Vast - Or at Least Half-Vast - Conspiracy Claim Dismissed

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Imagine a conspiracy so vast that it includes not only your usual plaintiff-side fantasy of the FDA conspiring with a drug company, but also high FDA officials, President Obama, Robert Mercer (noted Trump supporter and reputed Breitbart financier), a number of other investors, and just for good measure President and Hillary Clinton.

Larry Klaman could, and thus brought the lawsuit that recently resulted inAston v. Johnson & Johnson, ___ F. Supp.3d ___, 2017 WL 1214399 (D.D.C. March 31, 2017).

Nobody else did, though.

In particular, and fortunately for everyone on the defense side, the judge in Aston could not. Reading the Astonopinion, it is evident that the court is beyond skeptical of the vast, or even half-vast, conspiracy claims. In a nutshell, five plaintiffs who claimed a great many personal injuries (the opinion lists 74 separate alleged injuries, 2017 WL 1214399, at *1) from their use of the drug Levaquin, brought suit alleging that the drug's manufacturer and the FDA were in cahoots to cover up the drug's risks, in order to increase the value of the manufacturer's stock, to the advantage of various investors. As for the political officials, according to the opinion:

> Amazingly, former presidents Barack Obama and Bill Clinton also make cameo appearances in plaintiffs' alleged scheme, together with former Secretary of State Hillary Clinton, and the Clinton Foundation; these actors are alleged to have solicited, or received, "gratuities" from defendants in exchange for securing [another alleged conspirator's] appointment as FDA Commissioner.

Id. at *2. We admit, this is an extreme oversimplification – the opinion took two Westlaw pages just to sort through the Aston plaintiffs' labyrinthine conspiracy allegations.

Plaintiffs' legal theories were almost as numerous as their injury allegations – twenty-two counts, including RICO, state-law (Arizona (?)) RICO, strict product liability, negligence, fraud, express and implied warranty, unjust enrichment, Lanham Act, and a bunch of state consumer fraud claims (D.C., New York, Maryland, Pennsylvania, Illinois, Arizona, and California). Id. at *3.

Aston threw everything out on the many defendants' motions to dismiss. The half-vast conspiracy, and all its subsidiary theories of liability went down in a hail of defense-friendly rulings, and that's why – aside from its humor value – the Aston opinion is well worth reading. We'll list the rulings so our readers will have an idea of what this goodie basket contains.

RICO – The deficiency in the RICO counts was rather basic. RICO does not allow recovery for personal injuries. "The overwhelming weight of authority discussing the RICO standing issue holds that the 'business or property' language of Section 1964(c) does not encompass personal injuries." Aston, 2017 WL 1214399, at *4 (citation and quotation marks omitted). For a compilation of that authority, see Bexis' Book, §2.15, footnote 3. Further, "as plaintiffs' counsel is well aware, courts in this District and elsewhere have consistently rejected the argument that pecuniary losses derivative of personal injuries are injuries to 'business or property' cognizable under RICO."Aston, 2017 WL 1214399, at *4 (citing,*inter alia*, Klayman v. Obama, 125 F. Supp.3d 67, 88 (D.D.C. 2015)). Astonalso distinguishes "tobacco litigation [RICO] precedents" because those cases arose from a federal prosecution that was not limited by the "business or property" requirements of RICO's private cause of action. 2017 WL 1214399, at *5.

Nor did the Aston plaintiffs satisfy RICO's causation requirements – for another very basic reason. Even the most recent of the five plaintiffs' injuries arose before the conspirators allegedly acted:

> Barring some sort of temporal paradox, there is no way that suppression of an FDA report in 2013 could have caused plaintiffs to be injured in 2012 or earlier. Because plaintiffs' allegations, taken as true, are insufficient to establish proximate causation, their federal RICO counts must be dismissed.

Id. (citing H.G. Wells, The Time Machine, 22–23 (1895)) (other citation omitted). On this basis alone, we're rooting for the defendants to obtain recovery of their counsel fees, since the underlying premise of the entire litigation was physically impossible.

Arizona RICO – Same basis: "[P]laintiffs have failed to plead facts that make possible − let alone plausible − the conclusion that the alleged cover up by defendants was the proximate cause of plaintiffs' injuries." Id. at *6. Unfortunately, the relatively terse dismissal of does not answer the burning question − Why Arizona?

Lanham Act – Another fundamental basis for dismissal. "[T]o come within the zone of interests in a suit for false advertising under [the Lanham Act], a plaintiff must allege an injury to a***commercial interest*** in reputation or sales." Id. (quoting Lexmark International, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377, 1390 (2014) (emphasis original in Aston).

Now comes the most useful stuff – dismissal of the common-law claims. For the record, Aston applies the law of the District of Columbia rather than the law of the plaintiffs' (Maryland, Pennsylvania, Arizona, Illinois, California) or defendants' (New Jersey) domiciles. Aston, 2017 WL 1214399, at *6.

Product Liability (both strict liability and negligence) – *Manufacturing* defect is TwIqballed. For all its factual prolixity, the Aston complaint was utterly devoid of any allegations that the drug wasn't made precisely as intended.Id. at *7 ("for all these recitals of the term 'manufacture' and its derivatives, plaintiffs plead no facts that would appear to relate to manufacturing***defects***") (citation and quotation marks omitted).

Warning related claims were also dismissed, in a usefully rigorous application of TwIqbal. Dismissal inAston occurred because plaintiffs failed to plead: (1) "the contents of the warning label" when the drug was taken (2) "how the contents of the label were inadequate," (3) "the timing of each plaintiffs use of" the drug, including "when each individual plaintiff

was prescribed," (4) "the onset of [plaintiffs'] injuries," (5) "how the alleged distinctions in the warnings would have had a causal effect," (6) "what injuries each individual plaintiff experienced," (7) "why [plaintiffs] think [the drug] was the cause of the[ir] injuries," and (8) "why [plaintiffs] think inadequate ***warnings*** contributed to their injuries." Id. (various quotations omitted). That's a spicy TwIqbal – without even having to get into the learned intermediary rule.

As to warnings, we also note that the court held that all warnings publicly available on the FDA's website are subject to judicial notice. Id. at *2 n.1.

Design defect claims were preempted under Mutual Pharmaceutical Co. v. Bartlett, 133 S.Ct. 2466 (2013), andAston rejected the well-worn plaintiff argument that, for some reason, implied preemption is different in generic, as opposed to branded (as in Aston) drugs:

> Plaintiffs are mistaken. [Bartlett] expressly found that "[o]nce a drug − whether generic or brand-name − is approved, the manufacturer is prohibited from making any major changes to [its formulation]" by federal law. 133 S. Ct. at 2471. Thus, even though [Bartlett] arose from a state-law design-defect claim against a manufacturer of a generic drug, its holding applies to both types of drugs, and plaintiffs' design-defect claim must be dismissed.

Aston, 2017 WL 1214399, at *8. Preemption is "fully consistent with the well-established tort law principle, 'especially common in the field of drugs,' that an unavoidably unsafe product is 'not defective, nor is it unreasonably dangerous' where it is 'properly prepared, and accompanied by proper directions and warning.'" Id. at *8 n.7 (quoting Restatement (Second) of Torts §402A, comment k (1965)).

Fraud/Misrepresentation – Perhaps predictably, plaintiffs' fraud-based claims failed under Fed. R. Civ. P. 9(b).Id. Allegations broadly "span[ning] the more than twenty-year period" alleged could not possibly allow defendants to file a response. Id. Plaintiffs "do not even specify which corporate entity they believe was responsible." Id. Nor did any of the five plaintiffs allege their own circumstances with the required specificity. Id. "In sum, plaintiffs fall woefully short of pleading any specific allegations that would support a claim of fraud or misrepresentation." Id.

Warranty – Again, perhaps predictably, plaintiffs' express warranty claims failed for not "plead[ing] any express promises." Id. at *9. Here, Aston made another good TwIqbal ruling:

> [T]o state a claim for breach of express warranty in cases involving prescription drugs, Plaintiffs must allege facts demonstrating that Defendants' affirmations formed the basis of the bargain, *i.e.*, facts regarding how the warranties were made to Plaintiff's physician, and that Plaintiff's specific physician relied on them.

Id. (citations and quotation marks omitted). Implied warranty claims "cannot be independently maintained in a case involving prescription drugs." Id.

Unjust Enrichment – As against the investor defendants, merely "earn[ing] profits" from allegedly more valuable stock was "far too remote and speculative to support an unjust enrichment claim." Id. at *9. As against the drug manufacturer defendants, the plaintiffs did not allege "that ***they***conferred a benefit" on those defendants.Id. at *10 (emphasis original).

> [Plaintiffs] do[] not allege that [they] paid any money for [the drug], rather than relying on an insurer, as most patients do. This omission is significant because there is no authority demonstrating that benefits received from third-parties can be the proper subject of an unjust enrichment claim.

Id. "Because plaintiffs have not pleaded any facts showing that they paid for [the drug], I must dismiss their unjust enrichment claim." Id.

Obamacare to the rescue.

Readers should remember this point; we don't remember ever seeing an individual (as opposed to TPP) unjust enrichment claim that contains the allegations – personal, as opposed to third party payer – required by Astonand the precedent it follows.

Consumer Fraud Claims

Seven states' laws were implicated − D.C., New York, Maryland, Pennsylvania, Illinois, Arizona, and California. "Each count fails to state a claim." Id.

Six of the states (all but Arizona) did not recognize consumer fraud claims involving prescription drugs. Some states' statutes did not allow personal injury damages (Pennsylvania, California, D.C.). Others did not consider prescription drugs to be "consumer" goods (Maryland, New York). Still other statutes simply had been held inapplicable to prescription drugs (California, Pennsylvania, Illinois). Id. Beyond that, all of the consumer fraud claims were dismissed as inadequately pleaded under Rule 9(b), which Aston applied to all consumer fraud claims. Id. at *11. In prescription drug cases, Rule 9(b) required specific pleading of prescriber reliance:

> [T]he circumstances of those prescription decisions, and plaintiffs' reliance on them, are particularly important − yet plaintiffs allege no information about them. The absence of detail about Plaintiffs experiences leads to the conclusion that Plaintiffs have not pleaded these claims with the requisite particularity.

Id. (citations and quotation marks omitted).

Finally, none of the plaintiffs resided in D.C. or New York. Thus, claims under those two states' consumer fraud statutes were also "dismissed because neither statute applies extraterritorially." Id. at *10 n.9. We've always been interested in extraterritoriality.

So that's Aston for you – an example of really poor facts (for the plaintiffs) making some quite excellent law for our side of the "v." Our only quibble withAston is grammatical – in a couple of places, "principle" is used where "principal" is meant. Id. at *2 ("principle role"); *6 ("principle place of business"). But apart from a law clerk needing to repeat fifth grade English, the legal rulings in Aston are truly vast, and not half-vast at all. In Ashton all too many defendants were made to spend all too much money to hire all too many of us lawyers. With Aston now dismissed in its entirety, we

certainly hope that all the defendants so inconvenienced seek to recover their fees as a sanction against such frivolous litigation.

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