IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS, TYLER DIVISION

HARRIL GLEN SCOTT,	§	
PLAINTIFF,	§	CIVIL ACTION NO.6:11-CV-276
VS.	§	
PFIZER PHARMACEUTICAL,	§	
DEFENDANT.	§	

AMENDED CIVIL PRODUCT LIABILITY TORT

TO THE HONORABLE JUDGE OF SAID COURT:

CONSIDERATION BE GIVEN

A DOCUMENT FILED PRO SE IS TO BE LIBERALLY CONSTRUED,AND A PRO SE COMPLAINT,HOWEVER INARTFULLY PLEADED,MUST BE HELD TO LESS STRINGENT STANDARDS THAN FORMAL PLEADINGS DRAFTED BY LAWYERS. CASTRO V. U.SS., 570 U.S. 375, 124 S.Ct. 783 (2003); FED.R.CIV.PROC. RULE 8(a)(2).

COMES NOW HARRIL GLEN SCOTT, PLAINTIFF, HEREINAFTER REFERRED TO AS PLAINTIFF, AND COMPLAINING OF PERSONAL INJURIES CAUSED BY THE PROXIMATE CAUSE OF DEFENDANT'S NEGLIGENCE (FAILURE TO WARN), FRAUD, MISREPRESENTATION, AND BREACH OF EXPRESS WARRANTY THUS VIOLATING TEXAS DECEPTIVE TRADE PRACTICES (CONSUMER PROTECTION ACT), FOR THE CAUSE OF THIS ACTION, PLAINTIFF WOULD SHOW THE COURT THE FOLLOWING:

I.

JURISDICTION

THIS IS A PRODUCT LIABILITY ACTION FILED PURSUANT TO 28 U.S.C. SECTION 1332 (A) (1); THIS COURT HAS LAWFUL JURISDICTION TO ENFORCE LIABILITY FOR DEFENDANT'S ACTS AND CONDUCT, WHICH IS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURY SUFFERED AND THAT THE SUBJECT MATTER OF PLAINTIFF'S CAUSE OF ACTION IS CIVIL. THE COURT HAS SUPPLEMENTAL JURISDICTION OVER PLAINTIFF'S STATE LAW CLAIM. SEE 28 U.S.C. SECTION 1367. ALSO TEXAS DECEPTIVE TRADE PRACTICES ACT (D,T,PA) U.T.C.H. BUS&C SECTION 17.50 (A) AND TEX.CIV.P.& REM. SECTION 17.042 093. TEXAS LONG ARM JURISDICTION.

II.

PARTIES

A. NAME AND ADDRESS OF PLAINTIFF: HARRIL GLEN SCOTT, TDCJ-CID NO. 1319015, MARK STILES UNIT, 3060 FM 3514, BEAUMONT, TEXAS 77705-7635.

B. NAME AND ADDRESS OF DEFENDANT: MR IAN READ IS THE PERSON WHO ACTED IN HIS OFFICIAL CAPACITY AS PRESIDENT OF PFIZER PHARMACEUTICAL, 235 E. 42ND STREET, NEW YORK, NEW YORK 10017.

III.

STATEMENT OF CLAIM

1. PLAINTIFF HAD NO HISTORY OF HEART FAILURE OR CHEST PAINS BEFORE TAKING THE DRUG BEXTRA FOR ARTHRITIS PAIN.

2. PLAINTIFF WAS BEING TREATED BY DOCTOR DUANE TISDALE FOR DIABETEES AND HIGH BLOOD PRESSURE AT THE SMITH COUNTY PUBLIC HEALTH TREATMENT CLINIC.

3. FROM NOVEMBER 5, 2003 TO OCTOBER 22, 2004, DR, TISDALE PRESCRIBED BEXTRA PAINKILLER FOR ARTHRITIS. PLAINTIFF WAS GIVEN 100 BEXTRA PILLS EVERY 90 DAYS.

4. DURING THE TIME PLAINTIFF WAS TAKING BEXTRA HE COMPLAINED OF DEPRESSION, MOOD CHANGES, WEIGHT GAIN, NAUSEA, AND RAPID HEART BEAT.

5. PLAINTIFF WAS ARRESTED AND TAKEN TO THE SMITH COUNTY JAIL ON SEPTEMBER 30, 2004.

6. PLAINTIFF CONTINUED TO TAKE THE PAINKILLER BEXTRA FOR ARTHRITIS UNTIL OCTOBER 22, 2004 AT SMITH COUNTY INMATE CLINIC.

7. ON OR ABOUT NOVEMBER 23, 2004, PLAINTIFF WAS INFORMED BY NURSE THAT HE WOULD NO LONGER BE GIVEN THE PAINKILLER BEXTRA.

8. STILL AT SMITH COUNTY JAIL BETWEEN THE MONTHS OF NOVEMBER 2004, AND JANUARY 19, 2005 PLAINTIFF'S CONDITION WORSENED WITH FREQUENT AND SEVERE CHEST PAIN, RAPID HEART BEAT, DIZZINESS, NAUSEA, DEPRESSION, AND MOOD CHANGES.

9. PLAINTIFF WAS RUSHED TO THE EMERGENCY ROOM FOR SEVERE CHEST PAINS AND WAS TREATED ON JANUARY 21, 2005 AT SMITH COUNTY INMATE CLINIC.

H.S ~~10. PLAINTIFF HAD A HEART ATTACK ON OCTOBER 14, 2005 AS A RESULT OF TAKING THE PAIN MEDICATION BEXTRA.~~

10. ON MARCH 28, 2005 PLAINTIFF WAS EXPERIENCING SEVERE CHEST PAINS AND HAD TO BE TAKEN TO THE UNIT INFIRMARY.

11. ON JULY 29, 2005 PLAINTIFF WAS TAKEN TO THE LIMESTONE FEDERAL PRISON IN GROSSBECK COUNTY, WHERE PLAINTIFF WAS AGAIN TAKEN TO THE UNIT INFIRMARY BECAUSE OF CHEST PAINS. PLAINTIFF WAS THERE FOR 3 WEEKS (IN THE LIMESTONE FEDERAL PRISON IN GROSSBECK COUNTY).

12. ON SEPTEMBER 2ND, 2005 PLAINTIFF WAS TRANSFERRED TO THE GURNEY UNIT OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE. ON OR ABOUT SEPTEMBER 5, 2005 PLAINTIFF WENT TO THE GURNEY UNIT INFIRMARY SEEKING TREATMENT FOR DIABETES AND PLAINTIFF THEN BEGAN HAVING SEVERE CHEST PAINS WHILE IN THE INFIRMARY AND AN E.K.G. WAS THEN PERFORMED.

13. ON OR ABOUT SEPTEMBER 14, 2005 PLAINTIFF WAS TRANSFERRED TO THE BYRD UNIT LOCATED IN HUNTSVILLE, TEXAS. PLAINTIFF SAW DR. JOSEPH M. CURRY, WHO PRESCRIBED NITROGLYCEREN FOR PLAINTIFF'S CHEST PAINS. DR. CURRY PERFORMED AN E.K.G. ON PLAINTIFF AND DREW BLOOD FOR FURTHER TESTING.

14. ON OR ABOUT SEPTEMBER, 2005 PLAINTIFF WAS TRANSFERRED TO THE GOREE UNIT, WHERE PLAINTIFF WAS AGAIN SEEN FOR A SEVERE CHEST PAINS AND ANOTHER E.K.G. WAS PERFORMED. PLAINTIFF WAS THEN INFORMED THAT THE BLOOD TESTS PERFORMED BY DR. JOSEPH M. CURRY SHOWED THAT THE PLAINTIFF HAD AN IRREGULAR HEARTBEAT.

15. ON OR ABOUT OCTOBER 2, 2005, PLAINTIFF ARRIVED AT THE JESTER III UNIT AND HE BEGAN HAVING SEVERE CHEST PAINS AND HAD TO BE RUSHED TO THE UNIT INFIRMARY WHERE ANOTHER E.K.G. WAS PERFORMED.

16. ON OR ABOUT OCTOBER 14, 2005 WHILE STILL AT THE JESTER III UNIT PLAINTIFF HAD A HEART ATTACK AND EXPERIENCED SEVERE CHEST PAINS FOR THREE CONSECUTIVE DAYS AS A RESULT OF TAKING THE PAIN MEDICATION BEXTRA.

17. AGAIN ON NOVEMBER 1. 2005, WHILE STILL AT THE JESTER III UNIT PLAINTIFF SUFFERED FROM SEVERE CHEST PAINS AND WAS TAKEN BY WAY OF EMERGENCY AMBULANCE TO THE UNIVERSITY OF TEXAS MEDICAL BRANCH IN GALVESTON, TEXAS, WHERE AN E.K.G. WAS PERFORMED.

18. PLAINTIFF DISCOVERED THAT THE DEFENDANT WAS THE PROXIMATE CAUSE OF PLAINTIFF'S HEART ATTACKS, DIZZINESS, DEPRESSION, MOOD CHANGES, WEIGHT GAIN, AND NAUSEA ON SEPTEMBER 3, 2009 BY FAILING TO WARN PRESCRIBING PHYSICIANS OF THE TYPE OR SEVERITY OF THE SIDE-EFFECTS ASSOCIATED WITH THE USE OF THE DRUG BEXTRA.

19. ON OCTOBER 19, 2009 PLAINTIFF DISCOVERED THAT THE DEFENDANT'S PAIN KILLER DRUG BEXTRA WAS THE PROXIMATE CAUSE OF HIS HEART ATTACK, DIZZINESS, DEPRESSION, MOOD CHANGES, WEIGHT GAIN, AND NAUSEA, AND THAT THE DRUG BEXTRA WAS TAKEN OFF THE MARKET FOR LABEL USE.

PLEASE SEE ATTATCHED EXHIBITS: A; B; C; D; E1; E2; E3; AND E4.

CAUSE OF ACTION

PLAINTIFF ASSERTS THAT THE DEFENDANT WAS NEGLIGENT IN CAUSING THE PLAINTIFF'S INJURIES BY:

1. FAILING TO GIVE WARNING THAT BEXTRA COULD CAUSE BLOOD CLOTS, HEART ATTACK AND STROKES.

2. FAILING TO PROPERLY OR ADEQUATELY WARN EITHER THE PLAINTIFF OR DR. DUANE TISDALE, THE PRESCRIBING PHYSICIAN, OF THE DANGEROUS PROPENSITY OF BEXTRA AND THE TYPE AND SEVERETY OF THE SIDE EFFECTS ASSOCIATED WITH THE USE OF BEXTRA AND THAT THIS DEFICIENCY AND THE DRUG ITSELF CONSTITUTE A BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY.

3. THE DEFENDANT'S FAILURE TO COMMUNICATE ADEQUATELY THE LEVEL OF RISK INHERENT IN BEXTRA FOR A PERSON WITH PLAINTIFF'S MEDICAL CONDITION AND HISTORY GIVES RISE TO LIABILITY UNDER THEORIES OF:

A. STRICT LIABILITY

B. NEGLIGENCE (FAILURE TO WARN)

C. TEXAS DECEPTIVE TRADE PRACTICE (CONSUMER PROTECTION ACT)

D. BREACH OF EXPRESS WARRANTY (IMPLIED WARRANTY OF MERCHANTABILITY)

E. FRAUD (CONSUMER FRAUD)

F. MISREPRESENTATION

4. PLAINTIFF COMPLAINS THAT THE PAINKILLER BEXTRA CAUSED MULTIPLE SIDE EFFECTS IN HIM INCLUDING BUT NOT LIMITED TO: HEART ATTACK, DIZZINESS, DEPRESSION, MOOD CHANGES, WEIGHT GAIN, AND NAUSEA.

RELIEF

WHEREFORE, PREMISES CONSIDERED PLAINTIFF REQUESTS THAT THIS COURT WOULD GRANT HIM THE FOLLOWING RELIEF:

A. TRIAL BY JURY

1. PLAINTIFF DEMANDS A JURY TRIAL PURSUANT TO RULE 38 FEDERAL RULES OF CIVIL PROCEDURE ON ALL ISSUES TRIABLE BY JURY.
2. OR IN THE ALTERNATIVE, PLAINTIFF REQUESTS THIS COURT ISSUE A DECLARATORY JUDGEMENT STATING THAT THE ACTS AND CONDUCT OF THE DEFENDANT WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES AND ACTUAL DAMAGES AND THUS ENTITLES PLAINTIFF TO ALL OR PARTS OF THE RELIEF REQUESTED.
3. JUDGEMENT AGAINST DEFENDANT FOR ALL COST OF SUCH TRIAL BY JURY, IF ANY: COURT FEES, PLAINTIFF'S COST TO PRESENT HIS CAUSE OF ACTION (EXPERT WITNESSES, LAYMAN WITNESS EXPENSES, AND COST OF RECORDS) AND ALL OTHER COSTS THIS COURT DETERMINES THE DEFENDANT RESPONSIBLE FOR.

B. COMPENSATORY DAMAGES

1. AGAINST DEFENDANT IN THE AMOUNT OF $3,000,000 FOR THE INJURIES SUFFERED BY PLAINTIFF AND REFERRED TO HEREIN AS ACTUAL DAMAGES.
2. EXEMPLARY DAMAGES AGAINST DEFENDANT IN THE AMOUNT OF $3,000,000 (THREE MILLION DOLLARS) FOR INJURIES SUFFERED BY PLAINTIFF.

C. GENERAL RELIEF

ISSUE SUCH OTHER AND FURTHER RELIEF, JUDGEMENT DECREED, LEGAL AND EQUITABLE AS THE PLAINTIFF MAY BE ENTITLED TO IN THE INTEREST OF EQUITY UNDER THE LAWS AND FACTS OF THIS CAUSE OF ACTION.

RESPECTFULLY SUBMITTED,

Harril Glen Scott

HARRIL GLEN SCOTT
TDCJ-CID NO.1319015
MARK STILES UNIT
3060 FM 3514
BEAUMONT, TEXAS 77705-7635

DECLARATION

I, HARRIL GLEN SCOTT DO HEREBY SWEAR UNDER BOTH FEDERAL [TITLE 28 U.S.C. 1746] AND STATE LAW [TEX.CIV.P. & REM.CODE 132.001 THROUGH 132.003] THAT ALL CONTAINED HEREIN THIS PLAINTIFF'S AMENDED CIVIL PRODUCT LIABILITY TORT IS TRUE AND CORRECT UNDER PENALTY OF PERJURY.

Harril Glen Scott

HARRIL GLEN SCOTT
TDCJ-CID NO.1319015
MARK STILES UNIT
3060 FM 3514
BEAUMONT,TEXAS 77705-7635

CERTIFICATE OF SERVICE

I, HARRIL GLEN SCOTT, PLAINTIFF IN THIS CAUSE, HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE ABOVE AND FOREGOING PLAINTIFF'S AMENDED CIVIL PRODUCT LIABILITY TORT HAS BEEN SERVED BY PLACING THREE COPIES OF THE SAME IN THE UNITED STATES MAIL ON THIS 22 DAY OF August, 2011, ADDRESSED TO:

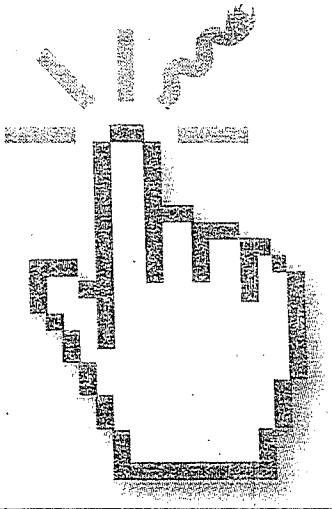
CLERK
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
211 W. FERGUSON, ROOM 106
TYLER, TEXAS 75702

Harril Glen Scott

HARRIL GLEN SCOTT
TDCJ-CID NO.1319015
MARK STILES UNIT
3060 FM 3514
BEAUMONT,TEXAS 77705-7635

EXHIBIT - A

USA TODAY
Money
Thursday, September 3, 2009



By Alejandro Gonzalez, USA TODAY

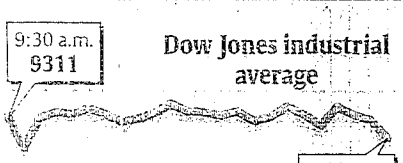
Technology

No safe browsing as nasty hackers saturate Internet

They're hijacking popular celebrities' names — Jessica Biel, Tom Brady, Beyoncé — to get their bad links into Web searches. 3B

Moneyline

Wednesday markets



Index	Close		Change
Nasdaq composite	1967.07	▼	1.82
Standard & Poor's 500	994.75	▼	3.29
Treasury note, 10-year yield	3.31%	▼	0.05
USA TODAY Internet 50	121.10	▲	0.15
Oil, light sweet crude, barrel	$68.05		unch.
Euro (dollars per euro)	$1.4273	▲	0.0060
Yen per dollar	92.15	▼	0.80

Sources: USA TODAY research, MarketWatch.com

▶ Market scoreboard with currencies, 4B

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Pfizer fined $2.3B for illegal marketing

Unit guilty of promoting off-label uses for 4 drugs

By Rita Rubin
USA TODAY

Health

In the largest health care fraud settlement in history, pharmaceutical giant Pfizer must pay $2.3 billion to resolve criminal and civil allegations that the company illegally promoted uses of four of its drugs, including the painkiller Bextra, the U.S. Department of Justice announced Wednesday.

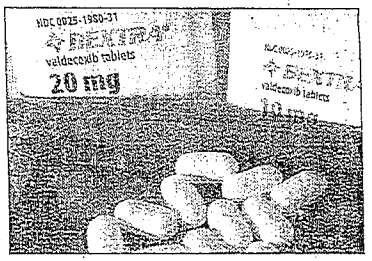
Besides Bextra, the drugs were Geodon, an anti-psychotic; Zyvox, an antibiotic; and Lyrica, an anti-epileptic drug. Once the Food and Drug Administration approves drugs, doctors can prescribe them off-label for any use, but makers can't market them for anything other than approved uses.

Pfizer subsidiary Pharmacia & Upjohn pleaded guilty to a felony violation for promoting off-label uses of Bextra, such as for pain relief after knee-replacement surgery.

At the FDA's request, Pfizer pulled Bextra off the market in April 2005 because risks, including a rare, sometimes fatal, skin reaction, outweighed benefits. It had been approved only for treating rheumatoid arthritis, osteoarthritis and menstrual pain.

As part of the settlement, Pfizer will pay a criminal fine of $1.195 billion, the largest criminal fine ever imposed in the USA for any matter, according to the Justice Department. Pharmacia & Upjohn must pay a $105 million criminal fine.

Pfizer also has agreed to pay $1 billion in civil damages and penalties to compensate federal health care programs for false claims.



2005 Bloomberg News photo

Pfizer drug: Painkiller Bextra was taken off the market in 2005.

The investigation resulted from whistle-blower lawsuits, the first of which was filed by former Pfizer sales representative John Kopchinski, 45.

When Kopchinski began questioning Pfizer's marketing of Bextra, Pfizer fired him, says his attorney, Erika Kelton of the Washington, D.C., firm Phillips & Cohen. Of the $102 million that will be divided among six whistleblowers, Kopchinski will receive $51.5 million.

Pfizer mentioned the settlement in January in filings with the Securities and Exchange Commission because the drugmaker had reserved $2.3 billion on last year's books to pay for it. But the lawsuits were sealed and the investigation was ongoing at the time, so no details could be released, Justice Department spokesman Charles Miller said Wednesday. Pfizer shares closed at $16.28, down 10 cents.

In a statement, Amy Schulman, Pfizer senior vice president and general counsel, said, "We regret certain actions taken in the past, but are proud of the action we've taken to strengthen our internal controls and pioneer new procedures."

EXHIBIT A

EXHIBIT B

Name: Scott Harris Date of Birth: 3-10-62 Allergies: NKA

Dated Labs Medications Refills (Date and Initials)

Dated	Labs	Medications Dates	7/2/03 E. Gibson	8/5/03 E. Gibson	11/5/03 E. Gibson	12/8/03 J. Yeoman	1/7/04 J. Moore	2/6/04 E. Gibson
7/2/03	RBS	Neurontin 300mg ⅰ TID	Rx 90 2RF	#90	100	RX 5RF		
7/3/03	UA CR	Glucovance 5/500mg ⅰ BID	Rx 60 5RF	#63	100	DC 11/5/03	DRT	
	Hepatic Fct	Maxide 37.5-25 ⅰ QD	#100	has		DC	11/5/03	DRT
8/5/03	RBS	Zantac 150mg ⅰ BID	Rx 60			DC 11/5/03	DRT	
11-5-03	RBS	Actos 30mg ⅰ QD		#30	#42	RX 5RF	90	has
11-6-03	A1C	Cardizem LA 240mg ⅰ QD		#	#35	RX 5RF	35	Rx 30 5RF
12/8/03	RBS	Glucovance XR 500 D/C ⅰ HS						
		Lipitor 10mg 12-31-04 ⅰ QD					30	Rx 30 5RF
		Bextra 10mg ⅰ QD					#6 30	Rx 30 5RF
		Metaglip 2.5/500mg ⅰ QD					35	2/18/04 DRT
		Neurontin 400mg ⅰ tid					100	Rx 90 5RF
		Metaglip 2.5/500mg ⅱ BID						Rx 120 5RF
		DATES	2-14-04	3/6/04 E. Gibson				
	✓	Actos 30mg ⅰ qd	has	#30				
	✓	Cardizem LA 240mg ⅰ qd	Rx 30 5RF	35				
	✓	Lipitor 10mg ⅰ qd	Rx 30 5RF	has				
	✓	Mobic 15mg ⅰ qd	Rx coupon					
	✓	Neurontin 400mg ⅰ tid	Rx 90 5RF	has				
		Metaglip 2.5mg/500mg ⅱ bid	Rx 120 5RF					
		Metaglip 2.5mg/500mg ⅰ BID						

Nurse's Signature and Initials

7/2/03 [illegible] RN MP	3/25/04 [illegible] LVN
8/5/03 [illegible] LVN	
[illegible] LVN 11/5/03	
Jan [illegible] Moore RN 2/6/04	
2/19/04 [illegible]	

Med One Time Only

8/5/03	Helidac Therapy x 14 days
2/6/04	Septra DS ⅰ BID #14 NR

SCPHD FORM T-046 (07-02)

EXHIBIT C

PROGRESS NOTES

NAME: Scott, Harril DOB: 3,10,62 CODE: Self Pay

DATE	RESULTS	NOTES	SIGNATURE
1-7-04		Pt waiting reply from SSF going for Exam on 1-13-04 see letter	
1-7-04		in files	
WT	199	RTC ī mo Dr F/u Work not Return	
BP	142/88	2. Pain from hip down Some better	D. Tuttle LVN
P	84	Pt can not afford Cardizem LA 240mg	D. Tuttle LVN
R	16	O - alert 41 y/o B/M NAD	
T	97.2	Lungs CTA Cor RRR	
Bextra 10		murmurs Tender R SI	
		& Rt leg	
		A - Low back pain HTN	
		DMII	
	(SOOT, UA ... sec order 12-31-03 #1 2-1-04 2-3-5-04 3-4-5-04)	P - Bextra 10mg daily #30 x6	
		Renew all meds x6	
		give samples	
		Metaglip 2.5-500 daily ...	
		DC Glucophage, XL 500	
		↑ Neurontin 400 tid ...	
1/7/04		Dr 2/6/04 @ 10:00 Wellness clinic	
2-6-04		DMII recheck, pt c/o tingling in feet in the evenings	K. ... LVN
WT	204		
B/P	153/82	O - alert 41 y/o B/M NAD	
P	63	Lungs CTA Cor RRR	
R	20	Ø murmurs	
T	96.5	A - Neuropathy DMII HTN	
Meds Taken	↑ P	P - Septra DS bid #14 ↑ Metaglip	
	Sept	2.5-500 ī bid #60 x6	

Renew all meds x6

RTC 2 wks

[signature]

SCPHD FORM T-028 (03-97)

EXHIBIT D

Scott, Hamil — 03/10/62 — NKA

Name — Date of Birth — Allergies

Dated Labs	Dates	Medications	Refills (Date and Initials) 4/5/04 E. Gibson	5-10-04 A. Roy	8/10/04 E. Gibson	9/8/04 [illegible]		
		Actos 30 mg i QD	#30	Δ'd	5-10-	04		
		Cardizem 240mg LA i QD	#35 [illegible]	10.5	[illegible]	50/5		
		Lipitor 10mg i QD	2/05	3.05	90 FS	D/C 8/10/04		
		Mobic 15mg i QD	[illegible] SPF	1.05	DC	8/10/04		
		[illegible] Metaglip 2.5/500mg ii BID	[illegible] SPF	1.05	DC	8/10/04		
		Actos 45mg i qd		[illegible] SPF	DC	8/10/04		
		Avandamet 2/500mg ii BID			#112	126		
		Lantus 10u QD			# [illegible]			
		Bextra 20 mg i QD			#10	has		
		Neurontin 300 mg i P.O. Bid			has	[illegible] 60 SPF		
		Lipitor 20 mg i Qd			#90	has		
		Lantus 12u QHS [illegible]				2/6/C		
		9/8/04 then 14 units QHS						
		Levitra 10mg i Q 48 hrs PRN				#6		
		Caduet 5mg/20 mg i QD				#30		

Nurse's Signature and Initials

4/5/04 [illegible] RN	
5-10-04 [illegible] LVN	
8/10/04 [illegible]	
9-8-04 DW D. Willis [illegible]	

Med One Time Only

SCPHD FORM T-046 (07-02)

EXHIBIT E-1

IN RE: DANIEL W. BORCHERT and CINDY BORCHERT, Debtors
UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF NEW YORK
2010 Bankr. LEXIS 140
CASE NO. 04-65653, Chapter 7
January 8, 2010, Decided

Counsel RICHARD P. WEINHEIMER, ESQ., Attorney for Debtors, Fort Plain, New York.
JAMES C. COLLINS, ESQ., Chapter 7 Trustee, Whitney Point, New York.

Judges: Hon. DIANE DAVIS, U.S. Bankruptcy Judge.

CASE SUMMARY

PROCEDURAL POSTURE: Debtors' attorney filed a motion requesting a determination by the court that certain funds awarded in connection with the settlement of class action litigation were not property of the debtors' bankruptcy estate under 11 U.S.C.S. § 541.Where a debtor who filed a Chapter 7 petition in 2004 was set to receive a settlement award resulting from his use of a prescription drug linked to heart problems, the settlement money was property of the bankruptcy estate under 11 U.S.C.S. § 541 because most of the debtor's use of the drug occurred prior to the bankruptcy filing.

OVERVIEW: The debtors, husband and wife, filed a voluntary Chapter 7 petition in August of 2004. The debtors were issued a discharge on November 15, 2004 and the case was closed shortly thereafter. In October of 2004, the debtor husband had a heart attack. He later was included in a class action case against the makers of Vioxx, a drug he had been taking for back pain which was later associated with heart problems. The case settled and the debtor husband was eligible for a total award in excess of $200,000 based on his use of Vioxx, most of which occurred prior to the date he filed for bankruptcy. The attorney argued that the settlement award was not property of the estate. However, the court concluded that here, where of the ten months the debtor took Vioxx, seven of those months occurred prior to filing his petition, his injury was sufficiently rooted in the pre-bankruptcy past to constitute property of the estate. Also, since the debtors' estimated unsecured claims totaled $ 21,246, even if the debtors had to pay out 100 percent on all those claims, it would not interfere with the debtors' fresh start.

OUTCOME: The court denied the attorney's motion on behalf of the debtors seeking a determination that the funds awarded to the debtor husband in connection with a settlement of a class action case were not property of the estate. The court ordered the debtors to comply with an earlier order requiring the debtors to turn over certain of the funds to the Trustee.

LexisNexis Headnotes

Bankruptcy Law > Estate Property > Content

11 U.S.C.S. § 541(a) provides a broad definition of the term "property of the estate" and includes all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C.S. § 541(a)(1). By including all legal interests without exception, Congress indicated its intention to include all legally recognizable interests although they may be contingent and not subject to possession until some future time. The determination of the extent of a debtor's interest in property is generally a matter of state law. Given the Code's broad definition of "property of the estate," it is clear that Congress intended that bankruptcy policy considerations

EXHIBIT-E-1.

be weighed in any such determination.

Bankruptcy Law > Estate Property > Content

The leading decision on whether or when an inchoate claim constitutes property of the debtor as of the date of the bankruptcy filing is that of the Supreme Court in Segal. Under the analysis set forth in Segal, it has been found appropriate to employ a three-step process: (1) determine the extent to which the claim is rooted in the pre-bankruptcy past; (2) determine the extent to which it is entangled with the debtor's ability to make an unencumbered fresh start; and then (3) with both considerations in the balance, determine whether, in view of the purposes of the Bankruptcy Act (now the Bankruptcy Code), the claim is more properly categorized as pre-petition property that should come into the estate or a post-petition asset that the debtor should take free of the claims of pre-bankruptcy creditors. This analysis does not turn on whether, under state law, the claim had accrued as of the petition date.

Opinion

Opinion by: DIANE DAVIS

Opinion

Hon. Diane Davis, U.S. Bankruptcy Judge

The Court has under consideration a motion filed on July 15, 2009, by Richard P. Weinheimer, Esq. ("Weinheimer") requesting attorney's fees of $ 5,000 and a determination by the Court that certain funds awarded in connection with the settlement of class action litigation are not property of the bankruptcy estate of Daniel W. Borchert ("Mr. Borchert") and Cindy J. Borchert (collectively, the "Debtors"). Opposition to the motion was filed by James C. Collins, Esq., the chapter 7 trustee ("Trustee") on July 31, 2009. 1

Oral argument on Weinheimer's motion was heard by the Court at its regular motion calendar in Binghamton, New York, on September 3, 2009. The Court afforded the parties an opportunity to file memoranda of law, and the motion was taken under submission on October 1, 2009.

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1), (b)(2)(A), (E) and (O).

The Debtors filed a voluntary petition pursuant to chapter 7 of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code") on August 6, 2004. On September 21, 2004, the Trustee filed a Report of No Distribution, and the Debtors were issued a discharge on November 15, 2004. The case was closed on December 2, 2004. On October 31, 2008, the Trustee filed an *ex parte* motion seeking to reopen the case. The Court signed an Order that day granting the relief sought.

According to a "Claimant Profile Form" completed by Mr. Borchert on or about January 3, 2006, in connection with the case of *In re Vioxx Products Liability*, MDL Docket No. 1657, U.S. District Court for the Eastern District of Louisiana ("Vioxx litigation"), Mr. Borchert indicated that he had a heart attack in October 2004, for which he was hospitalized at Mary Imogene Bassett Hospital in Cooperstown, New York. *See* Exhibit D, attached to Trustee's Memorandum of Law, filed October 1, 2009 ("Trustee's October M/L") (Dkt. No. 58). According to a consultation done on Mr. Borchert while in the hospital on October 5, 2004, Mr. Borchert had experienced worsening (in frequency and severity) chest pain with exertion over the two weeks prior to the consultation. *See* Exhibit A, attached to Trustee's Memorandum of Law, filed August 21, 2009 ("Trustee's August M/L") (Dkt. No. 48). According to the consultation,

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Mr. Borchert also indicated that the symptoms probably had been there for years but he had difficulty differentiating them because of other chronic back and neck pain. *Id.*

According to the "Profile Form," Debtor indicates that he was prescribed Vioxx for back pain. His "First Confirmed Vioxx Use" was identified as December 30, 2003. *See* Exhibit A, attached to Trustee's October M/L. Trustee alleges that based on a review of Mr. Borchert's medical records, he had ceased taking Vioxx sometime prior to an office visit on November 9, 2004.

On November 9, 2007, Merck & Co., the manufacturer and distributor of Vioxx, 2 and the "Negotiating Plaintiffs' Counsel" in the Vioxx litigation negotiated a settlement agreement which provided for the disbursement of interim payments to certain eligible claimants, including Mr. Borchert. The payments were based on a point system. According to this system, Mr. Borchert was determined to fall in the category for someone who was estimated to have taken between 128 and 389 pills over a 6-18 month period leading up to his heart attack on October 4, 2004. Mr. Borchert's net points were calculated to be 202.12 points. *See* Exhibit A, attached to Trustee's October M/L. According to Beasley Allen, Crow, Methvin, Portis & Miles, P.C., who represented the Debtor in the Vioxx litigation, the Debtor was entitled to receive an interim settlement based upon 40% of the estimated point value of his claim, less any attorney's fees capped at 32%, and costs. *See* Exhibit B, attached to Trustee's October M/L. As of September 30, 2009, Mr. Borchert's "present point value" was $ 1,915.00, and it was estimated that he would receive an interim check in the amount of $ 105,260. It was also estimated that he would receive a final settlement check in late 2009 after all potential Vioxx claims were processed and the value of each point recalculated. *Id.*

Weinheimer contends that the settlement did not have its roots in any prepetition activities of Mr. Borchert and his claim for injuries did not arise until he was certified as a member of the class on September 1, 2003. He asserts that Mr. Borchert had not suffered any damages, i.e. his heart attack, until after the petition was filed. Accordingly Weinheimer takes the position that until Mr. Borchert suffered his heart attack, his claim or cause of action had not accrued, and he would not have been eligible to initiate a lawsuit in state court or participate in the class action settlement. Thus, he argues that all of that occurred postpetition and after the Debtors received a discharge and, therefore, is not property of the estate.

Relying on *Segal v. Rochelle*, 382 U.S. 375, 380, 86 S. Ct. 511, 15 L. Ed. 2d 428 (1966), the Trustee points out that Mr. Borchert's heart attack was "sufficiently rooted in the prebankruptcy past" given that a significant amount of his daily use of Vioxx occurred prepetition. The Trustee points out that the extent and consistency of Mr. Borchert's use of Vioxx was a determinative factor in calculating the points on which the award was based. 3 Again relying on the analysis set forth in *Segal*, the Trustee further asserts that "only a small portion of [Mr. Borchert's] net Vioxx award (less than 10%) would be required to fund a 100% dividend to their creditors." *See* Trustee's October M/L at 10. Thus, a determination that the Vioxx award is property of the Debtors' estate would not have a serious impact on the Debtors' fresh start.

Code § 541(a) provides a broad definition of the term "property of the estate." 4 *See In re Riccitelli*, 320 B.R. 483, 489 (Bankr. D. Mass. 2005). As noted by one court, "[b]y including all legal interests without exception, Congress indicated its intention to include all legally recognizable interests although they

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may be contingent and not subject to possession until some future time." *In re Richards*, 249 B.R. 859, 861 (Bankr. E.D. Mich. 2000), quoting *Rau v. Ryerson (In re Ryerson)*, 739 F.2d 1423, 1425 (9th Cir. 1984). The determination of the extent of a debtor's interest in property is generally a matter of state law. *See Butner v. United States*, 440 U.S. 48, 54-55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979); *see also Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1101 (2d Cir. 1990) (indicating that "a]lthough federal law determines the outer boundary of what may constitute property of the estate, state law determines the 'nature of a debtor's interest'" and whether that interest is sufficient to confer on the estate a property right in the action). Given the Code's broad definition of "property of the estate," it is clear that Congress intended that bankruptcy policy considerations be weighed in any such determination.

The leading decision "on whether or when an inchoate claim constitutes 'property' of the debtor as of the date of the bankruptcy filing" is that of the Supreme Court in *Segal, supra*. Under the analysis set forth in *Segal*, it has been found appropriate to employ a three-step process:

> (1) determine the extent to which the claim is rooted in the prebankruptcy past; 5 (2) determine the extent to which it is entangled with the debtor's ability to make an unencumbered fresh start; and then (3) with both considerations in the balance, determine whether, in view of the purposes of the Bankruptcy Act (now the Bankruptcy Code), the claim is more properly categorized as prepetition property that should come into the estate or a postpetition asset that the Debtor should take free of the claims of prebankruptcy creditors. . . . this analysis does not turn on whether, under state law, the claim had accrued as of the petition date. *Riccitelli*, 320 B.R. at 490-91.

This is a matter of first impression for this Court. With the three-step process in mind, it has reviewed the outcome of a number of different decisions that have examined the issue. For example, the court in *In re Monger*, 2005 Bankr. LEXIS 1294 (Bankr. N.D. Tex. July 8, 2005) was asked to consider whether the debtor's interest in a class action recovery was property of the debtor's estate. The debtor had taken an antidiabetic drug known as Rezulin from the fall of 1997 through early 1999. She filed a chapter 13 petition on June 20, 2000, and the case was later converted to chapter 7 on December 16, 2003. After becoming aware of potential lawsuits arising from the use of Rezulin, the debtor completed a questionnaire in March 2002. *Id.* at *2. Despite the fact that she had not sustained any injury or ill effects from her ingestion of the anti-diabetic drug Rezulin, the debtor was later notified in March 2004 that she was eligible to receive approximately $ 1,677.96 in net proceeds as part of a class action settlement with the manufacturer of the drug. *Id.* at *3. The court concluded that the award was not property of the estate given the fact that there was no evidence of damage or injury from her prepetition use of Rezulin and that no cause of action had accrued prior to her filing. *Id.* at *5.

In *Richards* the debtor filed a chapter 7 petition on March 18, 1999. On October 20, 1999, he was diagnosed with asbestos-related injuries arising from his exposure to asbestos from 1960 through 1974. He commenced a personal injury lawsuit against his former employer on February 23, 2000, and the trustee filed a motion for turnover of the lawsuit. The trustee in *Richards* argued that the cause of action was property of the estate because

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the exposure occurred prepetition. *See Richards*, 249 B.R. at 860. The debtor argued that the cause of action did not accrue until he was diagnosed with an asbestos-related injury postpetition and, therefore, it was not property of the estate. *Id.* at 861.

Ultimately, the court in *Richards* concluded that in determining whether a claim is property of the estate, "the test is not the date that the claim accrues under state law." The appropriate inquiry is "whether the claim is 'sufficiently rooted in the prebankruptcy past.'" *Id.*, quoting *Segal*, 382 U.S. at 380; *see also Field v. Transcontinental. Ins. Co.*, 219 B.R. 115, 119 n.9 (E.D.Va. 1998), *aff'd*, 173 F.3d 424 (4th Cir. 1999) (indicating that "[e]ven when a debtor's claim is grounded in prepetition circumstances, his estate can recover for injury occurring postpetition").

In *Richards* the court found that all of the allegedly wrongful conduct giving rise to the debtor's claim occurred 25 years before he filed his bankruptcy prepetition when he was exposed to asbestos. He was diagnosed with asbestos-related injuries seven months postpetition, and approximately four months later he commenced a personal injury lawsuit against his former employer. Richards, 249 B.R. at 860. It was found that his prepetition asbestos exposure "led directly and inevitably to the postpetition accrual of his claim." *Id.* at 861-62. The court held that the debtor's claim for asbestos injuries was property of the estate "even though his diagnosis and therefore his legal ability to sue were postpetition." *Id.* at 862.

There is an obvious distinction to be drawn between *Monger* and *Richards*. In *Monger* the debtor's award clearly had "some" prepetition roots, but those roots arguably would not have been a "sufficient" basis for her to individually sue the manufacturer without there being an identifiable injury linked to her prepetition use of Rezulin. On the other hand, in *Richards* the debtor had been diagnosed with an asbestos-related injury postpetition which was associated with asbestos exposure some twenty-five years before he filed his petition. Clearly, his claim for damages were "sufficiently rooted" in his prebankruptcy past to warrant the finding that it was property of the estate, despite the fact that his diagnosis occurred postpetition.

In the view of the Court, the facts of *Richards* more closely mirror those now before it than those of *Monger*. Mr. Borchert suffered a heart attack on October 4, 2004, some seven or eight months after first ingesting Vioxx in late December 1993 and some two months after filing his chapter 7 bankruptcy petition. According to the medical examination following his heart attack, he admitted to having symptoms for years, including "a pressure that radiates down his left arm and up into his neck" which he attributed to chronic neck and back pain. *See* Exhibit A at page 3, attached to Trustee's August M/L (Dkt. No. 48). His eligibility to receive settlement proceeds as a member of the class action litigation was predicated not only on the fact that he had suffered a heart attack, but also on a point system under which he was entitled to a 20% upward adjustment due to the overall duration of his Vioxx use, namely, 6-18 months. According to his medical records, he ceased taking Vioxx sometime prior to November 9, 2004. Thus, of the ten months he had taken Vioxx (January through October 2004), seven of those months occurred prior to filing his petition (January through July 2004). In the opinion of this Court, his injury was sufficiently rooted in the prebankruptcy past to constitute property of the estate.

Consistent with the analysis found in *Segal*, the Trustee also focuses on the second step of the process, as discussed in *Riccitelli*, namely the extent to which the Court's holding will interfere with the Debtors' "ability

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to make an unencumbered fresh start." *See Segal*, 382 U.S. at 380. 6 The Trustee makes the argument that "any impediment to Mr. Borchert's fresh start would be relatively light - only a small portion of his net Vioxx award (less than 10%) would be required to fund a 100% dividend to his creditors." *See* Trustee October M/L at 10. Neither the court in *Monger* or *Richards* discussed the second step in the analysis. In addition, if the Court were to consider the second step in the analysis, based on the representations by Trustee's counsel, it would appear that that prong discussed in *Segal* would be satisfied as well. As noted above, it was anticipated that the Debtor would be receiving a net award in excess of $ 200,000 by the end of 2009. According to the Debtors' schedules, their estimated unsecured claims totaled $ 21,246.73. *See* Schedule F, attached to Debtors' Petition. The payment of that amount, assuming all creditors listed were to file proofs of claim in this case, which is over five years old, should not interfere with the Debtors' fresh start.

Accordingly, with both considerations in balance, the Court concludes that the Vioxx award is sufficiently rooted in the Debtors' pre-bankruptcy past and, is therefore property of the Debtor's estate and should be turned over to the Trustee.

Based on the foregoing, it is hereby

ORDERED that Weinheimer's motion on behalf of the Debtors seeking a determination that the funds awarded to Mr. Borchert in connection with the Vioxx settlement agreement are not property of the estate is denied; it is further

ORDERED that the Debtor comply with this Court's prior Order of June 16, 2009, requiring the Debtors and Weinheimer to turn over to the Trustee $ 21,246.73 and $ 5,000 in legal fees, respectively; it is further

ORDERED that the Trustee file a Notice of Asset Case and Request for Notice to Creditors upon receipt of the above-referenced funds; it is further

ORDERED that Weinheimer file a proof of claim for legal fees and costs; and it is finally

ORDERED that any attorney's fees sought in connection with the Trustee's motion to compel turnover and Trustee's opposition to Weinheimer's motion herein be restored to the February 4, 2010 Binghamton calendar at 9:30 a.m.

Dated at Utica, New York

this 8th day of JanuarMary 2010

/s/ Diane Davis

DIANE DAVIS

U.S. Bankruptcy Judge

Footnotes

1

On July 20, 2009, the Trustee filed a motion to compel the Debtors and Weinheimer to comply with an Order of the Court, signed June 16, 2009 (Dkt. No. 34), requiring them to turnover to the Trustee $ 21,246.74 and $ 5,000 in legal fees. The Trustee's motion (Dkt. No. 42) was granted by the Court, but according to the docket in the case, no order has ever been submitted.

2

Vioxx was allegedly withdrawn from the market by Merck on September 30, 2004.

3

According to the Trustee, Mr. Borchert's regular ingestion of Vioxx for a period of between 6 and 18 months resulted in an upward adjustment in his points by 20%. *See* Trustee's October M/L at 10.

4

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Code § 541(a)(1) broadly defines property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1).
5

As pointed out by the court in *Riccitelli*, "*Segal* requires not just *some* prepetition roots, however attenuated, but that the cause of action be '*sufficiently* rooted in the prebankruptcy past.'" *Riccitelli*, 320 B.R. at 491, quoting *Segal*, 382 U.S. at 379-80 (emphasis added).
6

The court in *Ryerson*, *supra*, examined this aspect of *Segal* in light of the 1978 revision of the Bankruptcy Code and found that whether the claim is somehow entangled with the debtor's ability to make a fresh start is no longer a consideration. *See Fielo*, 219 B.R. at 119, n.7, citing to *Ryerson*, 739 F.2d at 1426. Given the facts of this particular case, the Court need not reach a conclusion on that point.