

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

March 9, 2011

Lyle W. Cayce
Clerk

No. 10-20485
Summary Calendar

CHARLES THURSTON,

Plaintiff - Appellant

v.

MERCK AND COMPANY INC.

Defendant - Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:09-CV-3629

Before HIGGINBOTHAM, SMITH, and HAYNES, Circuit Judges.

PER CURIAM:*

Charles Thurston appeals the dismissal of his complaint alleging he suffered muscle damage from the cholesterol-reducing drug Zocor. He says he learned that his injuries were possible side effects of the drug from various websites and that, had he known of these possible side effects in advance, he

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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would not have taken the drug. He has not pointed to any medical evidence confirming his alleged injuries or connecting them to his use of the drug.

Even if Thurston could show he was injured by Zocor, the district court correctly dismissed Thurston's complaint under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The FDA-approved warning label for Zocor lists both "myopathy" (muscle damage) and "rhabdomyolysis" (a form of myopathy affecting skeletal muscle tissue) as known side effects. Thurston's failure-to-warn claim fails because Texas law provides that an FDA-approved warning label is presumed to be an adequate warning, TEX. CIV. PRAC. & REM. CODE § 82.007(a), unless the plaintiff can satisfy one of five enumerated exceptions, *id.* § 82.007(b). Thurston's complaint does not plead facts sufficient to meet any of the exceptions.

AFFIRMED.