Sixth Circuit Aredia/Zometa Triple Play (Or: Goodnight Irene)

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The problem with signing up for the "triple play" with your media provider is that when something like, say, a hurricane, knocks out the cable, you lose your television and your internet and your phone. Luckily, before Al Gore's invention abandoned us, we had printed out three opinions from the United States Court of Appeals for the Sixth Circuit affirming rulings in the defendant's favor in five Aredia/Zometa cases. Those opinions didn't exactly make up for missing this week's **Curb Your Enthusiasm** and **Breaking Bad**, but they gave us something to do while the winds roared outside like runaway freight trains. And, anyway, why not start the week out with good, good, good news?

In *Patterson v. NPC*, the Sixth Circuit affirmed the granting of a motion for judgment on the pleadings in a case in which the complaint did not "plausibly allege" that the plaintiff received name-brand Aredia. What the plaintiff alleged was that she was infused with "Aredia and/or generic Aredia (pamidronate)."

That "and/or" turns out to be fatal. What the "or" part in particular means is that it is just as plausible that the plaintiff did **not** receive the product made by the defendant as that she did. The complaint "fails to allege anything more than a mere possibility that she received Aredia infusions and, therefore, does not meet the requirements of *Twombly* and *Iqbal*." The appeals court further held that the district court did not abuse its discretion in denying plaintiff the right to take discovery. *TwIqbal* does not permit a plaintiff to take discovery to cure a pleading defect. The court also held that plaintiff could not rely upon evidence outside of the pleading because she failed to request that the defendant's motion on the pleadings be converted into a summary judgment motion. Finally, the district court did not abuse its discretion in denying leave to amend because the plaintiff's request "was not sufficiently particular" and the plaintiff was not entitled to what would amount to "an advisory opinion."

In *Anderson, Melau, and Thomas v. NPC*, the Sixth Circuit affirmed grants of summary judgment in the three cases. In all three cases the plaintiffs had no retained experts on the subject of specific causation, i.e., did Aredia and/or Zometa cause them to develop osteonecrosis of the jaw. Instead, they sought to rely upon the testimony of treating physicians to meet this burden. The district court held that none of these treating physicians was qualified

to opine on this issue. On appeal, the Sixth Circuit affirmed, holding that the district court had not abused its discretion in excluding these witnesses on the issue of causation.

To begin with, the treaters disavowed expertise on the subject at issue. We all know that whenever we depose a purported expert, the first part of the deposition is collecting the list of "You're not an expert in ____." Doctors are especially modest and prone to disavow expertise. A GP will quickly admit that he or she is not an expert in, for example, oncology, even if he or she got an A in that class at med school and currently deals with those issues frequently. A doctor might think that "expert" means board-certified. Of course, an expert's idea of expertise might not square with the law's definition or, more importantly, the judge's definition. Some judges think that someone is an expert if they know more about something than the judge does. Then again, there are professional testifying experts who know how to play the game and never-ever disavow expertise.

We remember a plaintiff-expert who was a professor of marketing and would opine that the defendant's advertising was misleading. He would also try to opine on medical causation. Or anything else. If you deposed this fellow and asked if he was an expert in medical causation, he'd say something like, "Well, I am not a medical doctor. But in the course of working on this case I've acquired education and experience in that area and I think I know many things that would be very helpful for the jury." And then he would grin. He knew how to play the game. But the Sixth Circuit's opinion says that the expert's own opinion of his or her expertise is not dispositive. The court looked past the purported experts' disavowal of expertise on the subject at issue, and concluded that the plaintiffs had not met their burden to show that the treaters possessed the requisite qualifications to opine about causation. So it turns out that the non-experts in the case were actually correct in opining that they were not experts. Good for them. And now to cut to the chase: because the plaintiffs lacked causation evidence, summary judgment was properly granted.

In *Emerson v. NPC*, the Sixth Circuit affirmed a grant of summary judgment based upon a statutory presumption created by Florida law. Florida has enacted a government-rules presumption that, as applied in this case, means that Aredia and Zometa were not defectively dangerous because they were FDA approved. The parties agreed that the presumption applied, and the primary argument raised by the plaintiff to overcome this presumption was that the defendant had defrauded the FDA. Oops. All together now: *Buckman* preemption.

Buh-bye.

The other assertions that plaintiff made in an attempt to overcome this presumption lacked particularity and incorporated all the pleadings in the MDL. As you can imagine, that is a massive volume of documents. The Sixth Circuit held that the district court was not required to do the work of plaintiff's counsel and perform a detailed review of the record. That's the lawyer's job. Trying to lateral that job over to the judges will not work. Indeed, it might even tick them off a bit.

(Just like we'll be ticked off if the cable is still out when we get home tonight. If we miss **Weeds**, in addition to missing **Curb** and **Breaking Bad** already, that will be the worst sort of triple play.)

Congrats and a tip of the cyber hat to Joe Hollingsworth for bringing these excellent results to our attention.