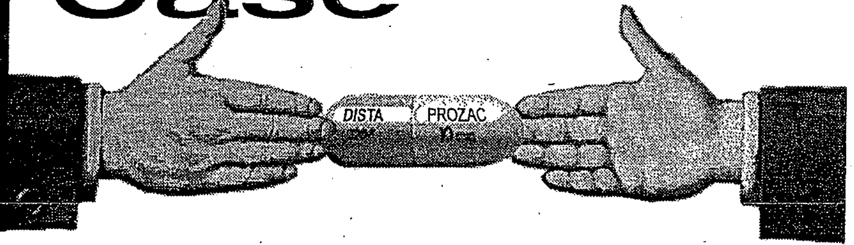
Throwing a Head Case

The depressing tale of a clandestine Prozac settlement



By RICHARD ZITRIN and CAROL M. LANGFORD

This story is not about Prozac, which from the weight of evidence appears to be a relatively safe drug. Rather, this is a tale of what happens when secret settlements are taken to their illogical extreme — in this case, a sham trial in which the plaintiffs and their lawyers were paid to pull their punches so the defendant could get a favorable verdict.

It started in September 1989, when Joseph Wesbecker armed himself with an AK-47, walked into the Louisville printing plant where he had worked and started shooting. He killed eight people, wounded 12 more and finished matters by blowing his own brains out. One month before, Wesbecker had begun taking Prozac. The lawyers for the shooting victims soon focused on the drug as the cause for Wesbecker's extraordinary violence, and they targeted Eli Lilly, Prozac's manufacturer, as the "deep pocket."

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The *Fentress* case, named for one of Wesbecker's victims, was the first of 160 cases pending against Prozac to go to trial. The circumstances made *Fentress* a tough plaintiffs' case: The lawyers would have to prove that the drug had affected not their own clients' behavior, but Wesbecker's. Still, Lilly and its lawyers were determined to defend Prozac with everything they had.

THE WONDER DRUG

By the time *Fentress* went to trial in autumn of 1994, Prozac had become the aspirin of anti-depressants — the wonder drug everyone was talking about and millions were using. Prozac represented almost one-third of all Lilly sales in 1994 — $1.7 billion. A great deal was at stake: If Lilly lost, other plaintiffs waiting in the wings would gain strength and resolve. But a defense verdict might make those plaintiffs reconsider.

Throughout the case, plaintiffs' attorneys pushed Judge John Potter to allow evidence about another Lilly product, the anti-inflammatory drug Oraflex, which had been taken off the market in 1982 as too dangerous. In 1985, Lilly had pled guilty to 25 criminal counts of failing to report adverse reactions to Oraflex, including four deaths, to the Food & Drug Administration. Central to the plaintiffs' claims was that Lilly had done the same thing with Prozac. Potter refused to allow the evidence, saying its prejudice outweighed any probative value.

But when Lilly executives testified that the company had an excellent reputation for reporting problem incidents — what they euphemistically called "adverse events" — plaintiffs' counsel immediately renewed their request to bring in the Oraflex evidence. Potter agreed, noting that "Lilly has injected the issue into the trial."

Potter's ruling set off a flurry of activity around his courtroom. The lawyers jointly asked for a recess and then asked to adjourn for a day. By mid-afternoon, a strong scent of settlement was in the air. But when court reconvened the next day, chief plaintiffs' counsel Paul Smith announced that the plaintiffs would rest without presenting the Oraflex evidence unless the trial went to its second phase, on damages. That, of course, would occur only if the jury first decided Lilly was liable. The strategy puzzled Judge Potter enough for him to ask the lawyers whether they had reached a settlement. He was told unequivocally that they had not.

While the jury was deliberating, a juror came forward and told Judge Potter that she had overheard settlement negotiations going on in the hallway. She repeated this in chambers with the lawyers present and was then excused. Potter turned to the lawyers and said, "Does anybody have anything they want to say?" A moment later, he asked again, "Does anybody have the slightest clue?"

"No," said Smith.

"I can't imagine," said one of the defense lawyers.

In other chambers meetings, lawyers from both sides emphasized their plans for phase two of the trial, on damages, including engaging in settlement discussions if the plaintiffs won phase one.

On December 12, only three court days after Potter's ruling allowing the Oraflex evidence, the jury returned a defense verdict. In January 1995, Judge Potter formally entered his order in *Fentress v. Eli Lilly*, dismissing the case after verdict by jury.

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As soon as the verdict was in, Lilly and its lawyers trumpeted their victory across the country. "We were able, finally," said one of Lilly's lead attorneys, "to get people head-to-head in a courtroom and say 'Put up or shut up.' . . [T]his is a complete vindication of the medicine."

SMELLING A DIRTY DEAL

Had John Potter not been the judge, the *Fentress* case might have ended there. Despite the lawyers' denials and their references to a damages phase, Potter suspected that a deal had been made before closing argument. When the plaintiffs didn't file a notice of appeal, Potter called in the lawyers from both sides. They continued to deny that a settlement had been reached.

Although Potter was more suspicious than ever, he had no jurisdiction, except as to his own order of dismissal. So in April 1995, stating "it is more likely than not that the case was settled," Potter filed an unusual document: On his own motion, he changed his post-trial order from a dismissal after verdict to "dismissed as settled." He set a hearing for May.

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Quickly, the lawyers on both sides joined forces to file an objection with Kentucky's appeals court to prevent Judge Potter's hearing anything about what they considered a closed case. Paul Smith stated flatly that "there was no secret settlement. . . . This was a hard fought case." Potter, meanwhile, found himself in need of counsel.

After Potter's changed order had become public, Richard Hay, then president of the Kentucky Academy of Trial Attorneys, told reporters that if money had been traded for evidence, the trial was "a sham," like "taking a dive in a boxing match." Potter read Hay's comments, called him and asked how outraged Hay was about the case. "Enough to represent you," Hay replied. Together, Hay and Potter filed a brief that emphasized a "public silence [that] has been bought and paid for," robbing millions who "want the truth."

In June 1995, the appeals court ruled against Potter, saying he no longer had jurisdiction over the case. Potter appealed to the Kentucky Supreme Court. Before the fall Supreme Court hearing, lawyers for both sides finally acknowledged that they had indeed settled all money issues and had agreed to go through only the liability phase of the trial no matter what the result. Still, they refused to disclose specifics. Meanwhile, in Indianapolis, Lilly's hometown, Paul Smith suddenly withdrew as lead counsel in a series of consolidated Prozac cases in federal court. He wouldn't say whether he had settled his Indianapolis cases as part of the *Fentress* settlement, and the judge refused to ask.

In their appeal to the Supreme Court, Potter and Hay de-emphasized the importance of public disclosure and focused instead on the lawyers' failure to be candid with the judge. On May 23, 1996, the Kentucky Supreme Court decided the case of *Hon. John W. Potter v. Eli Lilly* unanimously in Judge Potter's favor, citing the lawyers' "serious lack of candor" and evidence of bad faith, abuse of process, even fraud. Although the court said that "the only result" of exposing the secret *Fentress* agreement "is that the truth will be revealed," the decision was less a victory for open settlements, and more a demand that the judge be included in the secret.

JUDGE POTTER'S PROBE

Judge Potter, though, still saw the larger issue. Armed with Supreme Court authority to conduct an investigation and hold a hearing, Potter asked Deputy State Attorney General Ann Sheadel to investigate, giving her the power to subpoena documents and question witnesses under oath. Sheadel's March 1997 report uncovered new twists to the story. A complex agreement had existed between Lilly and the plaintiffs, one so secret that it was never fully reduced to writing. All Sheadel could find was a written summary of the verbal agreement. No lawyer would admit preparing it, and no plaintiff was allowed to have it.

In exchange for the plaintiffs agreeing not to present the evidence of Lilly's criminal conduct with Oraflex, Lilly had agreed to pay all plaintiffs, win or lose. Part of the agreement was that all of chief plaintiffs' counsel Smith's Prozac cases, including those in Indianapolis, were settled, and half his overall expenses paid by Lilly.

Judge Potter set a hearing to take sworn testimony on March 27, 1997. The hearing never happened. On March 24, in a surprise move, attorneys for Lilly and the plaintiffs presented Judge Potter with a new stipulation and order in *Fentress* showing that the case was dismissed "as settled," exactly what Potter had insisted on two years before. The judge signed the order. Three days later, Lilly's attorney went before the appeals court to argue that any further proceedings would be moot. He also claimed that Potter had violated judicial ethics and was on a "vendetta" against Lilly. Potter recused himself, saying, "the spotlight should be on what . . . is under the log, not the person trying to roll it over."

The judge had succeeded in uncovering the collusive settlement. But of the approximately 160 active Prozac cases in December 1994, fewer than half remained. Inexplicably, *Fentress* had received almost no attention in the national media, and the Kentucky court of appeal closed any further hearings to the public. Plaintiffs' attorney Paul Smith was still practicing law in Dallas. And the only thing that anyone ever learned about the amount of the settlement was the comment of a Louisville lawyer who represented one of the *Fentress* plaintiffs in a divorce. The amount, he said, was "tremendous." ■