



## And The Defense Wins

Published 7-18-12 by DRI

**Joe G. Hollingsworth, Katharine R. Latimer, Rebecca A. Womeldorf, Neil S. Bromberg, Beth S. Rose**



DRI members [Joe G. Hollingsworth](#), [Katharine R. Latimer](#), [Rebecca A. Womeldorf](#), and [Neil S. Bromberg](#) of **Hollingsworth LLP** in Washington, D.C., and [Beth S. Rose](#) of **Sills Cummis & Gross P.C.** in Newark, New Jersey, achieved two more defense victories on behalf of Novartis Pharmaceuticals in May and June. On May 11, 2012, Judge Jessica Mayer heard oral argument and then denied a plaintiff's motion to reconsider her March 16, 2012, order granting summary judgment for Novartis Pharmaceuticals Corporation. In *Irby v. Novartis Pharm. Corp.*, No. MID-L-1815-08 MT (N.J. Super. Ct. May 11, 2012).

Charles Irby alleged in the lawsuit filed in New Jersey that Novartis's drug Zometa caused him to develop osteonecrosis of the jaw. Judge Mayer entered summary judgment for Novartis, based on the statute of limitations of plaintiff's home state of Virginia. The plaintiff had stipulated that Virginia law would govern his failure to warn claim, with New Jersey law governing only procedural and evidentiary issues. Plaintiff's reconsideration motion argued for the first time that New Jersey's statute of limitations applied under the terms of the parties' stipulation because limitations is a procedural issue, not substantive. Judge Mayer agreed with Novartis that the reconsideration argument was procedurally improper because it could have been raised on the original motion for summary judgment. She also agreed with Novartis that the case plaintiff relied on to contend that New Jersey considers the statute of limitations procedural in tort cases did not apply in the choice-of-law context. More than 100 Zometa cases have been dismissed pretrial during motions practice or in discovery.

In the second case, on June 19, 2012, the New Jersey Appellate Division affirmed judgment in favor of Novartis Pharmaceuticals Corporation, rejecting plaintiffs' appeal of a 2010 defense verdict in the first bellwether trial arising out of the Aredia/Zometa consolidated litigation in New Jersey state court. *Bessemer v. Novartis Pharm. Corp.*, No. A-2069-10T1, 2012 WL 2120777 (N.J. Super. Ct. App. Div. June 13, 2012). Novartis was represented in *Bessemer* by [Joe G. Hollingsworth](#), [Katharine R. Latimer](#), [Rebecca A. Womeldorf](#), and [Neil S. Bromberg](#) of **Hollingsworth LLP** in Washington, D.C., and [Beth S. Rose](#) of **Sills Cummis & Gross P.C.** in Newark, New Jersey. Ms. Womeldorf argued the appeal on behalf of Novartis.

Oncologists—and even plaintiffs' experts in this litigation—widely acknowledge that Aredia and Zometa have revolutionized the treatment of the ravaging and painful symptoms of cancer, especially in patients

whose cancer has metastasized to their bones. In *Bessemer*, the jury returned a complete defense verdict, answering “No” to the question: “Did Novartis fail to provide an adequate warning to Mrs. Bessemer’s prescribing physician concerning the risks of jaw problems from Aredia and/or Zometa that Novartis either knew or should have known prior to Mrs. Bessemer discontinuing use of the drug(s)?”

The plaintiffs appealed, arguing that Judge Jessica Mayer erred in her pretrial ruling that Novartis had no duty to warn health care providers who were in the position to avoid the risk of harm to Mrs. Bessemer, but rather Novartis fully discharged its duty to warn by warning Mrs. Bessemer’s prescribing physician. The plaintiffs also argued on appeal that Judge Mayer should have held that the limited advertising conducted by Novartis enlarged the company’s duty to warn beyond the prescriber under the direct-to-consumer (DTC) advertising exception to New Jersey’s learned intermediary doctrine discussed by the New Jersey Supreme Court in *Perez v. Wyeth Laboratories Inc.*, 161 N.J. 1, 734 A.2d 1245 (1999).

The three-judge panel of the New Jersey Appellate Division issued a unanimous affirmance in favor of Novartis, citing as support “the well-considered and thorough opinions of Judge Mayer,” which the panel described as “well-supported by the evidence and legal precedent.” *Bessemer*, 2012 WL 2120777. The reasoning adopted by the appellate panel includes Judge Mayer’s April 30, 2010, decision, in which she reasoned that Novartis had no duty to warn nonprescribing dentists or oral surgeons of the risks of osteonecrosis of the jaw (ONJ) in patients using Novartis’s cancer drugs Aredia and/or Zometa. See Mem. of Decision at 21-23, *Bessemer v. Novartis Pharm. Corp.*, No. MID-L-1835-08 (N.J. Super. Ct. April 30, 2010). The appellate panel similarly adopted the reasoning of Judge Mayer’s August 20, 2010 decision, in which the trial court granted partial summary judgment to Novartis on plaintiffs’ DTC claims finding that Novartis did not advertise directly to consumers in such a manner that would deprive it of the learned intermediary defense. See Mem. of Decision at 15, *Bessemer v. Novartis Pharm. Corp.*, No. MID-L-1835-08 (N.J. Super. Ct. Aug. 20, 2010).

Plaintiff Jane Bessemer, a breast cancer patient with bone metastases, and her husband, Allen, alleged that she developed ONJ as a result of her receiving Aredia and Zometa. The case went to trial on plaintiffs’ remaining claims and after only two hours of deliberation, the jury entered a complete defense verdict for Novartis. In addition to winning the first bellwether trial in the New Jersey consolidated litigation, Novartis has won three of the past four cases arising out of the federal MDL: *Hogan v Novartis Pharm. Corp.* (E.D.N.Y.); *Brodie v. Novartis Pharm. Corp.* (E.D. Mo.); and *Kyle v. Novartis Pharm. Corp.* (W.D. Ky). In *Baldwin (Winter) v. Novartis Pharm. Corp.* (W.D. Mo.), the jury returned only \$225,000.00 in compensatory damages while rejecting entirely plaintiff’s claim for punitive damages. More than 100 Aredia and/or Zometa cases have been dismissed pretrial during motions practice or in discovery.

Hollingsworth LLP acts as national counsel for Novartis in the Aredia/Zometa litigation.

**To learn more about DRI, an international membership organization of attorneys defending the interests of business and individuals in civil litigation, visit [www.dri.org](http://www.dri.org).**