

Litigators of the Week: Paul Schmidt and Michael Imbroscio of Covington & Burling

By Scott Flaherty

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Not so long ago, Hoffmann-La Roche Inc. faced a grim reality in sprawling litigation over the acne medication Accutane.

In 2007, New Jersey judge Carol Higbee handed an edge to plaintiffs lawyers at Seeger Weiss, Weitz & Luxenberg and other plaintiffs firms, allowing their causation expert to testify about links between Accutane and forms of inflammatory bowel disease (IBD). Soon afterward, the plaintiffs were boasting a string of multi-million dollar verdicts.

Fast-forward to today, and the picture is drastically different. With a big assist from Covington & Burling's Paul Schmidt and Michael Imbroscio, Roche now has the plaintiffs lawyers scrambling to salvage thousands of pending lawsuits in the Accutane mass tort.

The momentum in the 12-year-old litigation began to shift when Roche's lawyers overturned several of the company's early trial losses. The turnaround accelerated last year when a new trial court judge, Nelson Johnson in New Jersey's Atlantic County—began overseeing the case.

The first real game-changer, however, came in late February this year, after an eight-day hearing at which Schmidt delivered closing arguments.

Siding with Roche, Johnson agreed to exclude testimony from the plaintiffs' experts, finding they had cherry-picked scientific research to support a theory that ingesting Accutane can cause a form of IBD known as Crohn's Disease. The decision immediately endangered thousands of cases involving Crohn's claims, which account for roughly half of the more than 6,700 pending Accutane cases. (Most other cases allege a link between the acne drug and ulcerative colitis.)

The next big victory came on April 2, when Schmidt and

Imbroscio helped obtain a ruling that could threaten up to 800 Accutane cases. Johnson granted summary judgment in Roche's favor on the question of whether, since April 10, 2002, Accutane's packaging adequately warned that IBD was a risk of taking the drug. The post-April 2002 packaging was the last Roche used for Accutane, which it stopped selling in 2009.

Schmidt argued the adequacy issues for Roche at a March 19 hearing. Accutane's label, he told Judge Johnson, contained "a remarkable set of warnings."

"The symptoms are directly called out in the label, in the brochure and the medication guide," Schmidt said, according to a transcript. "It's hard to say that's not a prominent, direct, accurate, forceful warning about inflammatory bowel disease."

Johnson agreed. In last week's ruling, he wrote that it was highly unlikely that an ordinary dermatologist or general physician could examine Accutane's labeling "and not immediately conclude that Accutane has been associated with life-altering side effects, including IBD."

Covington's Imbroscio helped develop the arguments behind both the February and April wins. (Roche's defense team in the Accutane litigation also includes Michelle Bufano of Gibbons, Russell Hewit of Dughi, Hewit & Domalewski and Colleen Hennessey of Peabody & Arnold.) He said the latest decision gives Roche a measure of vindication.

"Judge Johnson's ruling is a recognition that the company did the right thing," Imbroscio said.