Monday, May 09, 2011

West Virginia: No Country for Good Decisions

Last week we were at DRI-Chicago, which had some terrific panels. We especially liked the presentations on the strategies behind the VIOXX litigation and on how to dismantle a plaintiff's omnibus expert. On the flight back we took a gander at the airline magazine, because one can read only so many advance sheets and BNA alerts. There was an article about Ken Jennings's new book. Jennings was the uber-Jeopardy champion, magnificent even when he lost to Watson. Jennings has written a book about geography that contains lots of interesting observations. Among other things, Jennings writes that he always wanted to go to Weirton, West Virginia, because it has the odd distinction of touching two states other than the state it's in. That's a fascinating fact, though not so fascinating as the idea of somebody wanting to go to West Virginia. ("One Big Family -- Really.") We had a college roommate from Weirton who had that really cool, Chuck Yeager accent. Nice guy. We loved the way he drew out the state slogan: "Wwwwwiiiild and wwwwunderful West Virginia."

Since immersing ourselves in defense-oriented litigation, we've discovered West Virginia to be wild and not-so-wonderful. We won't repeat the parade of indignities or the Judicial Hellhole riff. Let's leave it at this: while there are some good state court judges there, they are vastly outnumbered by purveyors of home-cooking and crazy rulings paving the way for verdicts that defy reason and rattle stock prices. So when your client is sued in West Virginia state court, one of the first things to consider is removal.

That's what happened in *Hartman v. Caraco Pharmaceutical Laboratories, Ltd*., 2011 U.S. Dist LEXIS 46924 (S.D. W. Va. April 29, 2011). The plaintiff filed a complaint in West Virginia state court, alleging that she was injured in a car accident after an episode of sleep-driving. She had taken Zolpidem, a generic substitute for Ambien. The plaintiff was a West Virginia resident. She sued the manufacturer, a Michigan resident. She also sued the pharmacy, a fellow West Virginia resident. She claimed that the pharmacy failed to warn her adequately of the sleep-driving danger. Predictably, the manufacturer removed the case to federal court, arguing that the pharmacy had been fraudulently joined. Just as predictably, the plaintiff filed for remand.

Now we all know that outcomes are often determined by presumptions and burdens. So we also know that things are headed South (or at least to West Virginia, which is worse) when the

federal court deciding the remand motion drones on about the "heavy burden" facing a defendant removing a case for fraudulent joinder. The court says that the removing party must show there is "no possibility" that the plaintiff could establish a cause of action against the in-state defendant, that "[a]ny shades of gray are resolved in favor of remand," and that a plaintiff "need only demonstrate a 'glimmer of hope' in order to have his claims remanded." *Hartman*, 2011 U.S. Dist. LEXIS 46924, *4-5.

Okay, we get it. And we get where this is going. There's a lot of language out there about the presumption in favor of remand, but this judge selected the worst of the worst. It's kind of like that scene in **No Country for Old Men**, where the victim says to the killer, "You don't have to do this." Javier Bardem smirks and says, "People always say that" and then flips a coin. Some bad things can't be reasoned with.

Here, there were plenty of good reasons to see the claims against the pharmacy as bogus. First, there is a West Virginia statute that sure sounds like pharmacies can't be on the hook for product liability claims. Section 30-5-12(a) provides as follows: “All persons, whether licensed pharmacists or not, shall be responsible for the quality of all drugs, chemicals and medicines they may sell or dispense, with the exception of those sold in or dispensed unchanged from the original retail package of the manufacturer, in which event the manufacturer shall be responsible.” The federal court acknowledged that the majority interpretation of section 30-5-12(a) shields pharmacists from failure-to-warn claims. An earlier federal case -- and not much earlier (July 2010) -- followed that majority approach and deemed a pharmacy fraudulently joined.

But the *Hartman* federal court looked to the minority approach in older (2003 and 2005) decisions where section 30-5-12(a) was held to protect pharmacies only from claims "based upon the quality of the drug," and not against failure-to-warn claims. *Id.* at *7-8. Those cases (both federal, by the way) held that because the West Virginia legislature had not expressly mentioned failure-to-warn claims in section 30-5-12(a), such claims were not covered.

Geeze. Maybe the language in the statute was general because it was meant to apply generally and across the board. Maybe there's a reason why this approach is the minority approach, and an old one at that. And yet the federal court in *Hartman* seized upon such old and unsound law to supply the "glimmer of hope" that compelled remand.

But wait, there's more. Remember how the *Hartman* court relied on earlier federal cases to narrow the immunity of section 30-5-12(a)? One of those cases still held that the pharmacy had been fraudulently removed because "the learned intermediary doctrine applies to discharge any duty of the pharmacy to warn its customer." *Id.* at * 9, quoting *Ashworth v. Albers Medical, Inc*., 395 F. Supp. 2d 395, 407-08 (S.D.W. Va. 2005). Why doesn't that work here? You know the answer, don't you? It's the gruesome *Karl* case where, according to *Hartman*, "the supreme court of appeals mentioned and parted company with the substantial majority of other state courts that had addressed the issue as well as with *Ashworth* and other decisions predicting West Virginia would adopt the learned intermediary doctrine generally." *Hartman*, 2011 U.S. Dist. LEXIS 46924 at *10. Right. It's all coming back to us now. Like a sandwich with spoiled mayonnaise.

Of course, "the *Karl* decision did not involve a pharmacy." *Id.* at * 10. *Hartman* did. And, of course, the *Karl* "majority opinion appears to have been influenced heavily by the 'current state of the prescription drug industry and physician-patient relationships' impacted by direct marketing of drugs to consumers through mass media advertising." *Id.* at *11, quoting *Johnson & Johnson Corp. v. Karl*, 220 W. Va. 463, 465 (2007). *Hartman*, as far as we can tell, involved no such advertising. So, we don't have to do this, do we? There's still a chance to be reasonable ... isn't there?

Yes and no. The *Hartman* court basically interepreted the fraudulent joinder standard to assume that *Karl* would be extended even to cases where there was no direct-to-consumer advertising. This ruling is parallel to the court's assumption that the older, less sensible interpretation of section 30-5-12(a) would prevail. Does the fraudulent joinder standard really require a federal court to assume that state courts would adopt the dumbest, most plaintiff-friendly approach possible?

Well, we are talking about West Virginia.