plaintiffs' remaining allegations.

An appropriate Pretrial order follows.

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CIV. NO. 99-20345

PRETRIAL ORDER NO. 1022

AND NOW, TO WIT, this 28th day of December, 1999, upon
consideration of defendants American Home Products Corporation's
Motions to Dismiss and for Extension of Time to Answer Remaining
Counts in Lloyd S. List, Civ. No. 99-20331 and Barbara Naumann,
Civ. No. 99-20345 and the responses thereto, IT IS ORDERED that
said motions are GRANTED as follows:

1. plaintiff Lloyd S. List's (Civ. No. 99-20331) and
plaintiff Barbara Naumann's (Civ. No. 99-20345) claims
for breach of implied and express warranty are hereby
DISMISSED;
2. plaintiff Lloyd S. List's (Civ. No. 99-20331) and
plaintiff Barbara Naumann's (Civ. No. 99-20345) claims
for negligence per se are hereby DISMISSED; and

3. defendants American Home Products Corporation shall have 20 days from the date of this Order within in which to respond to the remaining allegations in the Complaints in the above captioned civil actions.

BY THE COURT:



Handwritten signature of Louis C. Bechtle, J. The signature is written in black ink and is highly stylized, with a large, sweeping initial 'L' and 'C' that extend across the line. The signature is written over a horizontal line.

LOUIS C. BECHTLE, J.