Give Us A T For Tennessee

Wednesday, June 29, 2011

Since we haven't heard any of the services mention it, we thought we'd point out that the learned intermediary rule recently got a lengthy endorsement in prescription medical product cases from the Tennessee Supreme Court:

"[T]he learned intermediary doctrine. . ., which allows a seller in a failure to warn case to rely on an intermediary to convey warnings about a dangerous product, derives from section 388 of the Restatement (Second) of Torts (1965). Comment n to section 388 provides that when a seller sells a product to an intermediary, the seller may rely on the intermediary to provide warnings to the user of the product if such reliance is reasonable under the circumstances. Although section 388 addresses a supplier's duty to warn under the law of negligence, courts also apply its principles to the duty to warn in strict liability.

Traditionally, the learned intermediary doctrine has been applied to warnings related to prescription drugs. The doctrine constitutes a defense by pharmaceutical manufacturers in cases where a plaintiff has suffered injury from a medication prescribed by a doctor. Physicians, who play a pivotal role in the distribution of prescription drugs, are the intermediaries relied on by manufacturers to give warnings to patients. A majority of jurisdictions, including Tennessee, recognize that a pharmaceutical manufacturer can discharge its duty to warn by providing the physician with adequate warnings of the drug's risks. In Tennessee, the learned intermediary doctrine is applicable in failure to warn suits where a physician is the intermediary between a defendant pharmaceutical or other medical product manufacturer and an injured patient."

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The rationale for the doctrine limits its application to the unique circumstances of the medical arena where a physician seeks to find the optimal treatment for a particular patient, as indicated in the following discussion of that rationale as it pertains to prescription drugs:

"We cannot quarrel with the general proposition that where prescription drugs are concerned, the manufacturer's duty to warn is limited to an obligation to advise the prescribing physician of any potential dangers that may result from the drug's use. This special standard for prescription drugs is an understandable exception to the Restatement's general rule that one who markets goods must warn

foreseeable ultimate users of dangers inherent in his products. Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug as well as the susceptibilities of his patient. His is the task of weighing the benefits of any medication against its potential dangers. The choice he makes is an informed one, and individualized medical judgment bottomed on a knowledge of both patient and palliative."

Nye v. Bayer Cropscience, Inc., ___ S.W.3d ___, 2011 WL 2184317, at *10-13 (Tenn. June 7, 2011) (quoting a case that quotes a case that ultimately quotes Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1276 (5th Cir. 1974), other citations omitted).

Anyway Nye makes us happy because it's one more reaffirmation, from a state high court that the learned intermediary rule is alive and well in the kind of prescription medical product cases that we defend. We can't say, however, that our feelings are shared by the defendant in Nye.

That's because Nye did not involve a prescription medical product. Rather, it was an asbestos case. The question that the court ultimately decided in Nye was whether the learned intermediary rule and what we call the "sophisticated purchaser defense" are one in the same. We're not going to comment on that, because we don't want to say anything that could possibly get quoted back at us in a one of our own cases not involving drugs or devices. The reasons why some courts don't apply the learned intermediary rule to all arguably "learned" intermediaries are set out at length in Nye. For the reasons why other courts disagree, we recommend reading Alm v. Aluminum Co. of America, 717 S.W.2d 588, 591-92 (Tex. 1986), or one of the cases cited in Alm.