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Risperdal Accords Don't Mean Swift End to Litigation

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Of the Legal staff

After settlement of the third case to head to the courtroom in Philadelphia's Risperdal mass tort, the lead trial attorney for the plaintiffs said it is too soon to expect a global resolution of the litigation.

On May 27, the day opening arguments were scheduled in Walker v. Janssen Pharmaceuticals, the case settled for a confidential amount, according to **Thomas R. Kline of Kline & Specter**, who is trying Risperdal cases with co-counsel Christopher A. Gomez and Stephen A. Sheller of Sheller P.C.

The first Risperdal case in Philadelphia concluded with a \$2.5 million verdict for the plaintiff, Austin Pledger.

In the second trial, the case of plaintiff William Cirba, the jury found that Risperdal was not the cause of the plaintiff's breast growth. However, the jury did find that Janssen was negligent in failing to warn about the potential risk of Risperdal to cause enlarged breast growth in males, known as gynecomastia.

In the wake of the recent settlement, Kline said he doesn't anticipate that Janssen will settle the remainder of the cases in the immediate future.

"There is more work to be done," Kline said. "We see it as a litigation road forward."

In an email to The Legal, a Janssen spokeswoman wrote, "We have reached a resolution of the Walker case in the Philadelphia Court of Common Pleas. The terms of the resolution are confidential, so we do not have any additional comment."

Observers said that case was likely settled based on its individual facts and that a settlement this early in the game does not illustrate a trend.

"My own hunch is that it's a case-specific issue," said Alan Klein, a products liability attorney at Duane Morris.

"There are broad lines in terms of science and those issues, but I think in each case there are specific facts," Klein continued, "and here I think there would be something in the facts of this case that motivated either side to settle it."

Klein said not enough cases have concluded for any clear direction to emerge in the litigation. Only after six to a dozen more cases would there be an indication as to whether there will be a global resolution.

"At this point with only three cases down, it's very hard to know if there's enough of a pattern to de-

velop some type of settlement matrix," Klein said.

James H. Heller, chairman of Cozen O'Connor's products liability department, also said it was likely that the case settled on a fact-specific basis.

Additionally, Heller said Supervising Judge Arnold New's order barring punitive damages in the cases, in accordance with New Jersey law, stands as a roadblock to a global settlement. Johnson & Johnson, Janssen's parent company, is a New Jersey entity.

Heller said the plaintiffs could fight the cap. He pointed to a recent ruling applying Alabama law over New Jersey law in a case in the Tylenol multidistrict litigation based in the Eastern District of Pennsylvania.

While the parties in the case agreed that Alabama law governs the substantive claims, they disagreed on which state's law governs wrongful-death claims. McNeil—Tylenol's manufacturer and a Johnson & Johnson subsidiary—argued the law of New Jersey would control. The plaintiff argued that Alabama law, or, alternatively, Pennsylvania law, would control. Alabama law allows for uncapped damages while New Jersey law prohibits punitive damages against corporations.

Ultimately, U.S. District Judge Lawrence F. Stengel of the Eastern District of Pennsylvania ruled Alabama law should apply, because the plaintiff was from Alabama, and the Tylenol was distributed, sold and ingested in Alabama.

In his opinion, Stengel said New Jersey "considers limiting damages to be more important, especially for pharmaceutical companies operating within its borders. Under the New Jersey punitive damages statute, punitive damages are not available in drug products-liability actions when a drug has been approved by the Food and Drug Administration. In 1987, the New Jersey Legislature enacted this provision in order to 're-balance the law in favor of manufacturers.'"

However, Heller said, "The Eastern District didn't apply the standard that I think Judge New applied here, which is when you're talking about punishing specific conduct, and when you're talking about where the conduct occurred," the allegedly inadequate warnings for Risperdal were written by Janssen in New Jersey, thus making New Jersey law controlling in the case.

Kline previously told The Legal the course of the mass tort will in part be affected by the parallel appellate cases contesting New's order barring punitive damages..