Finding a Happy Place

Tuesday, August 09, 2011

It's August – days are getting shorter, pencils and notebooks have replaced beach balls and suntan lotion in the stores, football is encroaching on baseball. Now, think of where you would like to be as the twilight of summer approaches. At a barbecue with fresh Jersey corn and tomatoes? Walking along the beach in the morning and the boardwalk at night? Reading a good book by the side of the pool? Whatever your first choice lazy, late summer spot is – we are sure it is a happy place.

Like us, our clients want to be in happy places too. Places with short statutes of limitations, no heeding presumption – and certainly places that recognize the learned intermediary doctrine. So, it is no surprise that drug and device manufacturers want to be in the West Virginia courts about as much as Mike Vick wants to face Clay Matthews and the Packers defense in Green Bay in the playoffs (keeping with our football theme from yesterday). And, with decisions like Woodcock v. Mylan, Inc., 661 F. Supp.2d 602 (S.D.W. Va. 2009) and Vitatoe v. Mylan Pharmaceuticals, Inc., 696 F.Supp.2d 599 (N.D.W. Va. 2010) – holding that the learned intermediary doctrine, as it violates West Virginia public policy, cannot be applied in a diversity case, regardless of what state's substantive law controls – West Virginia federal court was only marginally a more desirable location than state court.

Fortunately, earlier this year, and as reported on here, the West Virginia legislature enacted a statute declaring the public policy of West Virginia to be that the applicability of the learned intermediary rule is to be governed by the product liability law of the place of injury ("lex loci delicti") -- typically the residence of the plaintiff at the time s/he took the drug. W. Va. Code § 55-8-16(a). Great news – but only for cases filed on or after July 1, 2011. Id. at §16(b).

So, what should a pharmaceutical defendant sued in federal court in West Virginia prior to July 11, 2011 by a plaintiff who resides in another state do – move for a § 1404(a) transfer. That is precisely what the defendant in Locklear v. Mylan Inc., 2011 U.S. Dist. LEXIS 84398 (N.D. W.Va. Aug. 1, 2011) did – having been the defendant in the horrible Woodcock and Vitatoe decisions, Mylan was certainly looking to avoid a trifecta. If this didn't work, who knows? Poor Mylan might want to consider moving out of West Virginia.

Plaintiff Locklear sued Mylan for the death of her husband alleging an accidental fatal drug overdose after use of defendant's transdermal fentanyl patch. Locklear, 2011 U.S. Dist. LEXIS 84398, *2-3. There was no dispute that the case could have been filed in the Eastern District of North Carolina, where the decedent resided until his death, id. at *3, and the court agreed that that was the better venue:

"Overall, the interest of justice requires that this case be heard in a court with better access to relevant evidence and witnesses, where non-party witnesses will be less inconvenienced, and where the local citizens have a stronger interest in the case. These considerations are substantial and overcome the presumptively proper venue chosen by Locklear."

Id. at *17.

A note to our clients -- the court appeared particularly swayed by the defendant's willingness to make its employee witness available in North Carolina. With the focus off any burden to party witnesses, the court concentrated on non-party witnesses – like plaintiff's treating physicians in North Carolina: "These individuals with no stake in this litigation should not be asked to incur the inconvenience of traveling to West Virginia, even if voluntarily." Id. at *9.

Without burdened witnesses, the plaintiff made one last attempt to tie this otherwise North Carolina-based case to West Virginia by arguing that the court was required to apply West Virginia learned intermediary law regardless of whether the rest of the case was governed by North Carolina law – relying, of course, on Woodcock and Vitatoe. Since North Carolina has legislatively enacted the learned intermediary rule for drugs and medical devices, N.C. Gen. Stat. §99B-5(c), there is a significant difference between the law of the transferor and transferee courts. But, does it matter?

In finding that the difference between North Carolina and West Virginia law didn't impact the decision to grant the motion to transfer – and therefore, deciding not to resolve the issue – the court held:

"On transfer, however, a party retains the benefits of the laws of the forum she initially selected. That is, the case should remain as it was in all respects but location."

Locklear, at *12 (citations omitted). "A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms." Id. at *14 (citations omitted).

So, did defendant win the battle but lose the war? If plaintiff is entitled to application of the law of West Virginia regardless of location – then is the North Carolina federal court, in a case originally filed in West Virginia before July 11, 2011 – bound by Woodcock and Vitatoe? In other words, is West Virginia's supposed "policy" against the learned intermediary rule stronger than North Carolina's contrary "policy" in favor of the rule? North Carolina, unlike West Virginia, backs up its "policy" with a statute. We certainly argue that the answer is no, that the North Carolina federal courts are at least as bound to respect their home state's policies as is a West Virginia court, but we'll have to wait to see how that court handles the choice of law analysis. All in all, North Carolina is still a happier place to spend the rest of the summer, so we'll kick off our shoes and splash in the ocean while we still can.