An Oldie But Goodie

Friday, June 10, 2011

We've always been interested in being allowed to have informal (sometimes called "ex parte") interviews with treating physicians of the plaintiffs. We think they're fact witnesses (the most important ones in many, if not most, cases) and that by filing a personal injury lawsuit a plaintiff waives any expectation of physician/patient confidentiality as to the injuries being claimed and their treatment.

Good treating physician testimony can also win a case in and of itself – on the basis of no causation of any purported warning defect under the learned intermediary rule.

We've been sufficiently interested in the informal interview question that in late 2008, we even prepared our own 50-state survey of what we understood the states' law to be on the subject.

Little did we know.

Well, it pays to keep our eyes open. Just the other day the court in the Aredia/Zometa MDL released a valedictory of sorts – an order summarizing that MDL's activity for the benefit of judges in remand cases. In re Aredia & Zometa Products Liability Litigation, 2011 WL 2182824 (M.D. Tenn. June 3, 2011). We got word of this because the court mentioned its Buckman decisions on fraud on the FDA claims. Buckman citations tend to be interesting, so we have a search that looks for them.

But that wasn't what caught our eyes when we skimmed through the order. Rather, our interest was piqued when the court stated:

> "In each case placed in a wave for discovery, Defendant and Plaintiffs were entitled to conduct fifteen depositions of non-parties per the CMO. This number includes treating physicians. **The Court held that treating physicians are fact witness to which both parties should have access.** See Docket No. 1094. Accordingly, NPC could engage in ex parte communications with treating physicians as set forth in the Order."
> Id. at *4 (emphasis added).

Whoa! We'd never gotten wind of that. A ruling in a major MDL that "treating physicians are fact witness to which both parties should have access"? Heck, when a court in a single case made a similar ruling, that merited its own post. See Weiss v. Astellas Pharma, US, Inc., 2007 WL 2137782 (E.D. Ky. July 23, 2007). But a whole MDL? And here we were, sitting around ignorant.

Not for long.

We searched Westlaw. Nothing. We searched Lexis. Nothing. Did that stop us? No. We have a PACER account and we're not afraid to use it.

So here it is, three years late but better late than never. We start with the general ruling:

"The simple conclusion is that Plaintiffs' treating physicians are fact witnesses and Plaintiffs' counsel is not entitled to restrict access to these witnesses. Further, it is clear and undisputed that Plaintiffs' counsel themselves have participated in ex parte communications with these witnesses. The Magistrate Judge stresses that no party has an exclusive right to any witness. Additionally, the Magistrate Judge fully agrees with Novartis that allowing ex parte communications with the literally hundreds of physicians in this litigation would allow for more expeditious trial preparation as it would enable Novartis to efficiently determine which physicians need to be formally deposed. This would assist all parties in determining which physicians' testimony would be relevant at trial."

In re Aredia & Zometa Products Liability Litigation, No. 3:06-MD-1760, slip op. at 2 (M.D. Tenn. Jan. 17, 2008) (doc #1094).

This ruling says three things that we've pointed out about informal physician interviews: (1) doctors are fact witnesses and should be equally available to both sides, (2) whenever defendants' interview rights are restricted, plaintiffs cheat, and (3) informal interviews are quicker and less costly than requiring formal depositions in all cases.

The court (technically a magistrate) ultimately decides, as a matter of comity, not to allow informal interviews where they would not be available under that state's law. Slip op. at 4. We'd say that under Erie, federal courts are not bound by state procedural rules (only substantive privileges or ethical rules), but we'll take what we can get.

The court also goes through a shorthand state-by-state analysis, slip op. at 3-7 that resembles we did later in our 50-state-survey. Heck, if we'd known about this, we would have grabbed up the Aredia/Zometa parties' briefs on the subject and saved ourselves a lot of work.

Anyway, we hope our readers are as interested as we were in this discovery. We've sent the slip opinion on to Westlaw. It will probably show up there in a week or two.