The Closing Of The Learned Intermediary Frontier

Thursday, June 2, 2011

It was the last blank space on the legal map – the only state with no precedent whatsoever. As we mentioned earlier in the week, Rhode Island has now fallen. There now remains no state in the country totally without precedent concerning the learned intermediary rule. Granted, for now it's only an oral ruling in a transcript, but a federal judge has predicted that Rhode Island would join the overwhelming consensus of jurisdictions and follow the learned intermediary rule:

> First of all, after the learned intermediary doctrine, that has been adopted by over two dozen jurisdictions and, I think, Rhode Island would adopt it as well.
>
> I see nothing in Rhode Island case law, including the Castrugnano [sic, should be Castrignano] case, to suggest that Rhode Island would require direct patient warning in pharmaceutical drug cases. Just because 4024 A [sic, should be 402A] of the second restatement says nothing about the learned intermediary doctrine doesn't bother me. There are a lot of states that adopted both.
>
> If Rhode Island doesn't accept the doctrine in the way that most courts have, then it's likely it's going to look to the third restatement, which requires direct warnings when the manufacturer has reason to know that the health care provider will not be in a position to reduce the risk to the patient.
>
> Unlike the mass inoculation vaccine scenario that the restatement mention in one of its comments, Zometa is a very serious therapy that is commenced after consultation with doctors. . . . As intended there Zometa is a type of drug learned intermediary doctrine encourages a doctor-patient dialogue.
>
> Zometa does not fall within the exception of the restatement and I, therefore, find a direct warning to Mr. Hogan was not required.

Hogan v. Novartis Pharmaceuticals Corp., 06 CV 260, Trial Tr. (5/23/11), at 387-88 (E.D.N.Y.). The same court had discussed the learned intermediary rule with approval, but avoided a direct ruling, in Hogan v. Novartis Pharmaceuticals Corp., 2011 WL 1533467, at *9 (E.D.N.Y. April 24, 2011).

Given that there is no longer any untamed legal frontier (the effort now shifts to whether appellate courts might change existing precedent), this seems like a good time to review the

positions and precedents of the various states with respect to the learned intermediary rule. In doing this, we'll be combining three prior lists. The main count, of course, will be the learned intermediary rule itself, but we'll also add, because we have the data available, whether the state has: (1) applied the learned intermediary rule in medical device cases, and (2) applied the rule to protect pharmacists from direct-to-consumer warning claims.

Here goes:

There are, by our count, thirty-four states and the District of Columbia, in which the learned intermediary rule has been adopted either by the jurisdiction's highest court or by statute (which we consider equally authoritative). These are:

Alabama

Nail v. Publix Super Markets, Inc., ___ So.3d ___, 2011 WL 1820087, at *6-7 (Ala. May 13, 2011) (applied to pharmacists); Springhill Hospitals, Inc. v. Larrimore, 5 So.3d 513, 517-18 (Ala. 2008) (applied to pharmacists); Walls v. Alpharma USPD, 887 So.2d 881, 883 (Ala. 2004) (applied to pharmacists); Morguson v. 3M Corp., 857 So.2d 796. 801-02 (Ala. 2003) (applied to medical devices); Stone v. Smith, Kline & French Laboratories, 447 So.2d 1301, 1305 (Ala. 1984).

Alaska

Shanks v. Upjohn Co., 835 P.2d 1189, 1200 & n.17 (Alaska 1992). There's no precedent in Alaska (that we know of) concerning medical devices or pharmacists and the learned intermediary rule.

Arkansas

Kowalski v. Rose Drugs of Dardanelle, Inc., ___ S.W.3d ___, 2011 WL 478601, at *?? (Ark. Feb. 9, 2011) (applied to pharmacists); West v. Searle & Co., 806 S.W.2d 608, 613 (Ark. 1991). At one time, the Arkansas Supreme Court applied the rule to a medical device in Despain v. Bradburn, 2008 WL 324356 (Ark. Feb. 7, 2008), but rehearing was granted on other grounds (preemption), and the Despain opinion no longer exists. There's no other Arkansas precedent that we know of that addresses the rule in medical device cases.

California

Carlin v. Superior Court, 920 P.2d 1347, 1354 (Cal. 1996); Brown v. Superior Court, 751 P.2d 470, 477 n.9 (Cal. 1988); Stevens v. Parke, Davis & Co., 507 P.2d 653, 660 (Cal. 1973). In

Murphy v. E.R. Squibb & Sons, Inc., 710 P.2d 247, 250-53 (Cal. 1985), the California Supreme Court exempted pharmacists from duty to warn liability, but without specifically mentioning the rule. A raft of California intermediate appellate decisions applies the learned intermediary rule to medical devices. Valentine v. Baxter Healthcare Corp., 81 Cal. Rptr.2d 252, 262 (Cal. App. 1999); Evraets v. Intermedics Intraocular, Inc., 34 Cal. Rptr.2d 852, 860 (Cal. App. 1994); Plenger v. Alza Corp., 13 Cal. Rptr.2d 811, 818-19 (Cal. App. 1992); Hufft v. Horowitz, 5 Cal. Rptr.2d 377, 385 n.14 (Cal. App. 1992); Rosburg v. Minnesota Mining & Manufacturing Co., 226 Cal. Rptr. 299, 305 (Cal. App. 1986).

Connecticut

Hurley v. Heart Physicians, P.C., 3 A.3d 892, 899-900 (Conn. 2010) (applied to medical device); Hurley v. Heart Physicians, P.C., 898 A.2d 777, 783-84 (Conn. 2006) (applied to medical device); Vitanza v. Upjohn Co., 778 A.2d 829, 836-38 (Conn. 2001). A combination of state and federal trial courts has applied the learned intermediary rule to pharmacists. Levesque v. Cluett, 2007 WL 4305676, at *3 (Conn. Super. Oct. 16, 2007); Deed v. Walgreen Co., 927 A.2d 1001, 1003-04 (Conn. Super. 2007); Plante v. Lomibiao, 2005 WL 1090180, at *3-4 (Conn. Super. Mar. 31, 2005); Deed v. Walgreen Co., 2004 WL 2943271, at *5 (Conn. Super. Nov. 15, 2004); White v. Stop & Shop Cos., 1998 WL 559730, at *2 (D. Conn. Aug. 17, 1998).

Delaware

Lacy v. G.D. Searle & Co., 567 A.2d 398, 400-01 (Del. 1989) (applied to medical device). We don't know of Delaware law concerning the rule and pharmacists.

District of Columbia

Mampe v. Ayerst Laboratories, 548 A.2d 798, 801 & n.6 (D.C. 1988). In Raynor v. Richardson-Merrell, Inc., 643 F. Supp. 238, 246-47 (D.D.C. 1986), and Ealy v. Richardson-Merrell, Inc., 1987 WL 159970, at *2-3 (D.D.C. Jan. 12, 1987), federal district courts held that the rule precluded pharmacist liability. We don't think there's been a medical device/learned intermediary rule case in DC yet.

Florida

E.R. Squibb & Sons, Inc. v. Farnes, 697 So.2d 825, 827 (Fla. 1997); Upjohn Co. v. MacMurdo, 562 So.2d 680, 683 (Fla. 1990); Felix v. Hoffmann-LaRoche, Inc., 540 So.2d 102, 104 (Fla. 1989). In McLeod v. M.S. Merrell Co., 174 So.2d 736, 738-39 (Fla. 1965), the Florida Supreme Court exempted pharmacists from duty to warn liability, but without specifically

mentioning the rule. A bunch of federal district courts have applied the learned intermediary rule to medical devices under Florida law – these are just the published ones. Wolicki-Gables v. Arrow International, Inc., 641 F. Supp.2d 1270, 1286-87 (M.D. Fla. 2009), aff'd on other grounds, 634 F.3d 1296 (11th Cir. 2011); Beale v. Biomet, Inc., 492 F. Supp.2d 1360, 1367-68 (S.D. Fla. 2007); Alexander v. Danek Medical, Inc., 37 F. Supp.2d 1346, 1350 (M.D. Fla. 1999); Baker v. Danek Medical, Inc., 35 F. Supp.2d 875, 881 (N.D. Fla. 1998); Savage v. Danek Medical, Inc., 31 F. Supp.2d 980, 984 (M.D. Fla.), aff'd mem., 202 F.3d 288 (11th Cir. 1999); Zanzuri v. G.D. Searle & Co., 748 F. Supp. 1511, 1517-18 (S.D. Fla. 1990); Amore v. G.D. Searle & Co., 748 F. Supp. 845, 849-50 (S.D. Fla. 1990).

Georgia

McCombs v. Synthes (U.S.A.), 587 S.E.2d 594, 595 (Ga. 2003) (applied to medical device). Georgia appellate courts have also barred claims against pharmacists. Nail v. State, 686 S.E.2d 483, 485-86 (Ga. App. 2009); Chamblin v. K-Mart Corp., 612 S.E.2d 25, 28-29 (Ga. App. 2005); Walker v. Jack Eckerd Corp., 434 S.E.2d 63, 67-69 (Ga. App. 1993).

Hawaii

Craft v. Peebles, 893 P.2d 138, 155 (Hawaii 1995) (applied to medical device). We haven't seen any pharmacy liability cases out of Hawaii.

Illinois

Happel v. Wal-Mart Stores, Inc., 766 N.E.2d 1118, 1127 (Ill. 2002) (applied to pharmacists); Hansen v. Baxter Healthcare Corp., 764 N.E.2d 35, 42 (Ill. 2002) (applied to medical device); Martin v. Ortho Pharmaceutical Corp., 661 N.E.2d 352, 354 (Ill. 1996); Frye v. Medicare-Glaser Corp., 605 N.E.2d 557, 559-61 (Ill. 1992) (applied to pharmacists); Kirk v. Michael Reese Hospital & Medical Center, 513 N.E.2d 387, 393 (Ill. 1987). The Seventh Circuit recently ordered federal courts to respect Illinois' application of the learned intermediary rule to pharmacists. Walton v. Bayer Corp., ___ F.3d ___, 2011 WL 1938428, at *5-6 (7th Cir. May 23, 2011).

Kansas

Savina v. Sterling Drug, Inc., 795 P.2d 915, 928 (Kan. 1990); Humes v. Clinton, 792 P.2d 1032, 1039-40 (Kan. 1990) (applied to medical device); Tetuan v. A.H. Robins Co., 738 P.2d 1210, 1227-28 (Kan. 1987) (applied to medical device); Johnson v. American Cyanamid Co., 718 P.2d 1318, 1324 (Kan. 1986); Wooderson v. Ortho Pharmaceutical Corp., 681 P.2d 1038,

1052 (Kan. 1984). In Nichols v. Central Merchandise, 817 P.2d 1131, 1133 (Kan. App. 1991), the court barred pharmacist claims.

Kentucky

Hyman & Armstrong, P.S.C. v. Gunderson, 279 S.W.3d 93, 109-110, 112 (Ky. 2008); Larkin v. Pfizer, Inc., 153 S.W.3d 758, 761 (Ky. 2004) (dictum also extends rule to medical devices). Several Kentucky federal courts have barred pharmacist claims under the rule. Flint v. Target Corp., 2009 WL 87469, at *3-4 (W.D. Ky. Jan. 13, 2009), aff'd, 362 Fed. Appx. 446 (6th Cir. 2010); Smith v. Wyeth Inc., 488 F. Supp.2d 625, 628-29 (W.D. Ky. 2007); Foister v. Purdue Pharma, L.P., 295 F. Supp.2d 693, 706 (E.D. Ky. 2003).

Maryland

Rite Aid Corp. v. Levy-Gray, 894 A.2d 563, 577 (Md. 2006); Nolan v. Dillon, 276 A.2d 36, 40 (Md. 1971). Under Maryland law, a federal court of appeals applied the rule to pharmacists, Hofherr v. Dart Industries, Inc., 853 F.2d 259, 263 (4th Cir. 1988), and a couple of federal courts apply the rule to medical devices. Miller v. Bristol-Myers Squibb Co., 121 F. Supp.2d 831, 838 (D. Md. 2000); Lee v. Baxter Healthcare Corp., 721 F. Supp. 89, 95 (D. Md. 1989), aff'd, 898 F.2d 146 (4th Cir. 1990).

Massachusetts

Coombes v. Florio, 877 N.E.2d 567, 577 n.1 (Mass. 2007); Cottam v. CVS Pharmacy, 764 N.E.2d 814, 820 (Mass. 2002) (applied to pharmacists); MacDonald v. Ortho Pharmaceutical Corp., 475 N.E.2d 65, 68 (Mass. 1985). A federal court applied the rule to a medical device in Lareau v. Page, 840 F. Supp. 920, 933 (D. Mass. 1993), aff'd, 39 F.3d 384 (1st Cir. 1994), as has a state trial court. Chamian v. Sharplan Lasers, Inc., 2004 WL 2341569, at *6-7 (Mass. Super. Sept. 24, 2004).

Michigan

In Smith v. E.R. Squibb & Sons, Inc., 273 N.W.2d 476, 479 (Mich. 1979), the Michigan Supreme Court relied on the learned intermediary rule, but a later decision called that "dictum." In re Certified Questions, 358 N.W.2d 873, 877 (Mich. 1984). We count it, because the Smith rule has been followed by appellate courts applying Michigan law. Mowery v. Crittenton Hospital, 400 N.W.2d 633, 637 (Mich. App. 1986); King-Washington v. Eli Lilly & Co., 394 Fed. Appx. 827, 828-29 (2d Cir. 2010) (applying Michigan law). The rule was applied to medical devices in Brown v. Drake-Willock International, Ltd., 530 N.W.2d 510, 516 (Mich. App. 1995), and to pharmacists in several cases. Adkins v. Mong, 425 N.W.2d 151, 152-54

(Mich. App. 1988); Stebbins v. Concord Wrigley Drugs, Inc., 416 N.W.2d 381, 386-88 (Mich. App. 1987); Lemire v. Garrard Drugs, 291 N.W.2d 103, 105 (Mich. App. 1980).

Minnesota

Mulder v. Parke Davis & Co., 181 N.W.2d 882, 885 n.1 (Minn. 1970). Lots of federal courts apply the rule to medical devices. Wehner v. Linvatech Corp., 2008 WL 495525, at *4 (D. Minn. Feb. 20, 2008); Johnson v. Zimmer, Inc., 2004 WL 742038, at *9 (D. Minn. March 31, 2004); In re Orthopedic Bone Screw Litigation, 1999 WL 628688, at *14 (D. Minn. March 8, 1999), aff'd mem., 221 F.3d 1343 (8th Cir. 2000); Bruzer v. Danek Medical, Inc., 1999 WL 613329, at *6 (D. Minn. March 8, 1999); Greiner v. Sofamor, S.N.C., 1999 WL 716891, at *5 (D. Minn. March 8, 1999); Mozes v. Medtronic, Inc., 14 F. Supp.2d 1124, 1130 (D. Minn. 1998); Kociemba v. G.D. Searle & Co., 680 F. Supp. 1293, 1305-06 (D. Minn. 1988). We don't know of any Minnesota pharmacy cases involving the rule.

Mississippi

The Mississippi Supreme Court has consistently followed the rule. Janssen Pharmaceutica, Inc. v. Bailey, 878 So.2d 31, 57 (Miss. 2004); Moore v. Memorial Hospital, 825 So.2d 658, 664 (Miss. 2002) (applied to pharmacist); Bennett v. Madakasira, 821 So.2d 794, 804 (Miss. 2002); Wyeth Laboratories, Inc. v. Fortenberry, 530 So.2d 688, 691-92 (Miss. 1988). The legislature has also imposed the rule by statute to both drugs and medical devices. Miss. Code §11-1-63(c)(ii).

Missouri

Krug v. Sterling Drug, Inc., 416 S.W.2d 143, 146-47 (Mo. 1967). A federal appellate court applied the rule to medical devices. Kirsch v. Picker International, Inc., 753 F.2d 670, 67 (8th Cir. 1985). An intermediate appellate court allowed pharmacy liability despite the rule. Horner v. Spalitto, 1 S.W.3d 519, 522 (Mo. App, 1999).

Montana

Stevens v. Novartis Pharmaceuticals Corp., 247 P.3d 244, 257-60 (Mont. 2010); Hill v. Squibb & Sons, 592 P.2d 1383, 1387-88 (Mont. 1979). We don't know of any Montana cases involving the rule and either medical devices or pharmacists.

Nebraska

Freeman v. Hoffman-La Roche, Inc., 618 N.W.2d 827, 841-42 (Neb. 2000). In Uribe v. Sofamor, S.N.C., 1999 WL 1129703, at *13-14 (D. Neb. Aug. 16, 1999), the rule was applied

to a medical device. We don't know of any Nebraska learned intermediary cases involving pharmacists.

Nevada

Nevada's a little strange. In Allison v. Merck & Co., 878 P.2d 948 (Nev. 1994), both the plurality (2 justices) and the dissent (2 more justices) followed the learned intermediary rule. The plurality held that the "mass immunization" exception to the rule applied to the case.

> [W]e do not believe that [the prescriber's] advice . . . that "it was time" for [plaintiff] to receive his MMR II vaccine is the type of individualized medical judgment contemplated by the learned intermediary defense. . . . Accordingly, the mass immunization exception does apply to this case.

Id. at 958 n.16. As the plurality indicates, the Allison dissent believed that no exception to the rule applied. Id. at 969 (a manufacturer "should not be held liable simply because the learned intermediary failed to perform his duty to warn his patient"). No justice in Allison rejected the rule itself. Without mentioning the rule, the Nevada Supreme Court barred pharmacist liability in Sanchez v. Wal-Mart Stores, Inc., 221 P.3d 1276, 1280-84 (Nev. 2009). The rule was applied to a medical device in Moses v. Danek Medical, Inc., 1998 WL 1041279, at *5 (D. Nev. Dec. 11, 1998). In light of Allison, we think the trial order in Chanin v. Teva Parenteral Medicines, Inc., 2010 WL 1846579 (Nev. Dist. April 6, 2010), is simply wrong.

New Jersey

The learned intermediary rule is required by statute in New Jersey. N.J. Stat. §2A:58C-4. The Supreme Court also follows the rule. Perez v. Wyeth Laboratories, Inc., 734 A.2d 1245, 1257 (N.J. 1999) (addressing rule where the product "exhibit[ed] characteristics both of a medical device implanted in the body and of a drug"); Niemiera v. Schneider, 555 A.2d 1112, 1117 (N.J. 1989). We don't know of any New Jersey pharmacist/learned intermediary rule cases.

New York

Spensieri v. Lasky, 723 N.E.2d 544, 549 (N.Y. 1999); Martin v. Hacker, 628 N.E.2d 1308, 1311 (N.Y. 1993). Several New York intermediate courts have applied the rule to medical devices, Mulhall v. Hannafin, 841 N.Y.S.2d 282, 285 (N.Y.A.D. 2007); Banker v. Hoehn, 718 N.Y.S.2d 438, 440-41 (N.Y.A.D. 2000); Bukowski v. CooperVision Inc., 592 N.Y.S.2d 807, 809 (N.Y.A.D. 1993), and to pharmacies. In re New York County Diet Drug Litigation, 691 N.Y.S.2d 501, 502 (N.Y.A.D. 1999); Bichler v. Willing, 397 N.Y.S.2d 57, 58-59 (N.Y.A.D. 1977). Federal appellate authority also applies the rule to medical devices. Bravman v. Baxter Healthcare Corp., 984 F.2d 71, 75 (2d Cir. 1993); Fane v. Zimmer, Inc., 927 F.2d 124, 129-30 (2d. Cir. 1991).

North Carolina

A statute applies the learned intermediary rule to drugs and medical devices. N.C. Gen. Stat. §99B-5(c). A North Carolina appellate court rejected pharmacist liability in Batiste v. American Home Products Corp., 231 S.E.2d 269, 274-76 (N.C. App. 1977).

Ohio

A statute applies the learned intermediary rule to drugs. Ohio Rev. Code §2307.76(c); accord Howland v. Purdue Pharma, L.P., 821 N.E.2d 141, 146 (Ohio 2004); Wagner v. Roche Laboratories, 671 N.E.2d 252, 256 (Ohio 1996); Tracy v. Merrell Dow Pharmaceuticals, Inc., 569 N.E.2d 875, 876, 878 (Ohio 1991); White v. Wyeth Laboratories, Inc., 533 N.E.2d 748, 755 (Ohio 1988); Seley v. G.D. Searle & Co., 423 N.E.2d 831, 834, 836-37 (Ohio 1981). The Ohio Supreme Court held that the rule also applies to medical devices. Vaccariello v. Smith & Nephew Richards, Inc., 763 N.E.2d 160, 164 (Ohio 2002). We don't know of any Ohio law on pharmacists and the learned intermediary rule.

Oklahoma

Edwards v. Basel Pharmaceuticals, 933 P.2d 298, 300-01 (Okla. 1997) (applied to medical device); Tansy v. Dacomed Corp., 890 P.2d 881, 886 (Okla. 1994) (applied to medical device); McKee v. Moore, 648 P.2d 21, 24 (Okla. 1982); Cunningham v. Charles Pfizer & Co., 532 P.2d 1377, 1381 (Okla. 1974). We haven't seen any Oklahoma law on pharmacists and the learned intermediary rule.

Oregon

Oksenholt v. Lederle Laboratories, 656 P.2d 293, 296-97 (Or. 1982); Vaughn v. G.D. Searle & Co., 536 P.2d 1247, 1247-48 (Or. 1975); McEwen v. Ortho Pharmaceutical Corp., 528 P.2d 522, 528 (Or. 1974). In Griffith v. Blatt, 51 P.3d 1256, 1262 (Or. 2002), the court indicated that the rule may be statutorily limited in strict liability actions. In Allen v. G.D. Searle & Co., 708 F. Supp. 1142, 1147-48 (D. Or. 1989), the court applied the rule to a medical device.

Pennsylvania

Coyle v. Richardson-Merrell, Inc., 584 A.2d 1383, 1385 (Pa. 1991) (applied to pharmacist); Baldino v. Castagna, 478 A.2d 807, 812 (Pa. 1984); Incollingo v. Ewing, 282 A.2d 206, 220 & n.8 (Pa. 1971). Creazzo v. Medtronic, Inc., 903 A.2d 24, 31-32 (Pa. Super. 2006), applied the rule to medical devices, as have several federal district courts. Parkinson v. Guidant Corp., 315 F. Supp.2d 741, 749 (W.D. Pa. 2004); Burton v. Danek Medical, Inc., 1999 WL 118020, at

*7 (E.D. Pa. March 1, 1999); Taylor v. Danek Medical, Inc., 1998 WL 962062, at *8-9 (E.D. Pa. Dec. 29, 1998).

South Carolina

Madison v. American Home Products Corp., 595 S.E.2d 493, 496 (S.C. 2004) (applied to pharmacist). Federal appellate courts applied the rule to medical devices in Odom v. G.D. Searle & Co., 979 F.2d 1001, 1004 (4th Cir. 1992), and Brooks v. Medtronic Inc., 750 F.2d 1227, 1231 (4th Cir. 1984).

Tennessee

Pittman v. Upjohn Co., 890 S.W.2d 425, 429 (Tenn. 1994). A federal appellate court applied the rule to a medical device in Jacobs v. E.I. Du Pont Nemours & Co., 67 F.3d 1219, 1238-1239 (6th Cir. 1995), as did an intermediate appellate court in King v. Danek Medical, Inc., 37 S.W.3d 429, 452-53 (Tenn. App. 2000). We don't know of any Tennessee learned intermediary law concerning pharmacists.

Utah

Downing v. Hyland Pharmacy, 194 P.3d 944, 946-47 (Utah 2008) (applied to pharmacist); Schaerrer v Stewart's Plaza Pharmacy, Inc., 79 P.3d 922, 928-29 (Utah 2003) (applied to pharmacist); Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 835 (Utah 1984). A federal appellate court applied the rule to a medical device in Tingey v. Radionics, 193 Fed. Appx. 747, 757 n.4 (10th Cir. 2006).

Virginia

Pfizer, Inc. v. Jones, 272 S.E.2d 43, 44 (Va. 1980). A federal appellate court applied the rule to a medical device in Talley v. Danek Medical, Inc., 179 F.3d 154, 162-63 (4th Cir. 1999). A Virginia trial court rejected pharmacy liability in Gressman v. Peoples Service Drug Stores, Inc., 1988 WL 619115, at *6-8 (Va. Cir. 1988).

Washington

Washington State Physicians Insurance Exchange & Ass'n v. Fisons Corp., 858 P.2d 1054, 1061 (Wash. 1993); Rogers v. Miles Laboratories, Inc., 802 P.2d 1346, 1353 (Wash. 1991); McKee v. American Home Products Corp., 782 P.2d 1045, 1149-50 (Wash. 1989); Terhune v. A.H. Robbins Co., 577 P.2d 975, 978 (Wash. 1978) (applied to medical device). We don't know of any Washington pharmacist cases.

Wyoming

Rohde v. Smiths Medical, 165 P.3d 433, 438 (Wyo. 2007) (applied to medical device). Federal appellate courts have applied the rule to drugs. Thom v. Bristol-Myers Squibb Co., 353 F.3d 848, 851-53 (10th Cir. 2003); Haste v. American Home Products Corp., 577 F.2d 1122, 1125 (10th Cir.1978). There aren't any Wyoming pharmacist cases that we know of.

* * * *

There are two other states where the state's highest court has adopted the learned intermediary rule in a non-prescription medical product context. That raises the total of high court/statutory states to 36 (plus DC). One of them has lots of other precedent, the other none. These are:

Idaho

Sliman v. Aluminum Company of America, 731 P.2d 1267, 1270 (Idaho 1986). There are no other learned intermediary rule cases under Idaho law.

Texas

The Texas Supreme Court has applied the learned intermediary rule twice in non-prescription medical product cases. Humble Sand & Gravel, Inc. v. Gomez, 146 S.W.3d 170, 190-91 (Tex. 2004); Alm v. Aluminum Company of America, 717 S.W.2d 588, 591-92 (Tex. 1986). Texas intermediate appellate courts have repeatedly applied the learned intermediary rule. Centocor, Inc. v. Hamilton, 310 S.W.3d 476, 502-03 (Tex. App. 2010); Ethicon Endo-Surgery, Inc. v. Meyer, 249 S.W.3d 513, 516 (Tex. App. 2007) (applied to medical device); Morgan v. Wal-Mart Stores, Inc., 30 S.W.3d 455, 461-462 (Tex. App. 2000) (applied to pharmacist); Wyeth-Ayerst Laboratories Co. v. Medrano, 28 S.W.3d 87, 91 (Tex. App. 2000); Guzman v. Synthes (USA), 20 S.W.3d 717, 720 n.2 (Tex. App. 1999) (applied to medical device); Bean v. Baxter Healthcare Corp., 965 S.W.2d 656, 662 (Tex. App. 1998) (applied to medical device); Rolen v. Burroughs Wellcome Co., 856 S.W.2d 607, 609 (Tex. App. 1993); Stewart v. Janssen Pharmaceutica, Inc., 780 S.W.2d 910, 911 (Tex. App. 1989); Cooper v. Bowser, 610 S.W.2d 825, 831 (Tex. Civ. App. 1980); Gravis v. Parke-Davis & Co., 502 S.W.2d 863, 870 (Tex. Civ. App. 1973). So have the federal appellate courts. Pustejovsky v. Pliva, Inc., 623 F.3d 271, 276 (5th Cir. 2010); Ebel v. Eli Lilly & Co., 321 Fed. Appx. 350, 355-56 (5th Cir. 2009); Ackermann v. Wyeth Pharmaceuticals, 526 F.3d 203, 207-08 (5th Cir. 2008); McNeil v. Wyeth, 462 F.3d 364, 368 (5th Cir. 2006); Porterfield v. Ethicon, Inc., 183 F.3d 464, 467-68 (5th Cir. 1999) (applied to medical device); Wimm v. Jack Eckerd Corp., 3 F.3d 137, 142 (5th Cir. 1993) (applied to pharmacist); Skotak v. Tenneco Resins, Inc., 953 F.2d 909, 912 (5th Cir. 1992);

Hurley v. Lederle Laboratories, 863 F.2d 1173, 1178 (5th Cir. 1988); Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1276 (5th Cir. 1974). We're also watching two current appeals pending in the Texas Supreme Court that raise learned intermediary issues.

* * * *

One state's highest court has rejected the learned intermediary rule.

West Virginia

Johnson & Johnson Corp. v. Karl, 647 S.E.2d 899, 913-14 (W. Va. 2007). West Virginia has a statute that, regardless of learned intermediary rule issues, bars claims against pharmacists. W. Va. Code §30-5-2; see Vagenos v. Alza Corp., 2010 WL 2944683, at *3-5 (S.D.W. Va. July 23, 2010).

* * * *

Another five states have intermediate (but not highest) appellate authority following the learned intermediary rule.

Arizona

Piper v. Bear Medical Systems, Inc., 883 P.2d 407, 415 (Ariz. App. 1993) (applied to medical device); Gaston v. Hunter, 588 P.2d 326, 340 (Ariz. App. 1978) (applied to medical device); Dyer v. Best Pharmacal, 577 P.2d 1084, 1087 (Ariz. App. 1978). Federal appellate decisions have also applied the rule. King-Washington v. Eli Lilly & Co., 394 Fed. Appx. 827, 828-29 (2d Cir. 2010) (applying Arizona law); Head v. Eli Lilly & Co., 394 Fed. Appx. 819, 820 (2d Cir. 2010) (applying Arizona law); Gove v. Eli Lilly & Co., 394 Fed. Appx. 817, 818 (2d Cir. 2010) (applying Arizona law). We don't know of any pharmacist cases in Arizona.

Colorado

O'Connell v. Biomet, Inc., ___ P.3d ___, 2010 WL 963234, at *2-4 (Colo. App. March 18, 2010) (applied to medical device); Hamilton v. Hardy, 549 P.2d 1099, 1110 (Colo. App. 1976). Nor do we know of any pharmacist cases in Colorado.

Indiana

Allberry v. Parkmor Drug, Inc., 834 N.E.2d 199, 202-03 (Ind. App. 2005) (applied to pharmacist); Peters v. Judd Drugs, Inc., 602 N.E.2d 162, 165 (Ind. App. 1992) (applied to

pharmacist); Ingram v. Hook's Drugs, Inc., 476 N.E.2d 881, 886-87 (Ind. App. 1985) (applied to pharmacist); Ortho Pharmaceutical Corp. v. Chapman, 388 N.E.2d 541, 548-59 (Ind. App. 1979). Federal appellate decisions also apply the rule. Ziliak v. Astra Zeneca, 324 F.3d 518, 521 (7th Cir. 2003); Phelps v. Sherwood Medical Industries, 836 F.2d 296, 301-303 (7th Cir. 1987) (applied to medical device).

Louisiana

There is lot of Louisiana intermediate appellate authority applying the rule. Kampmann v. Mason, 921 So.2d 1093, 1094 (La. App. 2006); Marks v. Ohmeda, Inc., 871 So.2d 1148, 1157 (La. App. 2004) (applied to medical device); David v. Our Lady of Lake Hospital, Inc., 857 So. 2d 529, 532 (La. App. 2003); Brown v. Glaxo, Inc., 790 So.2d 35, 38 (La. App. 2000); Calhoun v. Hoffman-LaRoche, Inc., 768 So.2d 57, 61 (La. App. 2000); Guillory v. Doctor X, 679 So.2d 1004, 1010 (La. App. 1996) (applied to pharmacist); Mikell v. Hoffman-LaRoche, Inc., 649 So.2d 75, 79-80 (La. App. 1994); Gassen v. East Jefferson General Hospital, 628 So.2d 256, 258-59 (La. App. 1993) (applied to pharmacist); Rhoto v. Ribando, 504 So.2d 1119, 1123 (La. App. 1987); Kinney v. Hutchinson, 468 So.2d 714, 717 (La. App. 1985) (applied to pharmacist); Cobb v. Syntex Laboratories, Inc., 444 So.2d 203, 205-06 (La. App. 1983). Ditto for federal appellate courts. Hall v. Elkins Sinn, Inc., 102 Fed. Appx. 846, 849-50 (5th Cir. 2004); Stahl v. Novartis Pharmaceuticals Corp., 283 F.3d 254, 265-266 (5th Cir. 2002); Grenier v. Medical Engineering Corp., 243 F.3d 200, 205 n.14 (5th Cir. 2001) (applied to medical device); Theriot v. Danek Medical, Inc., 168 F.3d 253, 255 (5th Cir. 1999) (applied to medical device); Willett v. Baxter International, Inc., 929 F.2d 1094, 1098-1099 (5th Cir. 1991) (applied to medical device).

New Mexico

Serna v. Roche Laboratories, Division of Hoffman-LaRoche, Inc., 684 P.2d 1187, 1189 (N.M. App. 1984); Jones v. Minnesota Mining & Manufacturing Co., 669 P.2d 744, 748 (N.M. App. 1983) (applied to medical device); Perfetti v. McGahn Medical, 662 P.2d 646, 650 (N.M. App. 1983) (applied to medical device); Richards v. Upjohn Co., 625 P.2d 1192, 1195 (N.M. App. 1980); Hines v. St. Joseph's Hospital, 527 P.2d 1075, 1077 (N.M. App. 1974). We don't know of any New Mexico pharmacist cases.

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In addition to the 41 states where there is state appellate authority supporting the learned intermediary rule, federal courts predicting state law have forecast the adoption of the learned intermediary rule in seven more states – and Puerto Rico. Four of these states (and PR) involve court of appeals authority.

Iowa

Petty v. United States, 740 F.2d 1428, 1440 (8th Cir. 1984); Madsen v. American Home Products Corp., 477 F. Supp.2d 1025, 1033-34 (E.D. Mo. 2007) (applying Iowa law). We don't know of any pharmacist or medical device cases from Iowa.

Maine

Violette v. Smith & Nephew Dyonics, Inc., 62 F.3d 8, 13 (1st Cir. 1995) (applied to medical device); Doe v. Solvay Pharmaceuticals, Inc., 350 F. Supp.2d 257, 270-71 (D. Me. 2004), aff'd, 153 Fed. Appx. 1 (1st Cir. 2005); Herzog v. Arthrocare Corp., 2003 WL 1785795, at *8 (D. Me. March 21, 2003) (applied to medical device). In Tardy v. Eli Lilly & Co., 2004 WL 1925536, at *2-3), a state trial court applied the rule to bar claims against a pharmacist.

New Hampshire

Brochu v. Ortho Pharmaceutical Corp., 642 F.2d 652, 656 (1st Cir. 1981); McCue v. Norwich Pharmacal Co., 453 F.2d 1033, 1035 (1st Cir. 1972); Bartlett v. Mutual Pharmaceutical Co., 731 F. Supp.2d 135, 145-46 (D. N.H. 2010); Bartlett v. Mutual Pharmaceutical Co., 2010 WL 3659789, at *5-6 (D.N.H. Sept. 14, 2010); Nelson v. Dalkon Shield Claimants Trust, 1994 WL 255392, at *4 (D.N.H. June 8, 1994) (applied to medical device); Dupre v. G.D. Searle & Co., 1987 WL 158107, at *4 (D.N.H. April 28, 1987) (applied to medical device). We're unaware of pharmacist cases from New Hampshire.

North Dakota

Ehlis v. Shire Richwood, Inc., 367 F.3d 1013, 1017 (8th Cir. 2004); Harris v. McNeil Pharmaceutical, 2000 WL 33339657, at *4 n.4 (D.N.D. Sept. 5, 2000). We don' t now of any medical device or pharmacist cases from North Dakota.

Puerto Rico

Guevara v. Dorsey Laboratories, Division of Sandoz, Inc., 845 F.2d 364, 366 (1st Cir. 1988); Rivera-Adams v. Wyeth, 2010 WL 5072541, at *3 (D.P.R. Dec. 8, 2010); Pierluisi v. E.R. Squibb & Sons, Inc., 440 F. Supp. 691, 694-95 (D.P.R. 1977). We're not aware of medical device or pharmacy cases from Puerto Rico.

Rhode Island

Hogan v. Novartis Pharmaceuticals Corp., 06 CV 260, Trial Tr. (5/23/11), at 387-88 (E.D.N.Y.) (applying Rhode Island law); see Hogan v. Novartis Pharmaceuticals Corp., 2011 WL

1533467, at *9 (E.D.N.Y. April 24, 2011) (discussing rule with approval) (applying Rhode Island law). Obviously, we don't know of any pharmacist or medical device cases from Rhode Island.

South Dakota

Schilf v. Eli Lilly & Co., 2010 WL 4024922 (D.S.D. Oct. 13, 2010); McElhaney v. Eli Lilly & Co., 575 F. Supp. 228, 231 (D.S.D. 1983), aff'd, 739 F.2d 340 (8th Cir. 1984); Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159, 162 (D.S.D. 1967), aff'd, 408 F.2d 978 (8th Cir. 1969). They're all drug cases. We're not aware of any South Dakota medical device or pharmacist cases.

Wisconsin

Menges v. Depuy Motech, Inc., 61 F. Supp.2d 817, 830 (N.D. Ind. 1999) (applied to medical device) (applying Wisconsin law); Monson v. AcroMed Corp., 1999 WL 1133273, at *20 (E.D. Wis. May 12, 1999) (applied to medical device); Lukaszewicz v. Ortho Pharmaceutical Corp., 510 F. Supp. 961, 963 (D. Wis. 1981), modified on other grounds, 523 F. Supp. 206 (D. Wis. 1981). We don't know of any Wisconsin pharmacist cases.

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That's 48 states, plus DC and PR, following the learned intermediary rule. The one remaining state has a trial court case, and nothing else (that we know) applying the rule.

Vermont

Estate of Baker v. University of Vermont, 2005 WL 6280644 (Vt. Super. May 5, 2005) (applied to pharmacist).

* * * *

That's 49 (+DC/PR) up and one down as of now – aside from the occasional trial court decision attempting to deny appellate reality. The learned intermediary frontier has closed.