While Plaintiff Slept, Learned Intermediary Got a Re-affirming Wake Up

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For my first venture in blogging, I bring you a sweet learned intermediary victory made all the sweeter by the opposition's falling asleep at the switch – Dykes v. Johnson & Johnson, 2011 U.S. Dist. LEXIS 55138 (E.D. La. May 20, 2011) – a win/win in our book.

First, a little background: plaintiff underwent a hysterectomy during which her surgeon used a medical product (an absorbable hemostat) to help control bleeding. A few days later plaintiff claimed she suffered an inflammatory response wherever the hemostat had touched her body (described as a poison ivy type reaction in the bowel area). Clearly not a pleasant experience for plaintiff, but a risk both known in the medical community (her surgeon learned about foreign body reactions in medical school) and warned about by the manufacturer in the package insert:

> **PRECAUTIONS**: Use only as much SURGICEL Hemostat as is necessary. . . . Remove any excess before surgical closure in order to . . . minimize the possibility of **foreign body reaction**.
>
> **ADVERSE REACTIONS**: Encapsulation of fluid and **foreign body reactions** have been reported.

Id. at 4. Can't get much plainer than that.

But, I'm getting ahead of myself.

The devil was in the procedure. After the case had sat around for seven months, the court entered a scheduling order allowing nine more months for discovery. So, what did plaintiff's counsel do for those 9 months – ***nothing***! No interrogatories. No document requests. No noticing depositions. Not even hiring an expert to opine on the adequacy of the warning. Id. at 14-15.

Finally, when the defendant deposed the surgeon who performed plaintiff's hysterectomy – the key deposition of the whole case – plaintiff's counsel failed to ask THE question: whether the manufacturer's warning would have been adequate to inform her of the risk. See fn. 1.
It gets worse. Three months before the close of discovery, plaintiff's counsel told the judge that discovery was proceeding *without problem*. Id. at 5. That's probably true, since if nothing's happening, then there probably aren't any problems. We should all be so lucky to get this much help from opposing counsel.

Then, the inevitable happened. Defendants filed a motion for summary judgment. At that point plaintiff woke up, and sought a trial continuance on the grounds that more (any?) discovery was needed. Win #1 – Kudos to the court for denying the continuance request, holding:

> The fact that the motion to continue was denied should not have come as any surprise to plaintiff; counsel will not be rewarded for such dilatory trial preparation with a fishing expedition as this juncture.

Id. at 15.

Win # 2 – summary judgment granted because plaintiff could not satisfy either prong of Louisiana's two-prong test for proving an inadequate warning claim in a learned intermediary case. First, was the physician inadequately warned? If so, second, was that inadequacy both the cause in fact and the proximate cause of plaintiff's injury? Id. at 10. As to adequacy, Louisiana (like most places) looks to the testimony of the prescribing physician, who here acknowledged that she was aware of the risk since medical school and that the package insert did include a warning.

> Q: "Certainly the package insert does indicate a warning of foreign body reactions, right?"
>
> A: "Right, yeah."

Plaintiff had not bothered to probe this testimony at the deposition. She also failed to offer any expert testimony to the contrary. Nothing plus nothing equals nothing. The court found the defendant's warning adequate as a matter of law and plaintiff's failure to warn claim ended there. Id. at 12.

To make the rubble bounce, the court went on to find that even if the warning had been inadequate, plaintiff's claim still would have failed because plaintiff could not establish causation: "Dr. Williams never read the warning, and thus the warning played no role in the events leading up to plaintiff's injury." Id. at 13. So, don't wince when a physician says they've never seen the package insert for your client's product. Whenever a treater says that, it means there was nothing different your client could have done that would have changed the physician's decision to use the product or prescribe the drug. That's like not asking for directions. Or worse, it's like warning your husband that eating the large Italian hoagie with extra hot peppers is going to give him heartburn – something he's known the risk of since the day he turned 30 – it simply won't change his mind. *[Note, as the first woman blogger on this site, expect to see more of a female perspective. Get used to it, guys!]*