

## [Bisphosphonate Trial Score All Knotted Up](#)

Tuesday, May 31, 2011

Most defense lawyers, if given the choice, would probably pick North Carolina and Montana over New Jersey and Rhode Island as places to try cases. But as we mentioned [yesterday](#), the bisphosphonate litigation continues chugging along in its merry, contrarian way.

In the federal litigation that's being thrown off by the [Aredia/Zometa](#) MDL, the score is now tied (after yesterday's [Hogan](#) verdict in Rhode Island), 1-1. We're told that [Hogan](#) was a defense pick.

Good pick.

In what we're told was a case chosen by the other side, a North Carolina jury last year in [Fussman](#) brought back a \$287,000 compensatory verdict together with an evanescent \$12.6 million punitive award, according to [Lexis](#). Actually, the compensatory verdict was \$287,001, including a munificent \$1 for loss(?) of consortium. Sounds like it wasn't much of a loss.

Not so good a pick.

Why? Because in [Fussman](#) the plaintiffs chose a case under North Carolina law. Thus, they ran afoul of that state's punitive damages caps. Poof! There went nearly \$12 million of the \$12.6 million punitive award. Since it was an early case, we presume it's being appealed, too.

State court bisphosphonate trials are likewise knotted up at 1-1. The defense scored a win – in a case also (we're told) picked by the plaintiffs – in the usually pro-plaintiff New Jersey state courts. In [Bessemer](#), a jury in mostly blue collar Middlesex County found 7-2, that the defendant's warnings about the relevant risks were perfectly adequate, according to [contemporaneous sources](#). There's an appeal there, too, we're told.

An even worse pick.

Finally, today the United States Supreme Court [denied certiorari](#) in the fourth bisphosphonate case, [Stevens](#). In Montana of all places, plaintiff picked up \$3 million plus in a case that, by all rights, was barred by the statute of limitations (the plaintiff sued some four years after a diagnosed injury). However, in a decision that would have merited a place in last year's [bottom ten](#) if not decided on practically the last day of the year (after our post), the Montana Supreme Court in [Stevens v. Novartis Pharmaceuticals Corp.](#), 247 P.3d 244 (Mont. 2010), recognized the [dubious](#) doctrine of cross-jurisdictional class action tolling in order to save that plaintiff from the consequences of sleeping on her rights. Cf. [In re Aredia & Zometa Products Liability Litigation](#), 754 F. Supp.2d 939 (M.D. Tenn. 2010) (bisphosphonate MDL refusing to recognize same doctrine less than a month earlier).

So with that little legal assist, the plaintiffs and the defendants round the first turn in bisphosphonate neck and neck, but with each side winning in, relatively speaking, unlikely jurisdictions. Who knows? Maybe going forward the plaintiffs will buck the Michigan product liability statute while the defense will prevail in Central LA. Better yet, maybe the defense will win all of this year's cases.