# A Little Rain In The Desert

**Tuesday, June 28, 2011**

Several years ago (just writing that makes us feel tired) we put up a mournful post entitled In The Deserts Of New Mexico, in which we expressed our disappointment that a federal judge – any federal judge – would ignore no fewer than four intermediate appellate decisions from the New Mexico Court of Appeals and predict that New Mexico law would not adopt the learned intermediary rule.

But that's precisely what the court in Rimbert v. Eli Lilly, 577 F. Supp.2d 1174, 1214-24 (D.N.M. 2008), did – waving away previously consistent New Mexico precedent. Cf. Serna v. Roche Laboratories, 684 P.2d 1187, 1189 (N.M. App. 1984); Jones v. Minnesota Mining & Manufacturing Co., 669 P.2d 744, 748 (N.M. App. 1983); Perfetti v. McGahn Medical, 662 P.2d 646, 650 (N.M. App. 1983); Richards v. Upjohn Co., 625 P.2d 1192, 1195 (N.M. App. 1980); and Hines v. St. Joseph's Hospital, 527 P.2d 1075, 1077 (N.M. App. 1974), all adopting the learned intermediary rule. We felt we were in the Land of Disenchantment.

Well, there was a change in judges in Rimbert, and that case was promptly bounced on causation grounds, as we reported here. So the learned intermediary issue fell by the wayside in Rimbert, leaving that disenchanting decision on the books.

Today, we're pleased to report, courtesy of our friends at Sidley, that a little rain has fallen in the New Mexican desert. In the Trasylol litigation, the MDL court was faced with a New Mexico plaintiff (or at least a New Mexico procedure undertaken by a New Mexico physician) where the evidence was undisputed that the doctor – a tertiary care heart surgeon – would have used Trasylol regardless of any warning and, given the serious condition of the patient, would not have provided any different warnings to the patient. To make a long story short, the patient was dying of heart disease and was airlifted to an Albuquerque hospital where a long open-heart procedure involving lots of drugs and medical devices was performed.

The more learned the intermediary, the more likely the rule is to come in handy.

So once again summary judgment came down to the learned intermediary rule in a New Mexico case, because there was no way any different warning to this doctor would have affected the outcome. The court thought so too. The MDL judge in In re Trasylol Products Liability Litigation, No. 08-cv-80399, slip

op. (S.D. Fla. June 23, 2011), without hesitation predicted that New Mexico law was as stated in the multiple Court of Appeals decisions – and not Rimbert. Slip op. at 8-9 & n.11.

Even better, the court did a little Erie research and came up with a Supreme Court decision that directly addressed what courts should do when a state's high court hasn't decided an issue but the state's intermediate appellate court has. Trasylol, slip op. at 8 n.11 (citing Goodling v. Wilson, 405 U.S. 518 (1972)). Absent a "conflicting" supreme court decision, federal courts should follow the state appellate court consensus. Id.

That's useful because, according to our learned intermediary 50-state survey, several other states are essentially in the same position vis-à-vis the learned intermediary rule as New Mexico – Arizona, Colorado, Louisiana, and (for the time being, anyway) Texas.