An Easy Case Makes Good Learned Intermediary Law

Tuesday, July 05, 2011

Who says one can have too much of a good thing? Yesterday we lost count of the burgers and helpings of potato salad we piled in front of us on the picnic table. (We were doing a Joey Chestnut imitation.) We wanted more pie. More Springsteen on the boombox. More **Twilight Zone** episodes. (Cable marathon, for those of you not in The Know.) More fireworks. More days off.

Our firm usually gets the hardest cases. We don't often survey the evidence and encounter an embarrassment of riches. Imagine our envy when we read the facts of *Legard v. Ortho-McNeil Pharmaceutical, Inc.*, 2011 U.S. Dist. LEXIS 67997 (N.D. Ohio June 24, 2011). If ever a case called out for application of the learned intermediary doctrine, this was it.

Allow these facts to rain upon you, and grieve that you are seldom so lucky:

- Plaintiff was prescribed the birth control patch in 2002.
- Plaintiff complained of leg pain in May 2006. Upon her doctor's advice, she agreed to discontinue use of the patch.
- Plaintiff was, by the way, a nursing student.
- Plaintiff went to a clinic and complained of leg pain. She advised the clinic's doctor that she had been advised by her personal doctor of the risk of clots and had been told to remove the patch. When she arrived at the clinic, Plaintiff was still wearing the patch.
- Plaintiff underwent a vascular study, with negative results.
- In July 2006, Plaintiff attempted to refill her prescription, but her doctor insisted on seeing her first.
- Plaintiff saw her doctor and told him she wanted to continue using the patch. He agreed after learning of the negative vascular study.
- Plaintiff continued using the patch until Feburary 2007, when she presented at a medical center complaining of leg pain. A new vascular study showed deep vein thrombosis.
- Plaintiff stopped using the patch.
- Plaintiff filed a lawsuit in Louisiana state court. It was removed to federal court and became part of the MDL.

Defendant filed a motion for summary judgment on Plaintiff's failure-to-warn claims based upon application of the learned intermediary doctrine. Plaintiff did not file an opposition. (In criminal cases, this sort of thing is called a 'slow guilty plea.')

Why didn't Plaintiff file an opposition? Here comes another set of bullet points:

- Plaintiff's doctor testified that he was aware of the potential risks of the patch.
- Plaintiff's doctor also testified that "he took into account the information provided by the manufacturer, the patient's medical history, her physical condition, her health as well as the risks and benefits for the particular patient." *Legard*, 2011 U.S. Dist. LEXIS 67997 at *9.
- Plaintiff "acknowledged the risks of blood clots based upon her reading of the package insert." Id.

The court had little difficulty dismissing the case because Plaintiff had not demonstrated that Defendant failed to warn the doctor of a risk that was not otherwise known to the physician. *Id.* at * 12. Moreover, "no additional information regarding the patch would have changed the presciber's decision to continue use by the Plaintiff." *Id.*

That was enough. Plaintiff's own knowledge was extra -- gravy on the spuds, cherry on the ice cream, and bacon on top of more bacon.

So much for easy cases. Now get back to work.