Mirapex - Daubert Inapplicable To Toll Statute of Limitations

Thursday, July 28, 2011

We don't generally cover statute of limitations-type issues (except for class action tolling) because they tend to be too state-specific and fact-bound to be of much general use. We're making an exception for today's decision in Gazal v. Boehringer Ingelheim Pharmaceuticals, No. 10-3129, slip op. (8th Cir. July 28, 2011), because it decides a statute question we've seen raised in any number of jurisdictions. That's whether a plaintiff, knowing full well what he thinks is happening, is allowed to delay suit under until the scientific proof of causation would satisfy the relevant Daubert standard of the jurisdiction.

Gazal provides a resounding "no" to that question, meaning that tardy plaintiffs can't hide behind Daubert to excuse their failure to file suit in a timely fashion. The plaintiff in Gazal was an Australian national who was prescribed Mirapex in Texas, where he "owned property." He proceeded to gamble away lots of his money, and he tried to blame Mirapex for not being able to stay out of casinos.

For statute of limitations purposes, the key undisputed fact is this: "[Plaintiff] admitted that at some point in late 2005, he became aware that Mirapex was linked to, and might cause, compulsive gambling." Slip op. at 2. He didn't file suit, however, until June 2009.

Dead to rights under the Texas two-year statute of limitations, plaintiff tried to argue that his claim didn't "accrue" until there was scientific evidence sufficient to satisfy Texas' version of Daubert, which was imposed in Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997). Thus, plaintiff was trying to take pro-defense rule (Havner is relatively strict about causation standards and scientific proof), flip it, and use it to his own advantage.

The Eighth Circuit (Texas is in the Fifth, but due to the marvels of MDL litigation, the Eighth Circuit handled the appeal) said "don't mess with Texas" and affirmed summary judgment. Accrual for the statute of limitations is based upon consideration of notice, not on issues of ultimate proof:

"[O]bjective verification of causation, in the form of an epidemiological study that meets the Havner standard, is not a predicate that must be established for a claim to accrue. Havner considered what weight ought to

be given to particular epidemiological studies in determining whether the plaintiffs' causation evidence was legally sufficient under the "more likely than not" burden of proof. It did not speak to the minimum notice a plaintiff must have before a particular claim accrues and does not bear on the particular issue before us."

Gazal, slip op. at 6. Rather, what mattered for statute of limitations purposes was that the plaintiff admitted his own subjective notice of his allegations concerning Mirapex and compulsive gambling. Id.

Since we've seen similarly knowingly tardy plaintiffs make the same argument in reliance upon any number of non-notice related elements of proof (from malpractice expert certifications to limited tort injury severity), we're pleased to see an appellate court affirm, in cogent fashion, just what the statute of limitations is all about. So we thought we'd pass it along.