Wasting Time And Money

Wednesday, August 10, 2011

Most of the opinion in Riley v. Medtronics [sic], Inc., C.A. No. 2:10-01071, slip op. (W.D. Pa. Aug. 8, 2011), is a fact-specific statute of limitations discussion – oddly occurring in the context of a motion to dismiss – about a less-than-diligent plaintiff who did next to nothing until the statute had almost expired and an obstreperous (or so the plaintiff alleges) hospital that refused to turn over that plaintiff's own medical records when he (or more properly his lawyer) finally got around to requesting them. That's interesting in the sense that a car crash on the other side of the highway is interesting, but there's nothing in that that's really bloggable.

What interests us is the final argument where the defendant argued under Pennsylvania law (which imposes comment k "across the board" to prescription medical products) that the plaintiff's strict liability warning claim should be dismissed for failure to state a claim. The court denied this motion, too, not because of any uncertainty about the law, but because, from the face of the complaint, the court couldn't tell whether the product – described in the opinion as a "pacer box" – was in fact a prescription only product:

"Here, the Defendant is essentially arguing that this Court should infer, from the facts pled by Plaintiffs, that the pacer box is a prescription medical device. However, in their briefs, the parties disagree as to whether the pacer box constitutes a medical device or medical equipment. Neither party provides any basis for this Court to determine whether the aforementioned case law applies to the subject pacer box, as its status as a prescription medical device or medical equipment, has not been established, in the Second Amended Complaint."

Riley, slip op. at 20

It strikes us as a huge waste of time and money to deny a motion to dismiss for lack of such a basic fact. From the opinion, the "pacer box" sounds like some sort of pacemaker (it has leads, for one thing), and we're pretty sure that there's no such animal as an OTC pacemaker. More to the point, the basis for approval of medical devices is available to the public on the FDA's website. This kind of purely objective, and publicly available information – prescription-only or not – seems to us tailor-made for judicial notice. As we've blogged about before, FDA information of this sort (and much more) has been routinely judicially noticed in case after case.

The court in Riley never even mentions judicial notice, so we have to assume that this avenue of supplying the missing fact on a motion to dismiss was not raised. To us, that's a shame. In almost every case, the point of bringing a 12(b)(6) motion is to win it, and this is a motion that was eminently winnable. Now there will have to be discovery, which is expensive, and the cost of bringing the motion will be duplicated – all on an issue where the application of the law to the particular fact in question isn't really in serious dispute.

If only somebody had noticed judicial notice.