

lawyersusaonline.com

# Lawyers USA

Issue 2011 - 11/2011 LUSA 289

YOUR BUSINESS PARTNER

November 2011 \$26.00 per copy



## Pelvic mesh defect litigation increases

By Sylvia Hsieh  
Staff writer

Product liability lawsuits alleging that vaginal mesh devices implanted in women are defective and that manufacturers failed to warn about their dangers are shaping up into a widespread mass tort.

The lawsuits involve dozens of manufacturers of various products intended to deal with weakened muscles surrounding organs in the pelvic area, a condition called pelvic organ prolapse.

There are already hundreds of cases around the country and plaintiffs' lawyers say the number of calls they are receiving has picked up dramatically since the Food and Drug Administration issued an alert questioning the products' safety and efficacy.

"These cases are expected to grow exponentially. Since the FDA warning came out in July, we have seen a huge volume of cases come into our office," said Fidelma Fitz-



Derek Potts

ages against the manufacturer, American Medical Systems Inc. In federal court, multidistrict litigation has formed in West Virginia against C.R. Bard.

"We currently represent women in 37 states as well as Canada and Europe and have over 500 cases that either have been or will be filed in the fairly near future, with more cases weekly," said co-lead counsel of the federal MDL, Henry G. Garrard III, a partner at Blasingame, Burch, Garrard & Ashely in Athens, Ga.

C.R. Bard spokesperson Janine Kramer did not respond to questions seeking comment for this article.

"We're talking about 20-some different products litigated in different spots. ... There will be thousands of cases," said Derek Potts of Potts Law in Kansas City, Mo., co-lead counsel for the plaintiffs in the federal multidistrict

# 20 THINGS

LAWYERS NEED TO KNOW

SEE PAGE 7



# New challenges with e-discovery

As electronic discovery continues to evolve, litigators are facing new challenges, including emerging technology and expanding amounts of data. Looking ahead to the coming year, lawyers should keep an eye on the following trends:

## • Death of metadata.

As judges have become more sophisticated about electronically stored information (ESI), parties are having an increasingly difficult time convincing them that every single piece of metadata is needed in discovery, said Stephen D. Riden, a commercial litigator at Beck Reed Riden in Boston.

"Courts are more resistant to a soup-to-nuts request and will clip parties' wings if they feel like they are being too aggressive." Instead, lawyers should be prepared to tailor their ESI requests to the case at hand, he said.

## • Data changes.

The method of storing data continues to change, said Andrew Cosgrove, a partner at Redgrave LLP in Minneapolis with an information law practice focusing on e-discovery, information management, privacy and data protection.

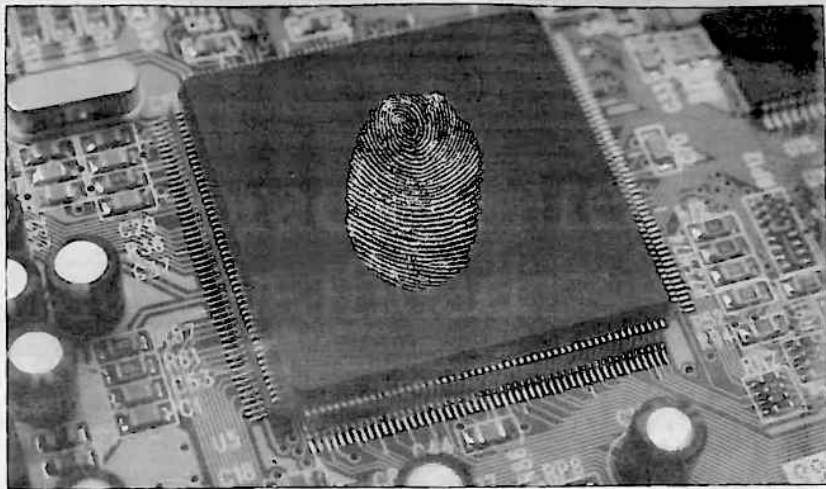
The rising use of tablets, including iPads, as well as mobile devices has resulted in more and more data, which can complicate the discovery process with issues like identifying, collecting and preserving the necessary information.

"We are going to see more cases dealing with the law surrounding mobile devices and tablets," Cosgrove predicted.

## • Predictive coding and pricing.

Sharon Nelson, president of SENSEL Enterprises Inc. in Fairfax, Va., said predictive coding "is spreading like wildfire," with more companies offering customized versions, which could help lower the cost of e-discovery. Predictive coding uses software to sample electronically stored information in order to create specific searches that will help locate the most relevant data.

In addition, Nelson predicted that per gigabyte charg-



©iStockphoto.com/Tatiana Popova

ing for e-discovery processing will continue to decrease, with companies increasingly using better pricing estimators based upon sampling, for example.

## • Rise of stealth data.

Lawyers should be aware of the value of information from unexpected places, Riden said. In addition to the potential treasure trove to be found on social networking sites, he noted that apps with geolocation abilities can track a person without his or her knowledge.

For example, iPhones have "a stealth tracking feature that shows every place you have been," Riden said, who pulled up his own information on his phone and was "shocked" at how accurate it was.

In addition, all General Motors cars are equipped with an OnStar GPS device, which not only tracks the location of the vehicle but reports the speed of the car and whether passengers were wearing seatbelts.

And Google's Picasa photo product has a facial recognition system that tags faces with their known e-mail address, Riden said. "It can discern who you are, where you were and who you were with."

## • Sanctions.

2011 brought record levels of sanctions in e-discovery cases and Riden said he expects the trend to continue - for now.

"There are still parties and lawyers out there who are ignoring obligations to preserve relevant information," he said.

Cosgrove agreed, although he said the numbers could begin to plateau as litigators better learn the rules of e-discovery.

"Meet and confers are becoming more meaningful, more important and more specialized," he said.

The type of sanctions could also change, Cosgrove added, away from simply having a party open a checkbook. Instead of monetary sanctions, courts are turning to the use of adverse inferences in a case, which can "have a big impact on winning or losing a case," he said, from an evidentiary instruction to the jury or a ruling on liability based on spoliation, for example.

- Correy E. Stephenson