Fosamax MDL Preps for Fourth Bellwether Case

Wednesday, September 07, 2011

Trial in the fourth Fosamax MDL bellwether case, Secrest v. Merck, is scheduled to begin today. So, we thought it appropriate to discuss the MDL court's recent summary judgment and Daubert decisions in that case. Secrest also interests us because it involves Florida law and the only claims now left for trial are strict liability and negligent design defect. Where have we seen this before? It's beginning to look a lot like the unfortunate case of Boles v. Merck, in which we are still waiting to see if the Second Circuit will take the interlocutory appeal of the trial court's denial of defendant's motion for judgment as a matter of law following an $8 million plaintiff verdict (check out our prior post here).

In Secrest, both parties filed multiple Daubert challenges and Merck filed a motion for summary judgment. While the decision initially may be viewed as Solmonesque – all of the motions were granted in part and denied in part – Merck was clearly the victor, with its experts coming out unscathed and winning summary judgment on all but plaintiff's design defect claims. In re: Fosamax Products Liability Litigation (Secrest v. Merck), 2011 U.S. Dist. LEXIS 97075 (S.D.N.Y. Aug. 30, 2011). Here are our highlights of the various rulings:

Plaintiff's Daubert Challenges: Plaintiff sought to partially exclude the testimony of two of Merck's experts. While these motions were granted in part, they were only granted as to topics on which Merck conceded the experts would not testify. Id. at *33-37. We call that a win.

Defendant's Daubert Challenges: Merck sought to exclude the testimony of three of plaintiff's expert witnesses on a variety of topics – they won some and lost some. For example, one of plaintiff's experts was precluded from testifying about bone mineral density because he "relied solely" on other physicians' calculations. Id. at *32. That same expert, however, as a treating physician, would be permitted to testify about "his clinical experience with certain medical options . . . and making recommendations to patients." Id. at *33.

While we won't go through each of Merck's expert challenges, we found one particularly interesting, and not in a good way. Merck sought to exclude the case-specific causation testimony of plaintiff's lead expert based in part on lack of evidence of plaintiff's continuous use of Fosamax. Id. at *26. As in many pharmaceutical products cases (Vioxx and hormone therapy come to mind), the "science" relied on by plaintiffs to establish causation is limited by a

length-of-use threshold for development of the alleged injury (it is limited in other ways too, but that's a topic for another day). In Fosamax, that temporal threshold is three years of continuous use. Id. at *16-17. While Plaintiff Secrest's medical treatment records reference that her physicians were prescribing her Fosamax from 1998 to 2004, her pharmacy records show large gaps during which she never filled a Fosamax prescription. Id. at *26-27.

As defense counsel, we routinely rely on pharmacy records to demonstrate that a plaintiff was not actually taking the drug prescribed to her – in other words pharmacy records trump treatment records. Right? Well, the Fosamax MDL court isn't so sure about that:

"Merck urges the Court to assume that these medical records lack probative value simply because no corresponding pharmacy records have been located during discovery, but the Court cannot say that Secrest's medical records have no probative value on the issue of Secrest's Fosamax use, even if they are apparently contradicted by gaps in the pharmacy records. In this case, these medical records create a genuine dispute of fact regarding the duration of Secrest's Fosamax use."

Id. at 27-28. Really? So, if plaintiff didn't fill a prescription, where did she get the Fosamax? Did she borrow it from a friend? Buy it online from Mexico? Strike a deal on a street corner? Shouldn't plaintiff have to come up with something better than the equivalent of my dog ate my pharmacy records? We think so.

Summary Judgment: Since the court wasn't willing to exclude plaintiff's case-specific causation expert, which would have ended the case in its entirety, it next turned to Merck's summary judgment motion on plaintiff's particular causes of action. First up, failure to warn. Plaintiff had no evidence that her prescribing physician would have changed his decision to prescribe Fosamax if Merck had given a different warning. Id. at *39-40. A summary judgment slam dunk. But plaintiff wasn't going down without a fight, so she argued that her non-prescribing treater would have recommended she stop taking Fosamax if he had been informed of the risks by Merck. Under Florida's learned intermediary doctrine, "it is the prescribing physician's course of conduct that is most relevant to proximate cause in the prescription drug context." Id. at *41 (citation omitted). But,

"other courts have recognized that proximate causation can be satisfied for purposes of the Learned Intermediary Doctrine where a non-prescribing physician testifies that the physician was aware of the patient's use of a given drug and would have recommended taking the patient off of that medication if a different warning had been given."

Id. at *41-42 (citation omitted). We've discussed this sort of learned intermediary situation before, here, and the key for the defendant is to keep asking questions. That's exactly what happened here. Plaintiff Secrest couldn't satisfy even this more liberal proximate causation standard because, as it turned out, her supposedly critical treater wasn't even aware she was taking Fosamax – so any assertion that he would have warned her to stop taking it if there had been a different warning on the label "is purely speculative." Id. at *43. No proximate cause, no failure to warn.

Next, punitive damages. The MDL court has previously thrown out plaintiffs' punitive damages claims in the other Fosamax bellwether cases, id. at *44, so Plaintiff Secrest had to try a different approach. She argued that because her injury date was later than the other bellwether plaintiffs, Merck had more information available to it. Id. at *44-45. So? Fortunately, the court asked the same question:

"Plaintiff has failed to introduce any evidence suggesting that Merck acted in a grossly negligent fashion in response to the available information. Rather than offering "clear and convincing evidence" that Merck reacted to the information that became available between October 2003 and her injury date in an intentionally wrongful or grossly negligent fashion, Plaintiff asserts in a conclusory fashion that, given the information available, Merck had a duty to add a warning about a possible connection between Fosamax and ONJ to the Fosamax label, and that its breach of this duty constitutes gross negligence. . . .Plaintiff has offered no evidence suggesting that Merck engaged in intentionally wrongful or grossly negligent conduct by delaying a label change until it had worked out language with the FDA."
Id. at *45-46.

Finally, the court struck plaintiff's fraudulent misrepresentation claim. Plaintiff alleged that Merck intentionally defrauded her prescriber by misrepresenting the risk/benefit profile of Fosamax, but plaintiff "fails to allege that Merck was aware of the FDA report, or the information contained therein" that forms the basis for the alleged misrepresentation. Id. at *47-48.

Since plaintiff didn't oppose Merck's summary judgment motion on her express or implied warranty claims, plaintiff is left with only design defect claim (how can you "redesign" Fosamax and still have Fosamax?) for trial. Having been here before, we can only hope for a better result than in Boles. With two other defense wins in bellwether cases and a judge familiar with and hopefully prepared to combat the type of unprofessional and outrageous conduct exhibited by plaintiff's counsel in Boles, we sit and wait with cautious optimism.