Déjà Vu All Over Again

Friday, August 19, 2011

The goal for the other side in MDL litigation is to file as many complaints as possible and after that do as little work as possible – while waiting around for the almost inevitable settlement, be it large or small. Thus, MDL plaintiffs want only one-way discovery. Their side gets to discover the living daylights out of our clients, and drive up our expenses to the maximum extent possible. But our side doesn't get anything more than pieces of paper called "questionnaires" or "fact sheets."

And even there, plaintiffs cheat. Sometimes it's just the desire to do as little work as possible; sometimes it's deliberate, to preserve pathetically weak cases so everyone can feed at the settlement trough. Either way, the result is the same. Occasionally, however, there's a judge who goes behind the Potemkin village of the MDL "fact sheet." The late Judge Bechtle nailed the plaintiffs for phony questionnaires in Bone Screw:

"The court finds that [certain plaintiffs' lawyers] violated Fed. R. Civ. P. 11 to the extent that certain answers provided on the 225 verified questionnaires submitted on behalf of their plaintiff clients had no evidentiary support and were either false or misleading in that a computer-generated "no" appeared in lieu of a truthful answer. The court further finds that [these lawyers] were negligent and hence violated Fed. R. Civ. P. 37 to the extent that they failed to exercise due care in the manner in which they directed and supervised both their office staff and the implementation of the computer program they knew was to be used in completing said questionnaires, such negligence resulting in widespread false and misleading answers provided on the 225 verified questionnaires submitted in discovery pursuant to court Order."

In re Orthopedic Bone Screw Products Liability Litigation, 1997 WL 704719, at *1 ¶2 (E.D. Pa. July 24, 1997) (imposing over $100,000 in fines and ordering the lawyers to "report" to the court on "how they intend to restructure the servicing of their clientele" so they will provide "professional and competent service").

Something similar seems to be brewing in the Yasmine/Yaz MDL, where the dismal MDL norm of one-way discovery evidently prevailed up until recently:

"[I]n non-bellwether cases, discovery for the defendants has been limited to information provided by the Plaintiff Fact Sheet ("PFS") submissions and the medical records secured through authorizations that accompany the PFS submissions. Plaintiffs, on the other hand, have had the benefit of conducting full

discovery with regard to the defendants and may conduct any investigation they choose into their own cases".

In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and Products Liability Litigation, 2011 WL 3035087, at *1 (S.D. Ill. July 25, 2011). However, the defendants appear to have convinced the court that the plaintiffs have been submitting dross in their fact sheets – as discovery in the relatively few bellwether cases provided the defendants enough of a record to expose those fact sheets for the rubbish that they are:

"[I]n bellwether cases core, case-specific discovery (such as taking the depositions of plaintiffs and treating physicians) has revealed that the PFS submissions are often inaccurate and/or incomplete. For example, [defendant] states that in more than one-third of the cases selected by the parties as potential bellwethers, the PFS submissions had to be amended or supplemented just before, or during, the deposition process because they were incomplete or inaccurate. . . . [I]f these bellwether cases had not proceeded to more fulsome discovery, the PFS inaccuracies would have remained undetected. This experience, leads [defendant] to question the value of the information it has gathered via the PFS submissions (and medical record authorizations which are based on information provided in the PFS submissions) in the non-bellwether cases."

Id. at *2.

The defendant's proof of pervasive fact sheet inaccuracies, like the similar proof submitted in Bone Screw, was apparently quite persuasive. The court in Yasmin/Yaz has decided to allow non-bellwether discovery of the plaintiffs in 100 more cases.

"The PFS deficiencies identified by the defendants raise questions about the credibility of the information that has been obtained. Considering these deficiencies in conjunction with the parties' arguments and the critical importance of obtaining accurate information during the discovery process, the Court will allow an expanded core, case-specific discovery program in the oldest 100 non-bellwether cases. In particular, the Court will allow case-specific depositions of the plaintiffs in these individual cases."

Id. at *3. If our Bone Screw experience is any guide, we're pretty sure that the result of exposing the plaintiff's questionnaires in Yasimine/Yaz to the light of discovery will be to reveal widespread inaccuracies – always in ways detrimental to defendants.

In the Bone Screw litigation, we ended up having full, two-way discovery. Literally hundreds of treating physicians (not to mention, plaintiffs) were deposed, to devastating effect. After remand, that full, two-way discovery provided the individual case records that resulted in almost 200 successful summary judgment motions (run a Lexis/Westlaw search for "pedicle screw"/"bone screw" in the 1997-2000 time frame, if you don't believe us), and the eventual settlement being less than a penny on the dollar of the other side's original demand.

So we'll be cheering on the Yasmin/Yaz defendants in their efforts to get the discovery necessary to show – as is almost inevitably the case – that the vast majority of the plaintiffs in MDL litigation have cases that are so weak that they can't stand the kind of scrutiny that would be a defendant's right if any particular case were filed separately.