

Another Third Party Payer Economic Loss Claim Gets Twlqbbled

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Looking back at our posts on [third-party payer cases](#), so many are titled “another” or “again” that we seriously are starting to question what TPPs are thinking when they file these suits. We are beyond the point of déjà vu. We’ve already analogized their behavior to the definition (most often credited to Albert Einstein) of [insanity](#). So how about another Einstein quote: “We cannot solve our problems with the same thinking we used when we created them.” Or, have you ever heard the expression “If you do what you always did, you will get what you always got”? We don’t think the TPPs have because, here “again” is “another” decision throwing out a TPP’s RICO and assorted state-law economic-loss-only claims. [Health Care Service Corp. v. Olivares](#), 2011 U.S. Dist. LEXIS 117750, *2 (E.D. Tex. Sep. 2, 2011) (magistrate’s report and recommendation)

In fact, there really isn’t anything particularly novel or new here – just another nail in the coffin of TPP claims based on alleged off-label promotion because plaintiff “again” ignored a crucial factor -- the medical judgment of independent prescribing physicians. The court in [Health Care Service](#), essentially asked plaintiff: didn’t you read the opinion in [Ironworkers Local Union 68 v. AstraZeneca Pharmaceuticals, LP](#), 634 F.3d 1352 (11th Cir. 2011)? We did and we wrote about it [here](#). Plaintiff must have missed that too. So, the [Health Care Service](#) court summarized it for them (like we did in our prior post too, but a few of these are worth repeating):

- “[E]conomic injury was an essential element of each of the plaintiffs’ claims.”
- And, “[i]n light of physicians’ exercise of professional judgment, a patient suffers no economic injury merely by being prescribed and paying for a more expensive drug.”
- “[I]n the context of prescription drug purchases, the fact that the payer merely paid for more expensive drugs does not suffice. Instead, the purchased drugs must have been either unsafe or ineffective for their prescribed use—i.e., the prescription needs to have been medically unnecessary or inappropriate according to sound medical practice.”

[Health Care Service](#), 2011 U.S. Dist. Lexis 117750, *15-16 (citations omitted).

The TPP in Health Care Service, however, made all the same mistakes as Ironworkers Local Union 68:

“Although [plaintiff] contends that it has had to pay for more prescriptions because of the off-label usage, [it] does not allege that any physician, had he or she known all the true information about [the drugs] would not have prescribed the drugs under the standards of sound medical practice because the drugs actually were unsafe or ineffective in treating their patients' conditions.”

Id. at *17. The Health Care Service decision also adopts the Ironworkers, assumption of the risk rationale:

“[T]here is nothing in the complaint to suggest that [plaintiff] set its premiums in other than the conventional manner outlined by the court in *Ironworkers*. By placing [these drugs] on its formulary, [plaintiff] assumed the risk that some of its reimbursements would be for off-label uses -- even those uses that may have been a product of the alleged marketing fraud.”

Id. at 18. Without a plausible economic injury, plaintiff's claims were Twlqbballed.

While that would have been enough, the court went on to discuss how the plaintiff's claims also failed for lack of proximate cause. This too is not new ground, see In re Schering-Plough Corp., Intron/Temodar Consumer Class Action, 2009 WL 2043604 (D.N.J. July 10, 2009) (discussed [here](#)). Like in Schering, and a host of other cases to have considered the issue (see Health Care Service, at *22-23), the court in Health Care Service rejected an “inference-of-causation theory.” Id. at *22. The theory goes something like this: Defendant's marketing scheme was so widespread that the court should infer that some of the prescriptions paid for by the TPP were written for off-label indications as a result of alleged unlawful marketing. Really? TPPs are still trying to argue fraud-on-the-market? Fortunately, the courts aren't buying it:

“In this case, [plaintiff] fails to allege what misrepresentations, if any, were made directly to it and upon which it relied. The complaint also fails to allege sufficiently how these representations caused [plaintiff] harm. This thwarts the court's ability to evaluate causation. . . . Similarly, [plaintiff] fails to allege that any doctors or other health care professional relied on any . . . misrepresentation promoting an off-label use, as opposed to relying on the professional's own judgment and expertise, when prescribing the drugs.”

Id. at *24-25.

So, to borrow from burger chain Wendy's recently resurrected, iconic advertising tagline, we ask: "Where's the Beef?" It certainly wasn't in the complaint in this case or the many others that have shared its fate. TPPs seem to keep missing the fact that in prescription drug cases they can't allege injury and causation without tying any of the damages or the purported conduct to any particular doctor or patient. Without the requisite individualized allegations – including allegations about how physicians' independent medical decisions were impacted -- courts across the country should keep dismissing these cases as all bun and no patty.