

[Defense Verdict in Hogan](#)

Monday, May 30, 2011

We have recently highlighted a few decisions coming out of *Hogan v. Novartis Pharmaceuticals Corp.*, No. 06-Civ-260 (BMC) (EDNY), and we've got some good news to report. After a week and a half long liability-only trial in the EDNY Brooklyn division, a six-member jury returned a defense verdict after about five hours of deliberation on Wednesday. Plaintiff Karlene Hogan alleged that her late husband developed ONJ after using the Novartis drug Zometa® to treat his widespread and aggressive multiple myeloma.

As we reported [previously](#), the defense was able to exclude testimony from ubiquitous plaintiff expert and – as the Court put it – “superlawyer” Dr. Suzanne Parisian before trial. The Court also shut down plaintiff’s efforts to get in irrelevant and prejudicial “corporate conduct” evidence from other experts and through corporate documents. We didn’t necessarily agree with the Court that the FDA was a “sideshow” in a prescription drug product liability case, but at least the Court excluded the plaintiff’s effort to introduce what truly would have been a “sideshow.”

Among her witnesses at trial, plaintiff called oral surgery expert Dr. Robert Marx, who claims to have discovered ONJ and has testified in several cases in the bisphosphonate litigation. Dr. Marx testified that a pathologist who analyzed samples from Mr. Hogan’s jaw incorrectly concluded that the specimen showed cancer. The defense case was headlined by a local oncology expert and their national expert on bisphosphonates and bone. The jury answered “no” to the first question on the verdict form: “Did plaintiff prove by a preponderance of the evidence that the Zometa® used by Mr. Hogan medically caused his jaw condition?” That is what we in the business call a resounding defense win.

The Court made some noteworthy rulings on the elements of plaintiff’s causes of action along the way. For example, when the Court denied defendant’s motion for judgment as a matter of law (while making clear that it would revisit defendant’s argument should the jury return a plaintiff verdict), it made two important, good rulings. First, the Court concluded that Rhode Island would apply the learned intermediary doctrine and held that Novartis had no duty to warn Mr. Hogan directly. Here is what the Court said:

I see nothing in Rhode Island case law, including the *Castrugnano* case, to suggest that Rhode Island would require direct patient warning in pharmaceutical drug cases. Just because 4024 A of the second restatement says nothing about the learned intermediary doctrine doesn't bother me.

There are a lot of states that adopted both. If Rhode Island doesn't accept the doctrine in the way that most courts have, then it's likely it's going to look to the third restatement, which requires direct warnings when the manufacturer has reason to know that the health care provider will not be in a position to reduce the risk to the patient.

Unlike the mass inoculation vaccine scenario that the restatement mention in one of its comments, Zometa is a very serious therapy that is commenced after consultation with doctors.

Plaintiff has admitted in the joint pretrial order that Zometa is admitted at infusion centers and the patient sees the package or gets any written information about it. Plaintiff doesn't despite Zometa's successful bone manufacturer, even if it can lead to ONJ. As intended there Zometa is a type of drug learned intermediary doctrine encourages a doctor-patient dialogue. Zometa does not fall within the exception of the restatement and I, therefore, find a direct warning to Mr. Hogan was not required.

That is a significant ruling because, as far as we know, no other court has addressed whether Rhode Island would adopt the learned intermediary doctrine.

Second, the Court refused to instruct the jury on the heeding presumption. Rather, the Court reasoned that the heeding presumption was something a court takes into account in deciding whether to allow a claim to proceed to the jury.

We offer congratulations to the Novartis trial lawyers, Bruce Berger and Robert Johnston of Hollingsworth LLP and Jesse Graham of Rivkin Radler, and thank them for sending us the transcripts.