Tallying Twlqbal

Friday, December 02, 2011

It's been a while since we've taken a comprehensive look at how Twlqbal's been affecting prescription medical product liability pleading. We've done lots of posts about this or that case, but we haven't synthesized anything lately - like in a year. So today we thought we'd take a look at exactly what's been held insufficiently pleaded and why. For convenience, we took our research back a year (a little longer on some issues)

Of course, Twlqbal applies generally to bar complaints that plead nothing but legal conclusions. Salvio v. Amgen, Inc., ___ F. Supp.2d ___, 2011 WL 3651314, at *6-7 (W.D. Pa. Aug. 18, 2011); Tillman v. Taro Pharmaceutical Industries Ltd., 2011 WL 3704762, at *4-6 (N.D. Ill. Aug. 17, 2011); Rollins v. Wackenhut Services Inc., ___ F. Supp.2d ___, 2011 WL 3489442, at *11-12 (D.D.C. Aug. 10, 2011); Henderson v. Sun Pharmaceuticals Industries, Ltd., 2011 WL 4024656, at *8 (N.D. Ga. June 9, 2011); Nimtz v. Cepin, 2011 WL 831182, at *4 (S.D. Cal. Mar. 3, 2011), dismissed with prejudice, 2011 WL 2160181 (S.D. Cal. June 1, 2011); Llado-Carreno v. Guidant Corp., 2011 WL 705403, at *3 (S.D. Fla. Feb. 22, 2011). But Twlqbal extends to a variety of particular, recurrent pleading flaws.

A very beneficial effect of Twlqbal has been its use to require plaintiffs to sort out their claims against different defendants – a particular, persistent problem permeating pathetically pleaded Pain Pump cases (8 "P's" in a row, not bad). Simply alleging that "defendants" did this or that, especially when the defendants aren't similarly situated, is no longer allowed (if it ever was). Currier v. Stryker Corp., 2011 WL 4898501, at *4 (E.D. Cal. Oct. 13, 2011); In re McNeil Consumer Healthcare Marketing & Sales Practices Litigation, 2011 WL 2802854, at *18 (E.D. Pa. July 15, 2011); McFarland v. APP Pharmaceuticals, LLC, 2011 WL 2413797, at *2-3 (W.D. Wash. June 13, 2011); Johnson v. Moog, Inc., 2011 WL 719600, at *2-3 (E.D. Tex. Feb. 22, 2011); Timmons v. Linvatec Corp., 263 F.R.D. 582, 584-85 (C.D. Cal. 2010); Peterson v. Breg, Inc., 2010 WL 2044248, at *2 (D. Ariz. April 29, 2010); Adams v. I-Flow Corp., 2010 WL 1339948, at *3 (C.D. Cal. March 30, 2010). Yeah - we went back a little further than a year on this one because it's important.

A particular application of this rule requires that the plaintiff plead product identification – to identify specifically who made what that they claimed injured them. Patterson v. Novartis

Pharmaceuticals Corp., ___ Fed. Appx. ___, 2011 WL 3701884, at *2 (6th Cir. Aug. 23, 2011); Hammonds v. Boston Scientific, Inc., 2011 WL 4978369, at *2 (W.D. Okla. Oct. 19, 2011); Henderson v. Sun Pharmaceuticals Industries, Ltd., ___ F. Supp.2d ___, 2011 WL 4015658, at *4 (N.D. Ga. Aug. 22, 2011); Singleton v. Eli Lilly Co., 2011 WL 2621067, at *3 (E.D. Cal. June 29, 2011); McFarland, 2011 WL 2413797, at *2; Bloom v. Depuy Orthopaedics, Inc., 2011 WL 1135753, at *1-2 (D. Md. March 25, 2011); Johnson, 2011 WL 719600, at *2-3; Rojas v. Qualitest Pharmaceuticals Inc., 2011 WL 334671, at *3 (E.D. La. Jan. 28, 2011); Timmons, 263 F.R.D. at 584-85; Peterson, 2010 WL 2044248, at *2; Adams, 2010 WL 1339948, at *3. The converse has also happened, although not as often. Twlqbal has been employed against a complaint that alleged no facts about the plaintiffs beyond where they lived and that they used the product. Cardenas v. Abbott Laboratories, 2011 WL 4808166, at *4 (N.D. Ill. Oct. 7, 2011); Mills v. Bristol-Myers Squibb Co., 2011 WL 3566131, at *1-2 (D. Ariz., Aug. 11, 2011). It has also been employed where the complaint is so vague as not to identify what the product at issue really was. Baldwin v. Zimmer, Inc., 2011 WL 3652411, at *2 (S.D. Ohio Aug. 19, 2011). That's pretty bad.

We also like those Twlqbal cases that require plaintiffs to plead facts that plausibly establish causation – that the product the complaint describes could actually cause the harm alleged. This has been particularly useful in medical device cases covered by Riegel preemption, as it requires a nexus between a claimed FDCA violation and the device that the plaintiff actually used. Funk v. Stryker Corp., 631 F.3d 777, 782 (5th Cir. 2011); In re Fosamax Products Liability Litigation, 2011 WL 5903623, at *7 (D.N.J. Nov. 21, 2011); Henderson, 2011 WL 4015658, at *4-5; O'Brien v. Intuitive Surgical, Inc., 2011 WL 3040479, at *2 (N.D. Ill. July 25, 2011); King v. Pfizer Pharmaceutical Co., 2011 WL 3157305, at *3 (D. Md. July 25, 2011); Rhynes v. Stryker Corp., 2011 WL 2149095, at *2-3 (N.D. Cal. May 31, 2011); White v. Stryker Corp., ___ F. Supp.2d ___, 2011 WL 1131496, at *7-8 (W.D. Ky. March 25, 2011); Llado-Carreno, 2011 WL 705403, at *3; Cohen v. Guidant Corp., 2011 WL 637472, at *1-2 (C.D. Cal. Feb. 15, 2011); Gelber v. Stryker Corp., 752 F. Supp.2d 328, 334-35; Maness v. Boston Scientific, 751 F. Supp.2d 962, 970-72 (E.D. Tenn. 2010).

Another aspect of causation we've seen Twlqballed (but not as often) is warning causation – requiring facts to be pleaded suggesting that a better warning would have changed the prescriber's conduct. Mills v. Bristol-Myers Squibb Co., 2011 WL 4708850, at *3 (D. Ariz. Oct. 7, 2011); Mills, 2011 WL 3566131, at *2; Woodhouse v. Sanofi-Aventis United States LLC,

2011 WL 3666595, at *3 (W.D. Tex. June 23, 2011).

It's also useful that Twlqbal requires plaintiffs to specify the nature of the alleged product defect with some specificity. In re Medtronic, Inc., Sprint Fidelis Leads Products Liability Litigation, 623 F.3d 1200, 1206 (8th Cir. 2010); Fosamax, 2011 WL 5903623, at *5; Wamsley v. LifeNet Transplant Services Inc., 2011 WL 5520245, at *6 (S.D.W. Va. Nov. 10, 2011); Currier v. Stryker Corp., 2011 WL 4898501, at *2-3 (E.D. Cal. Oct. 13, 2011) (manufacturing defect); Younker v. Ohio State University Medical Center, 2011 WL 4558922, at *2 (S.D. Ohio Sept. 29, 2011); Leonard v. Medtronic, Inc., 2011 WL 3652311, at *2-3 (N.D. Ga. Aug. 19, 2011); Baldwin, 2011 WL 3652411, at *2; Mills, 2011 WL 3566131, at *2-3; Rollins, 2011 WL 3489442, at *11; McNeil Consumer, 2011 WL 2802854, at *10; Woodhouse, 2011 WL 3666595, at *3-4; Henderson, 2011 WL 4024656, at *5; Llado-Carreno, 2011 WL 705403, at *4; Maness, 751 F. Supp.2d at 969-70; Adams v. Stryker Pain Pump Corp., 2010 WL 4909564, at *2 (D. Minn. Dec. 1, 2010); Forslund v. Stryker Corp., 2010 WL 3905854, at *3-4 (D. Minn. Sept. 30, 2010). Thus, in a failure to warn case:

> "a complaint should at least identify which danger was not warned against, that the danger was substantial, that the danger was not readily recognizable to an ordinary consumer, that the manufacturer knew or should have reasonably known of the danger, and causation."

Nimtz, 2011 WL 831182, at *2. The defect point has probably generated more Twlqbal law than any other in the product liability sphere.

Perhaps our personal favorite, however, is that Twlqbal requires more than a bare pleading of "defendant violated the law." Rather, the complaint must specify what statute, regulation, etc. was violated. Sprint Fidelis, 623 F.3d at 1206; Desabio v. Howmedica Osteonics Corp., ___ F. Supp.2d ___, 2011 WL 4074391, at *6 (W.D.N.Y. Sept. 13, 2011); Leonard, 2011 WL 3652311, at *2; White, 2011 WL 1131496, at *7-8; Gelber, 752 F. Supp.2d at 334; Bishoff v. Medtronic, Inc., 2010 WL 4852650, at *2 (N.D.W. Va. Nov. 22, 2010); Bass v. Stryker Corp., 2010 WL 3431637, at *4-5 (N.D. Tex. Aug. 31, 2010).

Other generally beneficial effects of Twlqbal are challenges to the vague use of "and/or," Patterson, 2011 WL 3701884, at *2, and a sharp limitation upon employment of "information and belief" pleading. Mills, 2011 WL 4708850, at *2.

On occasion, punitive damages claims have been Twlqballed for failure to plead facts establishing the heightened elements (such as scienter) required for such damages. Rhynes, 2011 WL 2149095, at *4-5.

Finally, it happened quite a bit even before Twlqbal, but express warranty claims must plead what the warranty is and how it became part of the basis of the bargain (that is to say, reliance). Fisher v. APP Pharmaceuticals, LLC, 783 F. Supp.2d 424, 431-32 (S.D.N.Y. 2011); Horsmon v. Zimmer Holdings, Inc., 2011 WL 5509420, at *4 (W.D. Pa. Nov. 10, 2011); Tillman, 2011 WL 3704762, at *8; Mills, 2011 WL 3566131, at *3 n.3; McCauley v. Hospira, Inc., 2011 WL 3439145, at *6 (M.D.N.C. Aug. 5, 2011); Llado-Carreno, 2011 WL 705403, at *4; Gelber, 752 F. Supp.2d at 335; Quatela v. Stryker Corp., ___ F. Supp.2d ___, 2010 WL 7801786, at *3 (N.D. Cal. Dec. 17, 2010); Stanger v. APP Pharmaceuticals LLC, 2010 WL 4941451, at *4 (D.N.J. Nov. 30, 2010); Baker v. APP Pharmaceuticals LLC, 2010 WL 4941454, at *4 (D.N.J. Nov. 30, 2010); Bishoff, 2010 WL 4852650, at *3.

Don't forget that we have more on our Twlqbal cheat sheet.

So there you go. Forearmed is ... well, forearmed. Now you have the precedent to try to force the other side to plead what they should have been pleading all along.