You are Your Record

Monday, August 08, 2011

We were saddened last week by the passing of Charles Aaron Smith. He was better known as Bubba Smith, and we were fans of him as both a football player and as an actor. He was an intimidating force at defensive end. He played on some great Michigan State teams, where the fans would cheer, "Kill, Bubba, kill." (By contrast, Princetonians chanted, "Kill, Bexis, kill.") Bubba Smith was the first player selected in the 1967 NFL draft and, in a sport full of tough guys, he stood out as being especially tough. After his football career ended, Bubba Smith went to Hollywood and played guys who were as sweet and loveable as they were strong and unmovable. (He was also a spokesman for a Baltimore plaintiff's firm.) In Miller Lite commercials and Police Academy movies, Bubba Smith seemed like a nice guy who would apply force only with the greatest reluctance.

As far as we were concerned, the latter image was closer to the person we knew. How did we know him? Only a little. About 15 years ago we were flying cross country and were lucky enough to be seated next to Mr. Smith. There was the usual issue when placed in close proximity to a celebrity -- try to make a connection or leave them alone. We resolved to do the latter. So we mostly kept quiet, bouncing the not-yet-two-years-old drug and device law daughter on our knees. Like a lot of infants, she called her bottle her "bubba." When she got hungry, she started babbling, "Bubba, bubba, bubba." Amazingly, this time she stared straight at Bubba Smith as she did so. He broke up laughing, and for the rest of the flight he told stories. Mostly they were funny stories about football and show business.

There was one story that made Bubba Smith's smile disappear: he was convinced that Super Bowl III, where the Joe Namath-led Jets shocked the world by upsetting Bubba Smith's Baltimore Colts, was fixed. He named the specific people he thought were in on it. He supplied plausible reasons. There's that famous shot of Jimmy Orr wide open in the endzone, desperately waving for the ball to be thrown his way. There are the reports of a lot of big-money, last-minute bets on the Jets. There's an argument that the Jets' upset of the powerhouse Colts, as well

as the Chiefs' upset of the Vikings the following year, were necessary to make the AFL look respectable and make its merger with the NFL successful.

Maybe we're naive, but we were shocked by Bubba's allegation. We were also skeptical. It's hard to believe that such a huge conspiracy can survive in this nation of blabbermouths. But we felt privileged to be privy to such a an interesting theory from such an insider. Turns out we weren't so privileged. In reading the obituaries, we learned that Bubba Smith didn't confine his theory to random lawyers he met during fly-overs. He told the same story to journalists. Often. Like we said, Bubba had lots of reasons, though little actual evidence. Clearly, that 1969 Super Bowl loss still stung.

Losses have a way of doing that. Maybe lawyers are less capable of dealing with losses than most people. As we mentioned last week, when lawyers tell war stories, they invariably end in victory. That's a fiction and that's a pity. One can certainly learn way more from losses than victories. Doctors have mortality and morbidity meetings, where they discuss why things went wrong with patients. Then they try to make sure those things don't happen again. We think that lawyers should do more of that: acknowledge losses, fess up to mistakes, and resolve to do better. Instead, we are more likely to hear lawyers either pretend losses didn't happen, or pin the losses on crazy judges, corrupt opponents, or imbecilic jurors. That should be a violation. That should draw a penalty flag. As Bill Parcells said (and, honestly, this is about the deepest thing we've heard anybody say in the last 10 years), "You are what your record says you are."

Lately, we've posted some accounts of cases that didn't turn out so well for those of us huddled on the right side of the "v." First of all, let's face it that sometimes the defendant is supposed to lose. Facts are stubborn things. Anyway, it can be tricky to identify what actually constitutes a loss. We've seen plaintiff lawyers walk away with 'wins' that probably didn't cover their experts' hotel bills. But let's also face the fact that lawyers sometimes lose by overcomplicating things, by burying one or two good arguments in a mountain of credibility-killing weak arguments. If the judge or jury is confused, the lawyer could have done better.

It's not always easy to tell from a published opinion what went wrong. In *Rossum v. I-Flow Corp*., 2011 U.S. Dist. LEXIS 84985 (D. Minn. August 1, 2011), the defense lost a motion to dismiss, and the judge's opinion makes the loss look inevitable. Indeed, the judge's opinion makes the defense motion look like Garo Yepremian's 'pass' in Super Bowl VII. Rossum claimed that a pain pump caused permanent degeneration of cartilage in her shoulder. She claimed, among other things, that the manufacturer "made representation and omissions" [how does one make an omission?] to the treating doctor regarding the safety of using the pain pumps in joint spaces. *Rossum*, 2011 U.S. Dist. LEXIS 84985 at *2. The plaintiff alleged that the defendant "misled the medical community, and the general public, by making false representations about the safety of their Pain Pump." *Id.* The defendant moved dismiss the negligent misrepresentation and fraud counts on the ground of preemption.

We like preemption almost as much as a November game in Lambeau Field on the frozen tundra, so we were ready to settle in for a tense battle. Instead, we got an Arena football game where the best player was named "He Hate Me" or "Garth the Most Savage Troll of All." According to the judge's opinion, the defendant "argues that Plaintiffs' misrepresentation and fraud claims are *impliedly* preempted under *Buckman*." 2011 U.S. Dist. LEXIS 84985 at *7 (emphasis in original). Okay. That's weird, given that the allegations in the case were that misrepresentations were made to the physicians, not the FDA. The court goes on: "In its Reply, however, I-Flow argues that some of Plaintiff's claims are *expressly* preempted under the MDA." *Id.* (emphasis in original). The Reply apparently didn't specify which counts warranted express preemption, and oral argument further muddied the waters when the defendant said that express preemption applied to counts that were not included in the motion to dismiss. *Id.* Hmmm. Something is seriously wrong here. Either the defendant really did fumble things, or the judge was confused. But if the judge was confused, maybe the defense fed that confusion. Anyway, it takes only a few paragraphs in the opinion to know how this one is going to turn out. It's a blow-out in the first quarter. (If you're getting the sense that we really miss football, you're right.)

The judge tosses the *Buckman* theory out because it just doesn't seem to apply.

More time is spent on sorting out the express preemption argument. Based on the pleadings and based on assertions by the plaintiff counsel during oral argument that went uncontradicted by defense counsel, the court concluded that the pain pumps lacked Premarket Approval (PMA) and were a class II device. 2011 U.S. Dist. LEXIS 84985 at *5. The court explains in a footnote how it went on to the FDA website to sort out the product's regulatory status. Frankly, it reads as if the court felt it was getting insufficient help from the parties. The court then holds that *Riegel* does not apply but that *Lohr* does. And while the court expends a bit more ink rejecting the defendant's claim that the misrepresentation and fraud claims lack specificity, the plaintiff can basically go into the victory formation and run out the remaining seconds of the game.

As we mentioned last week, and probably lots of other times, *Lohr* is not our favorite case. If Sachse wakes up in the middle of the night in a cold sweat, it's got to be either *Lohr* or the overload of Detroit Lions on his fantasy football team. Funny thing about that *Lohr* abomination: both the plaintiff and the defendant sought certiorari. Maybe one of those parties had it wrong. If the theme of today's post is understanding loss, and if the conceit is law-as-football, then we have to admit that when we lose it isn't always because somebody fixed the game. Sometimes the other side outplays us. And sometimes there are unforced errors and turnovers.