Phony Choices

Monday, June 20, 2011

It's hard to draft the Monday post without being unduly influenced by the weekend's bloviations and dissipations. Between the WSJ weekend review section, the NYT Week in Review, the television parade of talking heads, and the requisite pitcher of mojitos on the deck, at least one random and silly Big Thought is certain to weasel its way into our case discussion. This week's semi-pertinent idea comes from a WSJ article on the "Death of Duopoly." The article discusses how binary power is bad for business (e.g., it wasn't good when photographers were stuck with just Kodak or Fuji for their film needs) and also probably bad for the public interest. The focus was on the phony or feckless choices presented by Republicans vs. Democrats. The WSJ presented some of those creepy photo merges, such as Obama and W, Carter and Reagan, and Nixon and Kennedy. The point seemed to be that the two choices are inadequate and usually crumble after a long enough period of consumer dissatisfaction. Thus, digital photography wrecked the Kodak-Fuji duopoly. And wither the Whigs?

Of course, we usually don't see the Next Thing coming. We are plagued by something that has to go down as the best phrase we've heard so far this year: "existence bias." People assume that the status quo will endure. The ultimate point of the WSJ article seemed to be that something new will emerge from the current political gridlock and might already be slouching toward us. Frankly, we were more interested in other examples of sticky choices, such as Celtics-Lakers or Beatles-Stones. (When we were in college, you were supposed to pick sides between the Talking Heads or Springsteen. Decades later, that choice seems as dumb and pointless as Beatles-Stones and now it's obvious from the calm perch of middle age that one can like them both. And for those of us who do, the recent passing of Clarence Clemons is as sad as the long, wailing sax note near the end of "Jungleland." It was, indeed, momentous when the Big Man joined the Band.)

There's a phony choice in the middle of the recent opinion in *In re Zicam Cold Remedy*, 2011 WL 2181188 (D. Ariz. June 3, 2011). It results in a ruling that is weaker than the mojito from the bottom of the pitcher after most of the ice has melted. The defendant moved for summary judgment on general causation grounds. The plaintiffs claimed that Zicam results in loss of the sense of smell. And if "existence bias" is the phrase of the day, then "anosmia" is the word of the day.

A friend has lacked a sense of smell since she was an infant. She claims it's an advantage, on the theory that people are more likely to complain about smells rather than praise them. We're not so sure.

Maybe the smell of freshly baked madeleines won't inspire us to write a novel, but certainly among life's riches are the aroma of coffee in the morning, a gas station stop on the way to the Shore, and our kids' sweaty feet while running around the maze at Chuck E. Cheese. (When they were toddlers. Not now. Definitely not now.) So, yes, we side with the plaintiffs on this one.

So much for the olfactory sense. The legal issue is "whether plaintiffs must introduce evidence of the level of exposure that could cause anosmia, i.e., whether they must demonstrate a toxic dose." *In re Zicam*, 2011 WL 2181188 at *2.

Our answer to that question: Of course! The court's: 'Nah.' The court acknowledges the central tenet of toxicology about how "the dose makes the poison." For some reason, we've seen lots of defendants trot that out before juries over and over. Sure, the point is valid and important. But we squirm when a defendant calls its own product "poison." Surely, there's a better way of making the point that anything -- including water -- is potentially harmful if you take too much.

How much is too much? That’s the question.

Anyway, given that nobody disputes that central tenet of toxicology, how can someone claim that a product is harmful without establishing what amount it takes to cause the harm?

The *Zicam* court erects a straw man about how plaintiffs need not offer a "mathematically precise table equating levels of exposure with levels of harm." *Id.* at *5, quoting *Wright v. Willamette Indus. Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996). Okay, but how about at least offering evidence that there's some dose that causes the harm -- maybe even the standard dose that people take? Here's where the court builds its decision on a false dichotomy. The court says there should be different standards for "products liability" and a "toxic tort." The latter requires proof of a harmful dose, but the latter does not. *Id.* at *3.

Say what? Well, why? No good answer that we can think of.

Even here, the court is confronted with two product liability cases that require proof of toxic dose: (1) *McClain v. Metabolife Intern, Inc.*, 401 F.3d 1233, 1236 (11th Cir. 2005), and (2) *In re Bextra & Celebrex*, 524 F. Supp. 2d 166 (N.D. Cal. 2007). Here's what the *Zicam* court says about those cases: "Insofar as *McClain* and *Bextra* applied the 'toxic dose' requirement from environmental exposure litigation to drug products liability actions, they appear to be unique." *In re Zicam*, 2011 WL 2181188 at

* 4. Even if that's true, why are they wrong?

Well, "Toxicology and pharmacology are distinct disciplines." *Id.* at *5. Fine. (Though not enough courts remember that sort of thing when we file *Daubert* challenges against plaintiff omnibus experts. But we digress. Again.) Also: "[i]n environmental exposure litigation, plaintiff s may allege injury caused by a substance with which many people interact harmlessly at lesser degrees of exposure. In order to explain how a pervasive substance is harmful, one must show that at a particular level of exposure, the substance becomes toxic. Without requiring this kind of evidence, the door is open to meritless claims based on generally harmless levels of exposure." *Id.*

That, friends, is a distinction without a difference. The idea behind prescription drugs is that “many people interact harmlessly” with them – at their approved doses. The problem is when those doses aren’t harmless. Unless the plaintiff has an overdose case – or is just plain bizarre like the lady that used almost 200 pounds of denture cream – that’s precisely what the plaintiff has to prove.

Note how the court does even try to suggest that it is any harder to prove toxic dose in a "toxic tort" than in a "product liability" case. Instead the court says it shouldn't be necessary in a product liability case because there aren't as many potential plaintiffs or specious claims. Really? Have you counted the thousands of plaintiffs in "product liability" - not "toxic tort" - MDLs? Or seen how many, after just a little nudge of discovery, had minimal exposure to the product? Or had *Daubert* motions defeat the plaintiffs’ hand-picked best case? Why should the door be any more open in a case involving products that help thousands of people than in a toxic tort case?

More fundamentally, you won't find the "product liability" vs. "toxic tort" distinction in *Daubert* or the Rules. Science is science. Proof is proof. The binary analysis in the *Zicam* case makes no sense. When it derides the need for "precision" it is inviting the sort of sloppy science that *Daubert* was meant to foreclose. The court posed a false choice and then made the wrong choice. You might even say it stinks.