

We're Jealous

Wednesday, September 28, 2011

Plaintiff, suffering from pain and nausea, goes to the hospital and is administered an injection of promethazine HCL (otherwise known as Phenergan). The injection was accidentally put in plaintiff's artery instead of her vein. The resulting vascular injury required amputation of plaintiff's right arm. If this sounds very familiar -- it should. So you may think this is another post about Wyeth v. Levine. But, these are the facts of the recent decision in Schork v. Baxter Healthcare Corporation, 2011 U.S. Dist. LEXIS 107687 (S.D. Ind. Sept. 22, 2011).

So why are we blogging about it? Because there are two major differences -- 1) Schork involved a generic drug and 2) because of #1, the court found plaintiff's claims preempted. The court's legal analysis is just that simple. The Supreme Court decided Mensing, this case involves a generic drug, therefore preemption. It is difficult to imagine two cases more similar factually and more divergent legally. And this is only the beginning.