# Invisibility and the Courts

**Thursday, February 23, 2012**

Being invisible would be cool. We all know that. You could do things that you would otherwise be afraid or unable to do. And no one would see you do it. You're hidden from criticism, retaliation and embarrassment. It's such an alluring idea that it has shown up in literature for thousands of years. It's in The Republic. There's H.G. Wells's The Invisible Man. The Lord of the Rings and Harry Potter had it. Wonder Woman had an awesome invisible plane, though we never quite understood the advantage of an invisible plane while everything inside it, including the pilot, was visible. Maybe it looks like the pilot can fly, which is obviously very cool.

A theme running through much of the literature, however, is that invisibility can corrupt. In The Lord of the Rings, putting on the ring makes you invisible but also rots your soul and makes you visible to the evil that is coming for you. In The Republic, a man with an invisibility ring is used as support for the argument that a person who can do injustice without ramifications will do it.

But the purpose of the Courts is to do justice. To promote this goal, the public has a strong interest in the courts being an open forum with parties identified by name. The courts don't see invisibility as cool. They see it as an invitation to corruption. So we see in our everyday practice of law real names on both sides of the "v." Now, sometimes there's a John or a Jane Doe, but we know that those are there as placeholders until the actual party is identified and then named.

This leads us to the recent decision in Doe v. Merck & Co., No. 11-cv-02680-RBJ-KLM (D. Colo. Feb. 17, 2012), a products liability action in which the plaintiff claimed that the drug Propecia, used to treat baldness, caused him significant sexual problems. Given the "highly sensitive, intimate and personal nature" of the alleged side effects, the plaintiff brought a motion seeking to proceed anonymously. Slip op. at 3.

Requests to proceed in court anonymously are rare. We haven't seen much of it. The court noted that "[p]roceeding under a pseudonym in federal court is, by all accounts, unusual." Slip Op. at 2. The Federal Rules of Civil Procedure don't provide for it. In fact, FRCP 10(a) requires that a complaint "name all the parties," and FRCP 17(a) requires the action be prosecuted "in the name of the real party in interest." *Id*. at 2. This is all to say that there is a presumption of open court proceedings and that the public has an interest in knowing the identities of those who use the courts.

In addressing plaintiff's motion, the Court, considered the circumstances, including whether the plaintiff was a minor or was threatened with physical harm by proceeding under his name. Importantly, the court also had to consider whether allowing the plaintiff to proceed anonymously would create "a unique threat of fundamental unfairness to the defendant." *Id*. at 4.

The plaintiff gave a number of arguments for why he should be allowed to proceed anonymously: (1) there would be no prejudice to the defendant; (2) plaintiff wasn't seeking an advantage from it; (3) revealing plaintiff's name would have a chilling effect on others bringing such lawsuits; (4) the plaintiff's reason for using Propecia had nothing to do with sexual dysfunction; and (5) forcing plaintiff to reveal his name serves no public interest. *Id.* at 4.

The court addressed each of these arguments. As to (2) and (4) – that plaintiff was not seeking an advantage and did not take Propecia for reasons related to sexual dysfunction – the court noted that these arguments, while they may indicate that the plaintiff was proceeding in good faith, are irrelevant. And argument (3) – the chilling effect – was undercut by the fact that about 100 lawsuits had already been filed. *Id.* at 6.

But key to the court's analysis was its rejection of plaintiff's first and last arguments – that there would be no prejudice to the defendant, and that revealing plaintiff's name served no public interest. As Defendants responded, allowing plaintiff to proceed anonymously would force the defendants "to defend themselves publicly

while Plaintiff is permitted to hurl his accusations from behind a cloak of anonymity." *Id*. at 5-6. A cloak of invisibility in the courts is not a good thing.

In litigation, accusations and embarrassments run to both sides of the "v." Veterans of pharmaceutical and device litigation know full well the accusations often made against defendants and their employees. They put profits over patient safety. They marketed the product for improper uses or indications. They ignored safety signals. They did not test for safety. Authors of memos and emails are often skewered publicly on the basis of the plaintiff's interpretation of them. These accusations and lawsuits affect the company and employees, who are often doctors, scientists and researchers. That is the nature of our courts. And there seems little fairness in allowing one side to be invisible while the other must face the litigation and its accusations publicly.

Certainly we understand that the sexual problems suffered by the plaintiff can be embarrassing when made public. But this is the stuff of ordinary product liability litigation. We have seen litigation involving cancer, breast cancer, heart attacks, strokes, breast implants, severe mental illness and more. Moreover, many of these cases involve loss of consortium claims, which open up an additional area of issues that are personal in nature and can be embarrassing. Yet these concerns do not provide a basis for one party to become invisible while hurling what can often be hurtful and embarrassing accusations at the companies and people on the other side of the litigation.

As the court noted in rejecting plaintiff's last argument, "those using the courts must be prepared to accept the public scrutiny that is an inherent part of public trials." *Id.* at 6. This applies both to plaintiffs who chose to file lawsuits and the defendants who get sued.

This was not a case involving, for instance, a minor and potential sexual exploitation. *See* Plaintiff B. v. Francis, 631 F.3d 1310 (11th Cir. 2011). This is a fairly ordinary products liability case, many of which come with facts that are not always comfortable for both sides. The court in another Propecia case in New Jersey, involving another plaintiff seeking to proceed anonymously, put it best:

It is well established that lawsuits are public events. The risk that a plaintiff may suffer *some* embarrassment is simply not enough to overcome the constitutional presumption in favor of open court proceedings. This case and the alleged injuries do not present such an unusual situation in which the need for anonymity outweighs the presumption of openness.

Z.M. v. Merck Sharp & Dohme Corp., ATL-L-9169-11, ALT-L-9166-11; ATL-L-9142-11; ATL-L-9168-11; ATL-L-9157-011, at 3 (N.J. Super. Ct. Feb. 3, 2012).

Labels: Confidentiality, New Jersey, Pleading