

Transferring Pharmaceutical Product Liability Cases

6/20/2007 --- In a notable series of opinions, U.S. District Court Judge Timothy Savage transferred seven pharmaceutical product liability cases that had been consolidated in the Eastern District of Pennsylvania for purposes of discovery to the seven different districts in which the individual plaintiffs reside. See, e.g., *Elwell v. SmithKline Beecham Corp.*, 2007 WL 1234845 (E.D.Pa. Apr. 25, 2007); *Fisher v. SmithKline Beecham Corp.*, 2007 WL 1234845 (E.D.Pa. Apr. 25, 2007); *White v. SmithKline Beecham Corp.*, 2007 WL 1237952 (E.D.Pa. Apr. 25, 2007) (collectively “the Paxil cases”).

Remarkably, these decisions transferred cases from plaintiffs’ preferred forum, which is also where the defendant maintains its operational headquarters.

While plaintiffs fervently argued that keeping the cases in their consolidated format in the Eastern District was proper because it is where the defendant has its “nerve center,” the court was persuaded that balancing the private and public interest factors weighed most heavily in favor of transferring the cases to the places where the plaintiffs resided.

This series of opinions helps defeat the presumption that simply because a defendant has a physical presence in a particular venue, it automatically is the most appropriate venue.

The Paxil cases concerned claims by the plaintiffs that the defendant failed to warn the medical community of the increased risk of suicidality in pediatric patients taking Paxil.

Plaintiffs argued that the Eastern District of Pennsylvania was the most appropriate venue for these cases on several grounds.

First, they asserted the defendant’s location in Philadelphia was the site of innumerable decisions regarding the labeling, promotion, and distribution of Paxil, as well as home to many key witnesses and a Paxil document depository. To move the cases from this “nerve center,” plaintiffs argued, would be inconvenient and unfair.

The court was not persuaded by this reasoning. Judge Savage found that the defendant’s documents easily could be authenticated at trials in the plaintiffs’ home states, and that the defendant’s witnesses could be compelled, as party witnesses under the federal rules, to testify in the plaintiffs’ home states. *White*, 2007 WL 1237952, at *4.

Second, the plaintiffs contended that considerable weight should be afforded

to their choice of forum. Judge Savage acknowledged that a plaintiff's choice of forum traditionally receives "paramount consideration"; however, much less deference is due when the plaintiff does not live in the chosen forum and the operative facts occurred elsewhere. *Id.* at *3.

In the Paxil cases, the court determined that the plaintiffs had no real connection to the Eastern District of Pennsylvania, as they had purchased, ingested, and were allegedly injured by Paxil in their respective home states.

While admittedly some of the operative facts—such as pediatric clinical trials—occurred in Pennsylvania, the balance did not weigh in favor of granting the traditional deference to the plaintiffs' choice of forum when plaintiffs had such limited contact with the forum.

Thus, the court rejected the traditional "paramount consideration" approach and granted the plaintiffs' choice of forum only a "slight" preference. *Id.* at *4.

Third, the plaintiffs attempted to downplay the importance of their activities in their home states by spotlighting Philadelphia as the place where decisions about labeling, promoting, and distributing Paxil occurred.

Judge Savage declined to follow this rote approach. Instead, he focused on the place where plaintiffs' Paxil was prescribed, purchased, and consumed; where plaintiffs' alleged injuries occurred; and where plaintiffs' physicians received warnings about the drug.

These issues were of particular importance because they related to matters of how the parties could secure important documentary evidence, as well as obtain testimony from key witnesses and command their presence at trial.

For example, the defendant would be prejudiced if the cases remained in the Eastern District of Pennsylvania because it would be unable to take advantage of the court's subpoena power to compel the attendance of nonparty witnesses located more than 100 miles beyond the Eastern District of Pennsylvania.

The court was persuaded by the defendant's evidence that nurses, physicians, family members, school officials, and others would provide essential live testimony, the absence of which would prejudice the defendant.

Furthermore, the documents attendant to these witnesses—including medical, prescription, employment, and education records—would be more easily accessible in the home states.

The court also focused on the convenience of the parties and witnesses. Specifically, if the litigation remained in Philadelphia, parties from both sides would have to travel great distances for trial.

If the cases were transferred to the plaintiffs' home states, then only the defendant would have to transport witnesses, which it would have to do

regardless of where the cases were tried. Id. at *3.

The Paxil cases offer defendants new hope and several lessons on ways in which to secure the most suitable venue for a litigation.

One important lesson is that the decision to seek a transfer of venue likely will require considerable discovery. Strategic decisions should focus on questions of how documents can be secured, which witnesses a defendant can argue persuasively will be necessary to support its defense, and how all parties might be inconvenienced by a forum in practical terms (e.g., is the plaintiff's home a mere 20 miles from the courthouse with all key witnesses living within close proximity).

Other strategic decisions must focus on broader litigation issues such as choice of law, personal jurisdiction, and even possible class certification, which were inextricably linked to Judge Savage's decisions in the Paxil cases.

Pointing out to a court that it would have to apply a foreign jurisdiction's law if it opts not to transfer the case to the place where the plaintiff resides can be a powerful weapon in winning a motion to transfer venue.

Yet, because a position taken in one litigation may impact other similarly situated cases, this argument should be made only after fully considering the potential long-term ramifications.

The Paxil cases are useful precedent in assisting defendants who seek to transfer venue away from their alleged "nerve center" to a venue that may be more amenable to their litigation needs.

Judge Savage's analysis provides critical tools to help guide future courts through the public and private interest factors, and helps to rebut many courts' preconceived deference to a plaintiff's choice of forum, even where that forum might encompass a defendant's operational headquarters.

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