

## TOP DEFENSE WINS OF 2005

### Verdict quashed line of diet-drug claims

By: June D. Bell

**CASE TYPE:** Products liability

**CASE:** *Adams v. Novartis Consumer Health Inc.*, No. L-890-02 (Middlesex Co., N.J., Super. Ct.)

**DEFENSE ATTORNEYS:** Gita F. Rothschild and John F. Brenner, partners, McCarter & English, Newark, N.J.; James D. Herschlein, partner, Kaye Scholer, New York

**PLAINTIFF'S ATTORNEYS:** Esther E. Berezofsky, partner; and Kevin Haverty, associate, of Williams, Cuker Berezofsky, Cherry Hill, N.J.

Novartis Consumer Health Inc.'s successful defense in 2004 of two products liability cases involving phenylpropranolamine (PPA) in cold medications earned its lawyers a spot on *The National Law Journal's* top 10 defense verdicts for that year.

Novartis is back with another PPA case, this one involving the diet product Acutrim. This was the first PPA appetite-suppressant case to go to trial, and Novartis' victory helped ensure that there

wouldn't be another.

Forty-two of the 52 Novartis Acutrim cases were dismissed last year, and the remaining 10 settled by the end of last year, said Randolph S. Sherman, national coordinating counsel for Novartis and a partner in Kaye Scholer's New York office.

Hundreds of PPA diet pill cases brought against other drug companies had already settled for "generous" amounts, said Novartis trial attorney James D. Herschlein, also a Kaye Scholer partner in New York. Thompson Medical, which made Dexatrim (an Acutrim competitor that enjoyed about 80% market share), filed for bankruptcy protection and settled all of its PPA cases.

Novartis' defense team said that the company had attempted to resolve this Acutrim case but balked at plaintiff Doris Adams' demand for more than \$1 million.

Adams claimed her use of Acutrim over three days in 1998 caused a stroke that paralyzed her right arm. The U.S. Food and Drug Administration declared PPA unsafe in 2000 and banned it from cough, cold and diet medications after studies linked its use to an increased stroke risk.

Novartis' defense lawyers argued that Adams' stroke was caused by chronic high blood pressure, not her brief use of PPA.

They explained to jurors how Acutrim used a patented drug-delivery system to release small amounts of PPA over a long period of time to prevent spikes in delivery, a point that a Novartis researcher told them about during trial preparation. When they elicited that fact at trial, it proved vital to Novartis' case and a stunner for the plaintiff's team.



**GITA F.  
ROTHSCHILD**  
PARTNER  
McCARTER & ENGLISH



**JOHN F.  
BRENNER**  
PARTNER  
McCARTER & ENGLISH

"That was a huge surprise to them," said Gita F. Rothschild, a partner in McCarter & English in Newark, N.J. "No one had ever asked about this before. This drug-delivery system was a key part of the defense."

The jury decided, 9-1, in Novartis' favor on the failure-to-warn claim on May 6, 2005.

Adams' attorney, Esther E. Berezofsky, said jurors have a difficult time finding for a plaintiff in nonprescription drug cases because they want to believe that over-the-counter products they use are safe.

"It's hard psychologically to separate themselves out from the plaintiff and find [that] the kind of risk adheres to the product that we feel it does," said Berezofsky, a partner in Williams, Cuker & Berezofsky in Cherry Hill, N.J.

Don't look for another Novartis PPA case on the 2006 top defense verdicts list. By the end of this year, Sherman said, the company will have concluded all its PPA litigation.

This article is reprinted with permission from the April 17, 2006 edition of THE NATIONAL LAW JOURNAL. © 2006 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact ALM Reprint Department at 800-888-8300 x6111 or visit [www.almreprints.com](http://www.almreprints.com). #005-04-06-0012



ATTORNEYS AT LAW

[www.mccarter.com](http://www.mccarter.com)

## CHOOSING THE TOP 10 DEFENSE WINS

IN CHOOSING THE BEST DEFENSE WINS of 2005, *The National Law Journal* considered the obstacles that defense attorneys encountered, including plaintiff-friendly venues, the amount of damages at stake and the potential effect on similar cases.

We looked for a mix of bench and jury verdicts—class actions, criminal and significant civil cases—from a variety of jurisdictions. We interviewed dozens of trial counsel in distilling scores of nominations from across the country into the list you find here.