Recent HT Wins Worth Knowing About

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As much as we like blogging, first and foremost we're lawyers who represent clients in court. Our clients tell us how much we can say about litigation we're involved in, and when they say "not much," that's what we do. If that has the odd effect that we're sometimes more effusive about other lawyer's wins than our own – well, that comes with the territory. This blog has never been primarily about self-promotion, and never will be.

This firm is involved in the HT litigation. A couple of significant defense wins have occurred in that litigation lately that our readers should at least know about.

The first of these (technically two cases) was in New Jersey. After a lengthy appellate process, last week the New Jersey court with jurisdiction over the HT mass tort affirmed summary judgment in two HT cases. Here's a copy of the opinion: DeBoard v. Wyeth, Inc., Nos. A-6230-07T1, A-6251-07T1 slip op. (N.J. Super. App. Div. Sept. 29, 2011). The court essentially adopted the reasoning of the trial court's ("Law Division" in New Jersey parlance) opinion:

> "[W]e affirm substantially on the basis of the well-considered and exhaustive opinion of Judge Happas in the Bailey matter, which we have determined to be well supported by the evidence and legally unassailable."

DeBoard, slip op. at 4.

One beneficial aspect of the DeBoard affirmance is that the Bailey trial court summary judgment opinion, which is every bit as long and well-reasoned as the Appellate Division (also New Jersey parlance) found it to be, is now going to be published. We've complained in the past about the citation problems arising from the non-publication of Bailey, but now we expect those annoyances to be a thing of the past. Here's a copy of the Bailey summary judgment opinion, annotated with its clearance for publication: Bailey v. Wyeth, Inc., Nos. L-0999-06 MT, *et al.*, slip op. (N.J. Super. June 11, 2008). Look for it in A.3d in the reasonably near future. But don't wait for that. It's well worth a read if you haven't done so already (it's been around in slip for over three years). Among the topics Bailey covers are:

• Expert opinions on questions of law. Bailey, slip op. at 8 n.11.

• Scope of the FDA's changes being effected ("CBE") regulation. Id. at 9-10.

• Off-label use. Id. at 11-13.

• FDA regulations concerning class labeling. Id. at 16-17.

• The various types of FDA enforcement-related correspondence (advisory letters, untitled letters, and warning letters). Id. at 19-20. On this issue, there's probably no better discussion anywhere.

• The New Jersey statutory presumption of the adequacy of an FDA-approved warning. Id. at 30-34.

• The types of evidence that can, and cannot, rebut the presumption. Id. at 34-44.

• Ghostwriting. Id. at 39-40.

• Statutory consumer fraud in the product liability context. Id. at 49-54 (this is New Jersey specific).

• Fraud/misrepresentation claims in the product liability context. Id. at 54- (this is also New Jersey specific).

The other recent HT win is Scharff v. Wyeth, 2011 U.S. Dist. Lexis 107408 (M.D. Ala. Sept. 19, 2011). The plaintiff in Scharff blew the statute of limitations as to most of the usual product liability claims available in prescription drug cases, but due to quirks of Alabama law, a separate claim for "wanton" conduct in warning/design was still timely. Scharff, 2011 U.S. Dist. Lexis 107408, at *62. "Wanton" conduct in Alabama is the standard for punitive damages. Id. at *50.

The court granted summary judgment against plaintiff's wanton conduct claims in Scharff, essentially holding as a matter of law that the evidence was insufficient to establish liability for

punitive damages. In particular, the court found persuasive the low statistical increase in breast cancer risk that these drugs have. That increase, the court held, was insufficient to satisfy the "likely or probably result" in harm standard for wantonness in Alabama. Id. at *54-63. In a particularly notable footnote, the court criticized the opinion in Scroggin v. Wyeth, 586 F.3d 547 (8th Cir. 2009), for "ignor[ing]" the low risk increase in the context of similarly-phrased Arkansas statute. Scharff, 2011 U.S. Dist. Lexis 107408, at *57-58 n.24. Moving on, the Scharff court also found an absence of evidence of actual knowledge of the increased risk on the part of the defendant. Id. at *63-71. Finally, the court held that there was no genuine issue of fact as to the adequacy of the drug's label with respect to breast cancer under Alabama's wantonness standard. Id. at *71-76. Scharff is thus of interest to anyone faced with a punitive damages claim in Alabama.