Products Liability Law Daily Wrap Up, EXPERT EVIDENCE—DRUGS—E.D. Pa.: Plaintiffs' allowed to offer a new expert witness in Zoloft MDL, (Jan. 9, 2015)

By Kathleen Bianco, J.D.

Plaintiffs to the Zoloft MDL were permitted to identify and present a new general causation expert witness after a *Daubert* hearing resulted in the exclusion of all four of the expert witnesses originally identified by the plaintiffs, a federal district court in Pennsylvania ruled (*In Re: Zoloft (Sertraline Hydrochloride) Products Liability Litigation*, January 7, 2015, Rufe, C.).

Background. A large number of individuals sued Pfizer, the manufacturer of the prescription antidepressant, Zoloft, alleging that Zoloft causes birth defects in children whose mothers took the drug while they were pregnant. At the onset of the action, the Plaintiffs' Steering Committee (PSC) offered the testimony of four expert witnesses on the issue of general causation. Following a *Daubert* hearing, the testimony of plaintiffs' main expert was excluded in its entirety and the remaining witnesses were excluded from testifying that Zoloft caused birth defects in humans. The PSC now seeks to introduce a new expert witness, Dr. Nicholas Jewell, Ph.D, who will opine that *in utero* exposure to Zoloft can cause congenital heart defects. Pfizer has strongly objected to the new witness, arguing that the PSC failed to identify the proposed expert in the required time frame and asserted that to allow the plaintiffs to move forward with a new witness after an unfavorable outcome would amount to a "*Daubert* do-over" and would subject Pfizer to undo prejudice.

Expert witness. Due to the complexity of the multi-district litigation at issue, the court enjoys considerable discretion in determining whether to allow the new expert. When making such a determination, the court must consider five factors, including prejudice or surprise to the opposing party; ability of the opposing party to cure the prejudice; the disruption to the trial; bad faith or willfulness; and the importance of the evidence. While the court recognized that the allowance of the new witness would cause some prejudice to the manufacturer, it was not significant enough to warrant denial. The court, however, did acknowledge that if this issue had arisen outside of the MDL context, the manufacturer's argument may have prevailed.

The court went on to hold that there was no evidence to suggest that the plaintiffs had acted in bad faith in the submission of the original expert witnesses. Finally, the court opined that although consideration of the new witness's testimony would impact the efficiency of the trial, the importance of the testimony to the action as a whole warranted allowing the plaintiffs an opportunity to offer for vetting the testimony of a new expert witness. Accordingly, the plaintiffs' motion was granted.

The case number is MDL No. 2342; 12-MD-2342.

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Companies: Pfizer, Inc.; Pfizer International LLC; Greenstone, LLC

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