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Class Action Certified Against Pfizer's Neurontin

Asher Hawkins

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A Philadelphia judge has certified as a class all Pennsylvania purchasers of Pfizer's Neurontin who used the anticonvulsant for "off-label" purposes.

Philadelphia Common Pleas Judge Mark I. Bernstein's recent opinion *Clark v. Pfizer* appears to mark the first time a U.S. court has certified a Neurontin-targeting class of plaintiffs.

Neurontin was approved by the U.S. Food and Drug Administration in 1993 for helping to treat seizures in people with epilepsy. It is also approved for treating pain associated with certain herpes-related skin rashes.

The drug, also known as gabapentin, has been the subject of litigation across the country after it emerged in recent years that beginning in 1995, employees of the anti-epilepsy drug's manufacturer - now a Pfizer subsidiary - had hyped Neurontin use for a variety of other conditions, including bipolar disorder and nerve-related pain.

"Anytime you're called out just make sure that your main focus out of what you're doing is on Neurontin. . . . When we get out there, we want to kick some ass, we want to sell Neurontin on pain," a medical director for Neurontin manufacturer Warner-Lambert Co. told subordinates in a spring 1996 voicemail, according to Bernstein's opinion.

The 1996 voicemail message was one of many pieces of evidence cited by a Massachusetts federal court that three years ago slapped Pfizer-owned Warner-Lambert with a \$240 million fine as part of a criminal plea agreement.

The pharmaceutical manufacturer also said it would pay \$83.9 million in civil damages to the federal government to cover losses in the Medicaid program and \$34 million in civil damages to individual states - all to remedy the effects of what federal prosecutors called an "off-label marketing plan."

"Defendants also developed databases of influential prescribers of Neurontin for off-label uses and affirmatively promoted their views," Bernstein wrote in *Clark*. "Defendants provided financial incentives for these influential physicians to prescribe Neurontin off-label.

"[Their] strategy consisted of publicizing positive anecdotal and case-study results of off-label uses, financially supporting articles in medical literature which affirmed Neurontin's 'emerging uses' and paying for 'continuing medical education programs' dinners and teleconferences presented by physicians selected because they believed Neurontin was effective in off-label uses."

Pennsylvania's Neurontin class action began when Gregory Clark of Northeast Philadelphia claimed Neurontin was marketed as treatment for medical ailments for which the drug wasn't legally approved.

Specifically, Clark asserted he was prescribed Neurontin in 2003 for post-surgery knee pain as a "direct result" of its manufacturer's marketing tactics.

According to Bernstein's opinion, at least 200,000 Neurontin prescriptions have been written in Pennsylvania, and Pfizer and Warner-Lambert have sold as much as \$64 million of the drug per quarter in the Keystone State.

Bernstein wrote that a medical expert for the defense in *Clark*, Abington-based neurologist B. Franklin Diamond, had acknowledged under cross-examination to having "exaggerated the truth in his report" when he stated that Neurontin's effectiveness in treating a potentially debilitating nerve-related pain syndrome had been demonstrated in clinical trials.

"Dr. Diamond's report also contains a remarkable indictment of our entire governmental regulatory scheme for prescription drugs," Bernstein wrote in a footnote. "[Diamond] says: 'If a physician were limited to using drugs that had completed clinical trials for specific indications, there would be relatively few patients treated for anything successfully.'"

Bernstein concluded that the proposed class in *Clark* had satisfied the five prerequisites for certification under Pennsylvania Rule of Civil Procedure 1702: numerosity, commonality, typicality, adequacy of representation, and fair and efficient method of adjudication.

Lead class counsel is John Weston of Sacks & Weston in Jenkintown, who is being assisted in the case by Julie Parker and Charles Mangan.

Weston said that state court judges in New Mexico and New York have denied certification to other proposed Neurontin classes, while a federal court overseeing the Boston-based multidistrict litigation of Neurontin claims has yet to rule on the certification motion pending before it.

Weston said that many Neurontin claims have been removed from state courts to the federal system.

That almost happened to Pennsylvania's Neurontin plaintiffs, but U.S. District Judge Berle M. Schiller of Pennsylvania's Eastern District decided in September 2004 that if the individual members of a proposed class action voluntarily limit the damages they seek in court to less than \$75,000 - the threshold amount required for federal diversity jurisdiction - the case shouldn't be removed from state court.

Weston had promised Schiller that *Clark* would not accept any recovery above \$75,000.

Weston said Friday that the *Clark* class could wind up numbering in the hundreds of thousands.

Bernstein's ruling states that discovery in the case must be concluded by the end of this year, and that the case could be ready for trial by spring 2008.

Pfizer is being defended in *Clark* by attorneys from Montgomery McCracken Walker & Rhoads in Philadelphia and from Davis Polk & Wardwell in New York. No defense counsel was immediately available for comment on Bernstein's ruling.

Pfizer has publicly noted that the federal investigation of Warner-Lambert and the allegations against the manufacturer originated in 1996 - prior to Pfizer's acquisition of Warner-Lambert in 2000.

(Copies of the 26-page opinion in Clark v. Pfizer, PICS No. 07-1046, are available from The Legal Intelligencer. Please call the Pennsylvania Instant Case Service at 800-276-PICS to order or for information. Some cases are not available until 1 p.m.)