Ooee Gooey

Wednesday, July 20, 2011

When we (well, one of us) were little kids, we watched a TV show called the "Popeye Club." The host, Officer Don, would put four paper bags on a flat turntable – three of which were "goody bags" and one contained the infamous "ooey gooey" (mixed live on set, we recall). Officer Don would turn the turntable so blindfolded kids from the live audience who played the game almost always got the goody bags, but when Officer Don was blindfolded, well….

We may not remember much about our early elementary school days, but we still remember the exaggerated expression on Officer Don's face when he stuck his hand into the ooey gooey (made from stuff like coffee grounds, fresh broken eggs (shells included), Bosco, ketchup, and cottage cheese). Nobody could look more grossed out than Officer Don.

Reading the recent opinion in DiCosolo v. Janssen Pharmaceuticals, Inc., 2011 WL 2640801, slip op. (Ill. App. June 30, 2011), was a lot like getting the ooey gooey. Our expressions would have done Officer Don proud.

The decedent in DiCosolo died from some sort of drug overdose. She "had access to 11 central nervous system (CNS) depressants immediately prior to her death," including multiple sedatives (Clonazepam, Bextra, Topomax, Gabapentin), antidepressants (Venlafaxine), opiates (Avinza), narcotics (Duragesic), and barbituates (Butalbital). 2011 WL 2640801, at *1. The coroner tested her blood for some – not all, a bone of contention – of these drugs. Finding several present, he initially ruled the death a suicide. Id.

Then the plaintiff (the decedent's husband) received a recall letter for Duragesic – a transdermal (skin) patch with the narcotic fentanyl as its active ingredient. According to the recall, "a small percentage" of a certain batch "leaked medication" into the adhesive gel that could possibly cause an overdose. 2011 WL 2640801, at *2. The decedent's patches came from the batch. Id. The coroner's blood work also indicated a fentanyl overdose. Id. at *1.

Plaintiff got a lawyer. The lawyer prevailed on the malleable coroner to "change[] his conclusions . . . from 'suicide' to 'accident'." 2011 WL 2640801, at *2.

Then the real fun and games began. Plaintiff's complaint alleged "that the patch that [decedent] was wearing at the time of her death caused her respiratory arrest and death." Id.

However, plaintiff soon had a big problem.

He had kept the product.

Since when is keeping the product a problem? Most plaintiffs cause trouble for themselves by discarding the product.

Not this one.

Because the plaintiff kept the product, it could be tested – and it was. Turns out that the patch the decedent wore at her death wasn't one of the "small percentage" of the recalled product that leaked – something plaintiff did not dispute:

"On [irrelevant date], the director of process engineering for defendant . . . examined the preserved patch that [decedent] had been wearing at the time of her death and determined that it did not leak and contained no defect."

2011 WL 2640801, at *2.

Rather than contest that determination, the plaintiff filed a new complaint that targeted – not the patch used at the time of death, but – a patch that had been used the day before. That patch (the so-called "penultimate patch") could not similarly be proven non-defective as it "was not available because it was discarded by plaintiff." Id. at *4. The plaintiff accompanied the complaint with his too-good-to-be true affidavit that he just happened to remember that particular patch having gel issues, after having said nothing about that before. Id. at *2.

The court let plaintiff get away with this bait-and-switch, and let him proceed – and ultimately recover to the tune of $18 million – on the Illinois equivalent of the "malfunction theory"/res ipsa loquitur, despite no longer having the product. Actually, it was precisely because plaintiff no longer had the product:

> "A plaintiff is not required to present expert testimony that the product contained a specific defect. . . . A prima facie case that a product was defective and that the defect existed when it left the manufacturer's control is made by **proof** that in the absence of abnormal use or reasonable secondary causes the product failed 'to perform in the manner reasonably to be expected in light of [its] nature and intended function."

2011 WL 2640801, at *3 (citation and quotation marks omitted) (emphasis added).

Yuck.

The court allowed the plaintiff, after the most proximate product was conclusively proven non-defective, to switch theories and target as defectively manufactured a product that the plaintiff no longer retained and that could not be tested. 2011 WL 2640801, at *4. While **any** resort to circumstantial evidence is questionable in a manufacturing defect (as opposed to design defect) case, since those defects are inherently non-replicable, what really makes us grimace is how this theory actively encourages plaintiffs to destroy or discard the most crucial evidence in a product liability case, that being the product itself. That's the big ooey gooey – the precedential equivalent of coffee grounds and broken eggs.

It's simply wrong as a matter of sound jurisprudence to create incentives for plaintiffs to get rid of allegedly defective products, so that they can't be tested, and then to proceed on a circumstantial theory that testing could have disproved. Where, as in DiCosolo, the plaintiff (or perhaps the decedent, we don't think that matters) is responsible (whether intentionally or not) for the product being unavailable, the plaintiff should not be permitted to take advantage of his/her own actions and pursue a purely circumstantial case. Such theories should only be allowed where the product's absence was caused by a force of nature (such as

destruction by fire) or a third party (such as a hospital throwing away something that broke), not by the plaintiff's/decedent's own conduct. A party should never profit from his/her own destruction of evidence.

So this ooey gooey is off to to a most messy start. Now for some cottage cheese.

There really wasn't any product "malfunction." There was no collapsing ladder, nor dead mouse in a soda bottle, nor exploding microwave – just a patch that may or may not have oozed too much of a drug. Doesn't matter, held the court. Even though the plaintiff did "not address[] defendants' argument," 2011 WL 2640801, at *5, the court made up a response, relying upon a case where chemotherapy drugs escaped from an IV and ate a hole in the plaintiff's chest. Id. at *5-6 (citing Weedon v. Pfizer, Inc., 773 N.E.2d 720 (Ill. App. 2002)).

Well, drugs aren't supposed to eat holes in peoples' chests, and IV tubing exists to prevent that. We look at Weedon as the medical equivalent of the exploding microwave. If in DiCosolo the missing patch had left a huge burn on the spot where it had been, then Weedon would have been a proper analogy. The patch, however, didn't do anything of the sort. It just sat there – and a patient who had been using multiple central-nervous-system depressants died of respiratory failure. The court conceded that the patch's "operation" or "performance" is not observable, 2011 WL 2640801, at *6, but failed to draw the obvious conclusion that in such circumstances a malfunction-based theory simply shouldn't be available. Instead, it pounded an $18 million square peg into a round hole.

The court also mentioned that the coroner's blood work showed excessive amounts of fentamyl. 2011 WL 2640801, at *8. That was other evidence of an unobservable malfunction, it held.

That gets us to the ketchup.

Not only wasn't there a product malfunction in any meaningful sense of the term, there wasn't proper circumstantial proof either. Other secondary causes weren't ruled out by the evidence. As we alluded to earlier, the coroner failed to test for

all the other CNS-depressing drugs that the decedent had been taking. We didn't mention why – the plaintiff omitted several of them from the "first call list" of the decedent's medications that he gave the coroner. 2011 WL 2640801, at *9. The coroner thus didn't know what to test for. Once again, the plaintiff was responsible for the absence of critical evidence.

Not only that, "plaintiff threw the remaining pills out within the first few months after his wife died." Id.

Didn't matter. The trial court "exclude[d] all evidence or argument regarding drugs that were not found in [decedent's] system," 2011 WL 2640801, at *9 – that is, the drugs that the coroner didn't test for, mostly due to the plaintiff's withholding of information. The DiCosolo court affirmed, saying, in effect, "so what?"

> "Although admission of evidence related to [other drugs] may have rendered a matter in issue more or less probable, *i.e.* . . . whether a synergistic combination of CNS depressants, including [that drug], was a cause of [decedent'] death, we do not believe that it would have affected the outcome of the trial. There was overwhelming evidence regarding the defective . . . skin patch causing [decedent's] death."

Id. at *11.

Overwhelming evidence?

That's just pure [something Officer Bob wouldn't be allowed to use in ooey gooey]. The court had just gotten through allowing plaintiff to get away with: (1) throwing away the product, and (2) proceeding on a malfunction theory in the absence of any obvious malfunction. Now, all of a sudden this dog of a case becomes "overwhelming evidence"?

Not even the court could have believed what it was writing – or else it wouldn't have gone on to criticize the defendant for not itself demanding additional "post-mortem" blood tests. 2011 WL 2640801, at *11. Even putting aside the obvious question of when (Should defendant have demanded exhumation of the corpse?

We're sure the jury would have loved that.), the defendant had no such obligation.

Under the Illinois malfunction theory, plaintiff retained the burden of proof. 2011 WL 2640801, at *3 ("[a] plaintiff in a product liability case, must prove . . . that in the absence of abnormal use or reasonable secondary causes the product failed to perform in the manner reasonably to be expected") (citation and quotation marks omitted).

So it wasn't the defendant's obligation to prove the secondary cause – that is, the other equally deadly drugs plaintiff had been using – it was the plaintiff's burden to establish its absence. Exclusion of the other drugs was plainly prejudicial, since it allowed plaintiff to give the jury a false impression that alternative causes, strongly suggested by the excluded evidence, didn't exist.

How about some Bosco?

The court permitted the plaintiff to treat the recall – involving a "small percentage" of the recalled product, and definitely not the only patch that could be tested – as evidence of a defect. Illinois law forbade using a recall as evidence of defect where the problem causing the recall only "might exist in some" of the recalled products. 2011 WL 2640801, at *12 (quoting Millette v. Radosta, 404 N.E.2d 823, 835 (Ill. App. 1980)).

Then throw in some warm jello.

The court allowed evidence of fraud on the FDA, and then allowed an "expert" (without any FDA qualifications whatever) to testify that the defendant had committed a "federal offense." 2011 WL 2640801, at *14. That's wrong for so many reasons that we'll just summarize the ones occurring to us: (1) the email supposedly referring to "deceiv[ing]" the FDA had nothing to do with this product or this recall; (2) evidence suggesting fraud on the FDA is preempted under Buckman (something we've discussed here); (3) Illinois law does not allow plaintiffs to assert FDCA violations as a basis of state-law liability, Martin v. Ortho Pharmaceutical Corp., 661 N.E.2d 352, 356-57 (Ill. 1996); (4) the email was

excludable under the Dead Man's Act because the author (an employee of the defendant) was dead; (5) the expert was completely unqualified to offer such opinions; (6) the whole subject, having nothing to do with the product, was far more prejudicial than probative.

And let's top off this unsavory concoction with some turpentine, or linseed oil, or something else smelly and flammable.

The court "disapproved" of the inflammatory closing argument "in which plaintiff's counsel repeatedly accused defendants of 'killing' [decedent] and 'corporate greed run amok,' [and] also made a comment that defendants presented a 'frivolous defense'." 2011 WL 2640801, at *15-16. Why was this OK? We can't even tell. The opinion just says no abuse of discretion, no new trial. Id. at *16.

If not from the jury being inflamed, we'd like to know what possibly could be the basis of an $18 million verdict for a middle-aged (38), probably unemployed (the decedent had disabling pain, and no job was mentioned in the opinion), multiple drug user who died (no medical expenses) in her sleep (no pain and suffering). That's the kind of number more likely produced by death in a fiery automobile accident, or else by a large lost income claim.

But once again, we come away from DiCosolo with Officer Bob's expression on our faces. The opinion's **entire** factual discussion of the remittitur issue consists of two sentences:

> "We cannot say that the verdict in this case falls outside the range of fair and reasonable compensation or is so large it shocks the judicial conscience. We therefore deny defendants' request for a remittitur."

2011 WL 2640801, at *17.

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