Cross-Fertilization

Tuesday, September 27, 2011

With our focus on prescription drug and medical device product liability litigation, we sometimes overlook developments that occur outside the boundaries of our own little sandbox. While that's necessary to restrict the blog's scope to something manageable, nonetheless it's somewhat artificial. Drug and device law doesn't exist in some kind of vacuum, cut off from the rest of tort law. What we do here sometimes affects other types of cases, and what goes on in other types of cases certainly can have significant impact on our clients.

One of the other things that Bexis does around here to make himself useful is to prepare monthly memoranda that summarize newly decided cases involving Pennsylvania tort and product liability law generally (he's a glutton for punishment). In that capacity, he came across Pennsylvania Trust Co. v. Dorel Juvenile Group, Inc., 2011 WL 3740472 (E.D. Pa. Aug. 25, 2011), which on its face has nothing to do with prescription drugs or devices. Instead, it has to do with injury allegedly suffered from a child car seat.

The accident apparently happened when, for unknown reasons, the child's mother plowed her minivan headlong into a tree. The father originally brought the suit, but also for unknown reasons – possibly due to the parents' questionable actions – a bank ended up as guardian ad litem. See Pennsylvania Trust Co. v. Dorel Juvenile Group, Inc., 2011 WL 2789336 (E.D. Pa. July 18, 2011) (parents sanctioned for recklessly spoliating the product); Waltman v. Dorel Juvenile Group, Inc., 2009 WL 2877153 (E.D. Pa. Aug. 28, 2009) (parents entered into secret release, and then hid it during discovery).

The Dorel opinion at No. 3740472 addressed with a plethora of "in limine" (that means evidentiary matters presented before trial) motions. We're old enough to remember when in limine motions were thought of as unusual; but they've propagated faster than rabbits since we've been practicing - but back to the point.

In deciding these in limine motions the interconnectedness of the law becomes blatantly apparent in Dorel. First off, in an extremely odd decision, the court threw the case into suspense, and refused to decide a large number of the motions. We've blogged before about

the uncertainty now at the heart of Pennsylvania product liability law, as to whether the Commonwealth will continue its peculiar brand of strict liability or else move to the more negligence-friendly Restatement Third of Torts.

As lauded in our most recent post on that subject, the Third Circuit reaffirmed its prediction that Pennsylvania would move to the Restatement Third approach. Covell v. Bell Sports, Inc., ___ F.3d ___, 2011 WL 2690396 (3d Cir. July 12, 2011). Well, the court in Dorel decided to stage the judicial equivalent of a sit-down strike, placing the case in "suspense pending resolution of this conflict":

"A petition for review en banc is currently pending in Covell. Meanwhile, the Pennsylvania Supreme Court has indicated that it may take up the question again. See Lance v. Wyeth, 15 A.3d 429 (Pa. 2011)."

2011 WL 3740472, at *1. We presume that counsel in the case have already informed the court that the Third Circuit, without dissent, denied en banc rehearing on August 8 – more than two weeks before the suspense order in Dorel.

The other (Lance) citation demonstrates the interrelatedness of tort law. Lance is a prescription drug case. We know it well; some of us even worked on the current appeal. What we don't understand is how the court in Dorel thought that, in Lance, the Pennsylvania Supreme Court somehow had before it anything relating to the Covel/Restatement Third issue. The issues that the Supreme Court agreed to hear in Lance are available both on this blog and on the Supreme Court's website, and they have nothing whatever to do with the future of strict liability in Pennsylvania.

So right off the bat, neither of the excuses given for putting the Dorel case into suspense hold water – and they're both subjects already covered on this blog. Dorel could be in suspense for a long time.

But there's more to the seamless web of tort law at work in Dorel than an inexplicable suspense decision. Despite that order, the court went on to decide quite a few of the motions in limine. Some of them, we think the court got wrong; some we think the court got right.

One of the defense experts wanted to testify that the product in Dorel complied with a federal automobile regulation (called an "FMVSS"). The plaintiff claimed that "such testimony would

constitute an impermissible legal conclusion." 2011 WL 3740472, at *4. Shocking as it may sound, we agree with the plaintiff on that one. We don't see any conceptual difference between that proffered testimony, and an expert testifying that a product complied – or didn't comply – with an FDA regulation. In a series of posts, here, we've argued until we're blue in the face that the ultimate conclusion that a product complied or didn't comply with a statute or regulation is a legal conclusion that an expert witness should not be allowed to give. The proper way to go about it is to have the expert testify that the product had X, Y, and Z features (all of which were in compliance with the law), and then ask the judge to instruct the jury that the product in fact complied. The judge is where the jury should look for legal conclusions during trial, not either sides' paid experts.

In a ruling we agree with, the Dorel court ordered the exclusion of "foreign regulatory actions and labeling." 2011 WL 3740472, at *9. This issue also arises frequently in drug and medical device litigation, and we've blogged on it a number of times, most recently here. The court held, citing drug/device precedent, that foreign standards are irrelevant and prejudicial:

> "Evidence of foreign labeling requirements is inherently prejudicial and presents a substantial risk of jury confusion. See In re Trasylol Products Liability Litigation, 709 F. Supp.2d 1323, 1336 (S.D. Fla. 2010) (citing In re Seroquel Products Liability Litigation, 601 F.Supp.2d 1313, 1318 (M.D. Fla. 2009)); see also In re Baycol Products Liability Litigation, 532 F. Supp.2d 1029, 1054 (D. Minn. 2007) (collecting cases). Plaintiff has also failed to show that [defendant's] obligations under Canadian law are relevant here. As Plaintiff observes, [defendant] "simply placed whatever labels conformed to the location where the [products] were sold." Standing alone, this difference in American and Canadian labeling requirements does not speak to the wisdom or safety of the product's design."

2011 WL 3740472, at *10. Again, a recurrent issue where drug/device law and other types of product liability cross-fertilize.

The same thing occurred in the next motion, where the plaintiff was trying to have the jury hear about product risks in other types of accidents (roll-overs) that didn't happen to this particular plaintiff. The court granted the motion because: (1) such accidents were of little relevance, and (2) it was "cumulative" in light of studies done concerning the same type of crash. 2011 WL 3740472, *10. Once agaain we see this sort of thing in our neck of the woods, as we discussed at some length here. Indeed, not too long ago a Pennsylvania court rejected the contention that plaintiffs could claim that a drug maker's failure to warn of a much less serious

condition could possibly be causal where the product's warnings contained adequate warnings of a much more serious risk (the one the plaintiff actually had). Cochran v. Wyeth, Inc., 3 A.3d 673, 679-81 (Pa. Super. 2010) (see our post about Cochran here).

Finally, the last motion in limine that the court granted excluded the defendant's ultimate decision to cease production of the product – taken after the accident in question – as a subsequent remedial measure. Dorel, 2011 WL 3740472, at *16 (not proper impeachment where evidence intended to establish that the product "was in fact unreasonably dangerous and unsafe for its intended use"). Again, we see plaintiffs in our cases try to do the same thing with subsequent drug recalls. A subsequent drug recall (or labeling change) is equally a subsequent remedial measure, as we've argued here, among other places.

That's five, count 'em, five ways that rulings in the Dorel case – involving an infant car seat – can have impact on issues pertinent to prescription drug/medical device litigation, or vice versa. We here at the Drug and Device Law Blog try not to wear the blinders too tightly for precisely this reason. We recommend that our readers keep their eyes and ears open as well. It may not be drug/device decision that helps us win our next case.