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RECENT DECISIONS ON PLAINTIFFS' ATTORNEYS' *EX PARTE* CONTACTS WITH TREATING PHYSICIANS

In most jurisdictions, plaintiffs' counsel have virtually unfettered *ex parte* access to their client's treating physicians, while defense counsel typically have little (and in some jurisdictions no) opportunity to meet or communicate with treating physicians outside of formal discovery.[1] Defendants have pointed out that this asymmetry does more than impede defense counsel's ability to investigate the facts, it also enables plaintiffs' counsel to gain "an unfair advantage by … lobbying their theories of liability and causation upon treating physicians during *ex parte* contact."[2] The decision in *In re Ortho Evra Products Liability Litigation,* No. 1:06-40000 (N.D. Ohio, Jan. 20, 2010)[3], is the latest in a line of recent cases that have begun to level the playing field by limiting the scope of plaintiffs' counsels' *ex parte* contacts with treaters.

In *Ortho Evra*, the court ruled that while plaintiffs' counsel would be permitted to engage in *ex parte* contacts with treating physicians, the subject matter of those contacts must be limited to the medical care provided by the treaters. The court's order allows plaintiffs' counsel to "meet *ex parte* to discuss the physicians' records and related matters," but *prohibits* any discussion of "liability issues or theories, product warnings, Defendant research documents, or related materials."[4] The court also pointedly observed that it expects "mature attorneys such as Plaintiffs' counsel will not act in a manner which would result in woodshedding or gaining an unfair advantage by ambush when engaged in *ex parte* contact with treating physicians. Such conduct will not be tolerated."[5]

Similar limitations were imposed on plaintiffs' counsel by the court in the *NuvaRing* multidistrict litigation.[6] The court ordered that while plaintiffs' counsel may meet *ex parte* with treating doctors, "the interview should be limited to the

1 *See* Peter T. Grossi Jr. and Mallori Browne, "Defense Interviews of Treating Physicians: A Proposal to End Plaintiffs' Misuse of a 'Shield' as a Sword," 8 *Expert Evidence Report* 505 (Oct. 20, 2008), http://www.arnoldporter.com/resources/documents/Arnold&PorterLLP.ExpertEvidenceReport.pdf.

2 *In re Ortho Evra Products Liability Litigation,* No. 1:06-40000, at 1 (N.D. Ohio Jan. 20, 2010).

3 *Available at:* http://www.arnoldporter.com/public_document.cfm?id=15230&key=1A2.

4 *Id.* at 3.

5 *Id.*

6 *In re NuvaRing Prods. Liab. Litig.*, No. 4:08MD1964RWS, 2009 WL 775442, at *1, *2 (E.D. Mo. Mar. 20, 2009), *available at:* http://www.moed.uscourts.gov/mdl/08-1964/127.pdf.

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particular plaintiff's medical condition at issue in the current litigation."[7] The court also required plaintiffs' counsel to inform the treaters "that any interviews are voluntary and can be declined" and to provide "a medical authorization that is compliant with the HIPAA [Health Insurance Portability and Accountability Act] and signed by the plaintiff."[8] While plaintiffs in *NuvaRing* consented to those limitations, the court made clear that it, too, found "that those limitations on any interviews conducted by the Plaintiffs are fair and appropriate and shall apply to any such interviews."[9]

The New Jersey Superior Court overseeing the *Aredia* and *Zometa* litigations went even further. The court ruled that "in the interest of fairness to all, no party—Plaintiffs or Defendants—shall engage in *ex parte* contacts with Plaintiffs' treating physicians or influence the deposition or trial testimony of Plaintiffs' treating physicians."[10] The court explained that this would "ensure that all parties have the same right of access to all non-party fact witnesses."[11]

These rulings are a welcome development for counsel defending pharmaceutical product liability cases. While, with the exception of *Gaus*, they do not place plaintiffs' and defendants' counsel on identical footing, each of them prohibits plaintiff's counsel from using unilateral *ex parte* contacts to lobby a treating physician on issues beyond the plaintiff's medical condition. It is not uncommon for plaintiffs' counsel to use *ex parte* physician meetings as a forum to present cherry-picked documents and paint a one-sided picture of the liability case. Defense counsel may face an uphill battle at deposition if the treating physician's view of the case, and of the defendant's conduct, already has been shaped by a biased presentation of the issues.

This would be a concern with any witness, but it is particularly troubling in the case of treating physicians. The treaters are crucial witnesses in pharmaceutical cases—the doctors who prescribed the medication, evaluated its risks and benefits, and determined what risks to discuss with the patient. Jurors often give greater weight to the testimony of these "real doctors" than to paid experts for either side. This problem can be further exacerbated when the plaintiff's treating physician offers a causation opinion and himself becomes an expert witness. Rulings such as those in *Ortho Evra*, *NuvaRing*, and *Gaus* provide defense counsel with new hope in combating these inequities. Defendants should continue to urge the courts to ensure that plaintiffs' counsel are not permitted to use the shield of the physician patient privilege as a sword in the discovery process.

In seeking and implementing this type of relief, some commonsense practical considerations apply. First, it is advisable for defendants to request limitations on *ex parte* contacts as early as possible in the lifecycle of the litigation. Plaintiffs' counsel have ready access to their clients' doctors and can be expected to pursue *ex parte* contacts at an early stage. Second, defense counsel should consider seeking plaintiffs' counsel's agreement to limitations on *ex parte* contacts, as was ultimately achieved in *NuvaRing*. Even if these efforts are unavailing, plaintiff's refusal to agree to reasonable limitations can contribute to laying a predicate for the motion. Finally, to the extent the court permits but limits *ex parte* contacts by plaintiffs' counsel, in order to ensure compliance (and seek redress for any noncompliance) with the court's

7 *Id.* at *2.
8 *Id.* at *2.
9 *Id.* at *3. The court declined to go farther and grant the defense an equal opportunity "to have *ex parte* communications with Plaintiffs' healthcare providers," citing "Plaintiffs' time honored privilege in their communications with their healthcare providers." *Id.* at *1, *2.
10 *Gaus* v. *Novartis Pharmaceuticals Corp.*, No. 278, at 18 (N.J. Sup. Ct., Middlesex Cty. Oct. 29, 2009) *available at:* http://www.judiciary.state.nj.us/mass-tort/zometa-aredia/gaus102909.pdf.
11 *Id.* Under New Jersey law, ex parte contracts by defense counsel may be permitted under specified conditions and with various "procedural safeguards" and limitations, but New Jersey courts have held that permitting such contacts is "not mandatory in all cases." *Id.* at 13-14. *See also In re Vioxx*, Case Code 619 (N.J. Super Law Div. Nov. 17, 2004, *available at:* http://www.judiciary.state.nj.us/mass-tort/vioxx/vioxx_memostempler_112404.pdf) (barring defendants from conducting ex parte interviews of plaintiff's physicians). The defendants in *Gaus* had moved for an order permitting them to have *ex parte* contacts with the treating physicians of Aredia/Zometa plaintiffs; however, the court concluded that it would be more practical and equitable to bar both sides from such contacts, which among other things would obviate the need for hearings over the permissible scope of defendants' contacts. *Gaus*, *supra*, at 17-18.

order, defense counsel should take care at deposition to probe the nature and content of all contacts between plaintiffs' counsel and treating physicians.

We hope that you have found this advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:

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