More Twlqbal Scholarship

Tuesday, May 10, 2011

We've found something quite rare - a balanced law review article on Twlqbal. It's called *Iqbal* "Plausibility in Pharmaceutical and Medical Device Litigation," 71 La. L.R. 541 (Winter 2011), and it's by Prof. William Janssen (we don't think there's any connection to Janssen Pharmaceuticals of Oxycontin fame, but we don't know for sure one way or the other). The good professor sent us a copy, but for our readers we were able to locate an online copy here.

The article's relatively unbiased because it's empirical. Instead of trying to prescribe what the law should be with respect to Twlqbal and pleading, is sticks to what has happened. Having selected drug and device (not necessarily product) liability litigation, Prof. Janssen looks at over 250 Twlqbal cases and attempts to devine whether Twlqbal in fact changed the result. Without giving away everything in his article (which we found an interesting, if rather lengthy, read), he basically concludes that, all in all, Twlqbal doesn't matter all that much - affecting the outcome of, at most 21% of the cases reviewed. He sums up his conclusion thusly:

> [I]f one is inclined to see in *Iqbal* the harbinger of momentous change in federal pleading, an arrival greeted either alarmingly (in fear of meritorious cases lost) or warmly (in appreciation of unmeritorious cases purged), the cause for either alarm or delight is waning.

71 La. L.R. at 643 (one of the incessant footnotes omitted). Not only was the difference all that great to begin with, but Prof. Janssen's study detects a decrease in Twlqbal's importance over time. Id.

What do we think? Well, first, we think there's more to Twlqbal than meets the eye - because we think that plaintiffs have themselves responded to Twlqbal by pleading more thoroughly than they used to. Just look at the Bausch (Bausch v. Stryker Corp., 630 F.3d 546 (7th Cir. 2010)) and Funk (Funk v. Stryker Corp., 631 F.3d 777 (5th Cir. 2011)), appellate cases (neither of which is old enough to be included in the study). In both of those cases, the plaintiff responded to the initial motion to dismiss by filing a much more detailed complaint - amendments considered in Bausch, but not in Funk, for procedural reasons. In most cases plaintiffs can plead better, but were simply too lazy to try. That's one thing that Twlqbal is changing, whether or not a successful motion to dismiss results. Now that the appellate courts are starting to weigh in in drug/medical device pleading situations, we think Twlqbal is more important.

Second, we think that where the plaintiffs might not be able to plead more specifically, usually preemption cases, courts need to step back and realize why that is. It's not because nefarious defendants are hiding away what plaintiffs need to plead to avoid preemption in Class III medical device cases. Rather it's a function of Congress trying to tell the courts - through use of an express preemption clause - that **we don't like** this kind of case. Preemption means that the targeted suits are not to be favored by the law. There will be cases, probably lots of them, where plaintiffs won't know enough to plead a violation, and in 99% of those cases, there isn't going to be a violation. Only egregious situations did Congress intend that there still be litigation. In light of the legislative choice to preempt, courts should not cut plaintiffs slack under Twlqbal and allow fishing expeditions into violations that are not already known to exist.