Co-Promoter Liability

Wednesday, December 07, 2011

"Co-promotion," for those not familiar with the term, is a contractual arrangement between two drug companies. The details will differ, but basically one company has a drug but not enough sales people. The second company – the co-promoter – has a larger (or in some other way better situated) sales force, and no competing drug. By signing a co-promotion agreement, the second company (for compensation, of course) puts its sales force to work stirring up interest in - that is, promoting - the other company's drug.

Such arrangements are fairly frequent in the pharmaceutical business (less so with devices), so we thought we'd take a look at co-promoter liability – that is, whether there's any support for the independent liability of the non-manufacturing co-promoter. We're not looking at the other party's (the manufacturer's) liability, since that would be determined primarily by the law of agency as applied in a standard product liability case.

We're interested in the liability of the non-manufacturing co-promoter precisely because that entity isn't going to be a "manufacturer" or a "seller" of the product for purposes of black letter product liability law. Co-promoters typically do not manufacture, sell, or supply the drugs they promote. They likewise don't usually have design, clinical research, or FDA regulatory roles with respect to the product. See Steadfast Insurance Co. v. Purdue Frederick Co., 2004 WL 2166258, at *5 (Conn. Super. Sept. 1, 2004) (describing role of pharmaceutical co-promoter).

We wanted to see what sort of claims had succeeded against co-promoters. We thought it would make a good post. We've been disappointed. We searched high and low, and we couldn't find a single case where any claim, under any theory, had succeeded against any defendant sued as a co-promoter of a drug.

None.

But that's not for want of trying.

We've found that, because they're not product manufacturers or sellers, the usual product liability claims don't lie against co-promoters. Lopienski v. Centocor, Inc., 2008 WL 2565065,

at *4 (D.N.J. June 25, 2008) (no claim under New Jersey product liability statute); Yurcic v. Purdue Pharma, L.P., 343 F. Supp.2d 386, 397 (M.D. Pa. 2004) (warranty claims fail). We can't say we're surprised at that; it's why we started writing this post in the first place.

Also, while it seems sort of obvious, in order to make any kind of claim at all against an alleged co-promoter, there needs to be evidence that the defendant actually entered into such an agreement. See In re Diet Drugs, 2004 WL 1824357, at *6 (E.D. Pa. Aug. 12, 2004) (not even a "colorable" claim where plaintiff's only evidence was an unsigned "draft" contract) (applying Florida law).

And a third thing's pretty clear. Since promotional activity is a co-promoter's only tie to a plaintiff, where there wasn't any promotion directed towards the plaintiff's prescribing doctor(s), there's no claim. Koenig v. Purdue Pharma Co., 435 F. Supp.2d 551, 554 (N.D. Tex. 2006) (promotion only after the prescriptions in question); Timmons v. Purdue Pharma Co., 2006 WL 263602, at *5 & n.9 (M.D. Fla. Feb. 2, 2006) (no promotion); Foister v. Purdue Pharma, L.P., 295 F. Supp.2d 693, 709 (E.D. Ky. 2003) (promotion only after the prescriptions in question); Ewing v. Purdue Pharma, L.P., 2003 WL 1883475, at *2 (W.D. Va. April 10, 2003) (no promotion); Allen v. Purdue Pharma, L.P., 2002 WL 32726841, at *1 (W. Va. Cir. June 26, 2002) (same). For some reason, it was the Oxy-C cases that litigated this.

That's all we know. We wish it were more, but we haven't seen any co-promoter cases that have gotten past these obstacles. If anyone has anything to add, we're all ears.