

## Jury Tests the Limits in AndroGel False Ad Verdict

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In late July, an Illinois jury came to a bizarre verdict in a case over an alleged link between heart attacks and AndroGel, a gel product used for treating low testosterone (or “low T”). The jury found that AbbVie, Inc., the drug company behind AndroGel, although not strictly liable or negligent in allegedly causing a user’s heart attack and owing \$0 in compensatory damages, was nevertheless liable for fraudulent misrepresentation in its product advertising and was responsible for \$150 million in punitive damages.

Over the past few years, roughly 6,000 individuals have filed lawsuits linked to testosterone gel products alleging health concerns, like heart attacks. One of those lawsuits was brought by Jesse Mitchell in Illinois district court in 2014. This July, Mitchell’s lawsuit became the first of these cases to reach a jury verdict, and could have an important impact on the vitality of the remaining lawsuits.

In Mitchell’s complaint, he alleged that he suffered a heart attack because of his use of AndroGel. To start, Mitchell asserted that AbbVie embarked on a “massive advertising campaign” to convince men that they suffer from low T, while promoting a product to treat the condition that was not safe for consumers. Through its advertising campaign, the complaint alleged, AbbVie hoped to artificially boost the customer base for products used to treat low T. In order to do so, AbbVie allegedly created unbranded websites containing questionnaires that attributed common symptoms of aging (like “listlessness” and “increased body fat”) to low T. Mitchell further alleged that AbbVie was promoting a product that was not a safe and effective treatment for low T, and pointed to studies that associated the use of testosterone replacement gel with a number of health risks, like strokes and heart attacks.

At trial, AbbVie countered that AndroGel could not be linked to Mitchell’s heart attack. First, AbbVie argued that Mitchell’s cited studies were flawed and did not show a risk of heart attack associated with the use of testosterone replacement gel in individuals of Mitchell’s age. Further, AbbVie pointed to Mitchell’s own health conditions, noting that he was an overweight smoker who suffered from high blood pressure and cholesterol, and that he harbored a family history of heart disease. According to AbbVie, these factors alone, without the use of AndroGel, could have caused Mitchell’s heart attack.

After hearing these arguments, the jury’s verdict was rather unorthodox. The jury found that AbbVie

was not liable for Mitchell's heart attack, thus rejecting Mitchell's claims for strict liability and negligence, but then determined that AbbVie was liable for fraudulent misrepresentation as a result of its advertising campaign. The jury denied any compensatory damages sought by Mitchell, yet required that AbbVie pay \$150 million in punitive damages.

A jury verdict awarding punitive damages in the absence of any compensatory damages is a highly unusual outcome, which seemingly will be overturned. Earlier this week, AbbVie filed a motion to strike the punitive damages award, citing, among other cases, the Seventh Circuit's decision in *Pileco v. Slurry Systems*, in which it was "obvious" to Circuit Judge Posner that "punitive damages can't lawfully be awarded when no compensatory damages are awarded." 804 F.3d 889, 892 (7th Cir. 2015). Regardless of the outcome of the motion to strike the punitive damages, the jury verdict was an outcome that neither party likely expected, and a peculiar one in the annals of false advertising law.

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