

# SC verdict for \$327M

## *Huge penalty, but drug maker dodges the maximum*

By **FRED HORLBECK**

*fred.horlbeck@sc.lawyersweekly.com*

The record-setting \$327 million verdict levied against the Ortho-McNeil-Janssen pharmaceutical company for violations of the state's Unfair Trade Practices Act is hardly small change, but it could have been a lot bigger.

Like more than \$2 billion bigger.

The award, announced June 3, could have soared to more than \$2.6 billion, had the Spartanburg judge who set damages decided to hit Janssen, a subsidiary of Johnson & Johnson, with maximum penalties under the UTPA for violations involving the anti-psychotic drug Risperdal.

For lawyers representing the state as the plaintiff in *State v. Ortho-McNeil-Janssen et al.*, case no. 2007-CP-42-1438, such a staggering sum was not beyond the realm of possibility.

"We knew that it could be a big number," said Assistant Deputy Attorney General C.H. Jones Jr., who worked on the case.

But Jones and other lawyers for the state aren't complaining about the final verdict, believed to be the largest in the state's history for a company found to have violated the UTPA and the largest brought against Janssen for Risperdal.

"We feel very good about it, obviously," said lawyer Don Coggins of the Spartanburg firm of Harrison, White, Smith & Coggins, one of several private firms that represented the state.

"The whole purpose of the statute is to, basically, say to business, 'We want all the business in the world in South Carolina, but if you come into South Carolina to do business, we want you to do it in a fair and honest way,'" Coggins said.

The law prohibits unfair methods of competition and unfair or deceptive practices in trade and commerce. The state claimed



Coggins

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**Don Coggins**  
**Spartanburg Attorney**

Janssen engaged in such practices when marketing Risperdal.

"It is a big victory. This is one of the first cases we've had like this with the Unfair Trade Practices Act just on the civil penalties aspect of it," Jones said.

Spartanburg Circuit Court Judge Roger Couch, who set damages after a penalty hearing, "could have gone higher, yes," Jones said.

"I thought it was a full settlement, and it was appropriate based on the circumstances. That's my personal feeling," Jones said.

In a statement, Janssen said it planned to appeal. Kara Russell, a spokeswoman for the company, declined to discuss the case. Steve Pugh, a lawyer for Janssen, was unavailable for comment.

The verdict amount was based on UTPA violations involving drug labels or inserts and "dear doctor" letters, messages the company sent to physicians in an alleged attempt to

conceal growing concerns about Risperdal. Couch ruled that the company distributed 509,499 package inserts with sample boxes and that it also mailed 7,184 "dear doctor" letters and provided another 36,372 letters during sales calls.

Under the UTPA, each violation carries a maximum penalty of up to \$5,000. Add up the number of violations – 535,055 – and multiply the sum by \$5,000, and result is a knee-buckling \$2,675,275,000.

Couch, however, didn't hit Janssen with the maximum allowed penalties. He levied a \$300 fine for each of the 509,499 violations involving package inserts, totaling \$152,849,700. He set a \$4,000 fine for the 43,556 violations involving "dear doctor" letters for a total award of \$174,224,000.

In the April penalties hearing, Janssen had argued for minimum damages, Jones said. The state's lawyers had countered with argu-

ments expanding on the public injury and the company's ability to pay damages and had told Couch they would "argue for the maximum on everything," Coggins said.

The state lawyers refrained from mentioning specific figures, however.

"We did not want to presume to tell the court what the court should award. What we were going to present was the evidence that showed the various activities or transactions that could be considered violations," Coggins said.

"We acknowledged on the record that we certainly understood that some of the transactions and occurrences were more egregious than others," he said.

After that, it was up to the judge.

In his order, Couch said he considered the award in light of the good or bad faith of the company; the injury to the public; the desire to eliminate benefits the company may have derived through violations; the need to vindicate the state's authority; and the company's ability to pay. He noted that Janssen's total earnings from Risperdal sales topped \$29 billion.

In its complaint, the state had asserted that worldwide sales of Risperdal in 2005 alone topped \$3.5 billion. Both Coggins and Jones told Lawyers Weekly that the company is fully able to pay the damages set by Couch.

The hearing followed an almost three-week trial in March in which a Spartanburg County jury found that Janssen had willfully violated the UTPA through deceptive or unfair marketing and labeling of Risperdal.

The state claimed that Janssen misrepresented and concealed side effects of the drug, including diabetes, hyperglycemia and weight gain and that users were at an increased risk of hyperprolactinemia, which can cause premature female menstrual cycles and lactation in boys. The state also pointed to a study that showed a growing risk of heart-related problems in elderly users.

"What we were prosecuting ... was Janssen's conduct in the information that they gave to the public about the drug," Coggins said.

The company countered with the defense that what it said about Risperdal was true or was later proven to be true. But Couch said in

his order that the case was about manipulation intended to "get prescribers and patients to make treatment decisions based upon misleading or incomplete data."

The state Attorney General's Office contracted with Harrison, White, Smith & Coggins to handle the case on behalf of the state. The firm retained the Simmons Law Firm of Columbia and the Texas-based firm of Bailey Perin Bailey to assist.

The award will cover attorney fees and costs, and the state will keep the rest. Jones said outside counsel are expected to receive about \$19 million if the verdict survives an appeal.

Because the UTPA doesn't apply to claims for actual harm resulting from use of a product, consumers claiming harm from use of Risperdal will not share in the award.

In its statement, Janssen said it was disappointed with the court's decision.

"The company acted responsibly and believes it did not violate the South Carolina Trade Practices Act," the statement said. "We do not believe the ruling can be upheld on appeal."