Enbrel, Part 1: Bride of a Mad New Hope Toy Story Dies Harder

Monday, February 20, 2012

Last week two Enbrel cases rolled in. We're going to discuss one of them, the earlier one, today: *Deese v. Immunex Corp*., 2012 U.S. Dist. LEXIS 17342 (S.D. Miss. February 13, 2012). We'll do the later one later. Both cases are favorable for the defense. Truth be told, the second case -- the one we're not addressing today -- is a tad more interesting.

And naturally, we started thinking of instances where the sequel was better than the original, though the original was good. We were going to offer our top-ten-sequel-movies-that-outdid-the-original, but we could come up with only nine, and one of them is questionable. The questionable one is **Godfather 2**. Sometimes we like it better than the original. But the Michael Corleone arc in the first one is so perfect. And then there's Brando. So call that one a push. Now we're down to eight:

1. **The Empire Strikes Back** is better than **Star Wars (A New Hope).** If you disagree with that, well, we really don't have much to say to each other, do we? We simply occupy different moral and aesthetic universes.

2. **Superman 2** is better than **Superman**.

3. **The Wrath of Khan** is much better than the rather leaden first **Star Trek** film

4. **Die Hard 2: Die Harder** is more fun than **Die Hard**. (Though it's a close call as to whether Alan Rickman or Jeremy Irons was the better villain.)

5. **The Road Warrior** is a fully sustained thrill ride, whereas **Mad Max** is somewhat indecipherable. The folks in the original are allegedly speaking English, but we need subtitles.

6. **Aliens** is better than **Alien**. You can't get too much of a creepy thing.

7. **Toy Story 2** (originally conceived to go straight to video) is better than **Toy Story**.

8. This one is the oldest example, and our personal favorite: **Bride of Frankenstein** is better than **Frankenstein**. Elsa Lanchester has an amazing dual role as Mary Shelley and The Bride. Here are some of the greatest lines in cinema history: "She's alive! Alive!" "We belong dead." The scene where the Monster is befriended by a blind hermit is the basis of the most hilarious scene in **Young Frankenstein**. In fact, we'll say that **Bride of Frankenstein** is the greatest horror movie ever made. The sequel, not the original, is James Whale's masterpiece.

And now on to the legal masterpiece of the day.

In the *Deese* case, the plaintiff claimed that Enbrel caused him to suffer lymphoma in his heart. The causes of action were negligence, breach of warranty, and products liability claims -- including design defect, manufacturing defect, and failure to warn. The court began by tackling the design defect and manufacturing defect claims. Here is what the Complaint said: Defendants "designed and manufactured" and "marketed and distributed, an unreasonably dangerous pharmaceutical product" that was "unsafe and harmful to Plaintiff." Got it? But wait, there's more: "As a direct and proximate result of Defendants' wrongful design, manufacture and distribution of

this unreasonably dangerous pharmaceutical product" Deese allegedly suffered serious injuries. Under *Iqbal* (and really under pre-*Twombly/Iqbal*), such conclusory allegations don't cut it. The court points out that the plaintiff never alleged what was defective about the design, or how the manufacturing deviated from what it was supposed to be. In the end, it became obvious to the court and, apparently, even the plaintiff, that this was just a failure to warn case. That's sort of predictable isn't it? We've seen this movie before. In any event, the design and manufacturing defect claims were dismissed with prejudice. *Deese*, 2012 U.S. Dist. LEXIS 17342 at *8.

The failure to warn claim had a little more to it. A little. The Complaint challenges the nature and location of certain warnings. But Mississippi recognizes the learned intermediary doctrine, and the Complaint "falls short of alleging that an adequate warning would have kept his physician from prescribing Enbrel. *Id.* at * 15. Thus, the court dismissed the failure-to-warn claim, but the plaintiff is given leave to amend the Complaint. Presumably, the issue will be whether there is any adequate basis to allege warning causation.

The negligence claim concerns breaches of duties "to design, adequately test, manufacture, market and/or distribute Enbrel. The court isn't sure that Mississippi law imposes a duty to test (we don't think it does), but it doesn't matter, because, as with the design defect and manufacturing claims, there was no there there. To the extent the negligence claim asserts a negligent failure to warn, the plaintiff can try to amend. Otherwise, the negligence claims hit the cutting-room floor.

The court addresses both express and implied warranty claims. The problem with the former is that the plaintiff identified no factual representation that the defendants allegedly breached. The problem with the latter is that any implied warranty claim necessarily rehashes the failure to warn claims. Goodbye, Mr. Bond! (One could say that **From Russia with Love** was better than **Dr. No**, but the James Bond franchise seems too big to talk about sequels. For the same reason, we are rejecing Bexis's suggestion that we include on our list the superior successors of the first **Harry Potter** film.)

Finally, the plaintiff sought alternative relief -- to place the dispositive motion on hold while the parties could "complete basic formal discovery." But the whole point of *Iqbal* is that Rule 8 does not "unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Deese*, 2012 U.S. Dist. LEXIS 17342 at *21 (quoting *Iqbal*, 129 S. Ct. at 1950. The plaintiff's request was denied.

We love happy endings. Except, of course, the *Deese* case is not over until it's over. We have a feeling that attempts at amendment will be futile -- straight to video. Dismissal will be the final destination. (Wait a minute -- isn't **Final Destination 2** better than the original?)