

Illegal Promotion in the Air Can't Defeat the Learned Intermediary Rule

Friday, July 29, 2011

There's not all that much to King v. Pfizer Pharmaceutical Co., 2011 U.S. Dist. Lexis 80952 (D. Md. July 25, 2011). Basically it's a slam dunk learned intermediary dismissal. The plaintiff admitted that "she had conversations with her treating physician about possible side effects of [the drug], one of those side effects being leg pain" - which was the adverse effect over which she was suing. Id. at *7.

On a warning claim, that kind of admission entitles the plaintiff to no-expenses-paid one-way ticket to the exit. We wouldn't bother telling you about it if that was all there was.

The interesting part was the plaintiff's argument that certain alleged "past violations of FDA guidelines" undercut the ability of the defendant to communicate warnings "adequately" to physicians, and thus (plaintiff argued) "undermin[ed] the role of the learned intermediary." Id. We're not 100% sure (and neither was the court), but that looks like a rather inarticulately presented overpromotion claim.

The court threw it out. Why? Because alleged illegal promotion had "no discernable relevance to her individual claim." Id. at *8. The court's rationale is an endorsement of a seemingly unassailable proposition that, nonetheless, some courts have chosen to ignore - alleged improper promotion must have affected the plaintiff's own prescriber in order to be relevant - and for that reason, we deem it worthy of mention. The court held:

"[Plaintiff] does not even attempt to show how [defendant's] past improper practices affected her own physician's ability to understand the risks and side effects associated with [the drug], nor does it appear that she reasonably could have. . . . Accordingly, [plaintiff's] apparent attempt to sidestep the "learned intermediary" doctrine must fail."

King, 2011 U.S. Dist. Lexis 80952, at *8 (emphasis original). Thus, King is one more entry in the string citation we employ when trying to keep out extraneous "evidence" of purportedly improper promotion that the plaintiff can't show ever reached his/her own prescriber.