Not Swallowing the Whistle

Monday, May 23, 2011

Last week we settled a case. It was a good settlement. But we groused about it a bit, because we thought the judge should have granted us summary judgment on preemption grounds. The denial of summary judgment was truly "summary." There was no written opinion at all, and the judge's few statements at the hearing hardly qualified as any sort of legal analysis. What was going on?

Then we took a look at a recent book, **Scorecasting: The Hidden Influences Behind How Sports are Played and Games are Won**, by Moskowitz and Wertheim. The book, in a manner reminiscent of **Moneyball** or **Freakonomics**, uses data to unearth some surprising truths, debunk a lot of conventional wisdom, and raise interesting questions. For example, there is no valid reason to believe that a player with a "hot-hand" will continue to score at will. Or, you probably know that home teams enjoy an advantage, but do you know when and why? Or -- and this is the topic of today's intellectual frolic and detour -- when and why do sports referees "swallow the whistle?"

Sports have rules and somebody's got to enforce them: umpires in baseball, referees in football, etc. When hockey games are in their final minutes or in overtime, referees don't call as many penalties. One of the all-time great examples in football is when the Giants upset the then-unbeaten Patriots in the Super Bowl. In the closing minutes of the game, David Tyree caught a pass against his helmet that some call the single greatest play in a championship game. But what some people forget is that Eli Manning threw that pass only after escaping the clutches of a Patriots lineman. In fact, Manning was in those clutches so long that, under the rules, he could (and people in Boston will howl that he should) have been called "in the grasp" and the play would have ended. So would the Giants' chances. History would have changed. But the referee didn't blow his whistle. He let the players decide the game. Similarly, Moskowitz and Wertheim analyze statistics from baseball, comparing umpire balls-and-strikes calls against a machine. It turns out that umpires are right way more than they are wrong, but their error rate goes way, way up in failing to call ball four or strike three. That is, the rules enforcers are seemingly reluctant to be outcome-determinative.

We wondered whether something like that happens in the law. Maybe our judge thought there

ought to be some sort of settlement, even if the plaintiffs' case had certain legal and factual weaknesses. Granting us summary judgment would have knocked that out. Not granting summary judgment keeps the case alive and leaves open the possibility that the parties will reach agreement. In fact, we did. Maybe the judge thinks that rough justice was done. Or maybe the judge is just happy to have the case off the docket. (And we make no bones about our belief that it is pernicious and counterproductive for judges to shape their rulings to aid docket management rather than to follow the law. It's wrong and ultimately counterproductive.) Maybe judges sometimes swallow the whistle.

Unlike Moskowitz/Wertheim, we don't have data to back up that allegation. But if judges do swallow the whistle at crucial moments, we don't think it's at all benign. At least in sports, swallowing the whistle affects both sides equally. In the sort of litigation we do, it's almost always the defense side that files Daubert motions and summary judgment motions. So a judicial reflex against granting dispositive motions disproportionately hurts defendants. Moreover, sports referees swallow the whistle because they know that fans pay to see players, not refs, decide the game. The last time we looked, litigation was not a spectator sport and was not being conducted for the amusement of paying fans.

Anyway, these are just musings. The case is over and we're on to the next thing. But we'd be fascinated if anybody could assemble data and do a sort of **Moneyball** or **Freakonomics** or **Scorecasting**-type analysis on our business.

Today we report on a case where the referee did not swallow the whistle. In *Barnhill v. Teva Pharmaceuticals USA Inc*., 2011 U.S. Dist. LEXIS 51222 (S.D. Ala. May 10, 2011), the court granted summary judgment to the defendant and ended the case. The plaintiff went through "a stormy course of SJS" after taking cephalexin, a generic substitute for Keflex. *Barnhill*, 2011 U.S. Dist. LEXIS 51222 at *4. SJS is a bad disease, SJS plaintiffs are entirely sympathetic, and SJS cases are tough. By the time the defendant moved for summary judgment, the plaintiff had three remaining claims: (1) negligent failure to warn, (2) negligent failure to conduct post-marketing surveillance; and (3) breach of the implied warranty of merchantability. *Id.* at * 10.

The plaintiff claimed that the warning was inadequate "because the information about SJS was listed as an 'Adverse Reaction' rather than under 'Warnings'. *Id.* at * 17. Even assuming such

inadequacy, the claim failed for want of proximate cause. There was simply no evidence that the prescribing doctor would have done anything different if the warning had been different. In fact, at the time of her deposition, which was ten years after the treatment at issue, the doctor continued to prescribe cephalexin. The plaintiff tried to prop her claim up via the heeding presumption, but "Alabama courts have not recognized such a presumption." *Id.* at * 20. In any event, a heeding presumption "would not alone establish proximate cause." *Id.* at *21. At this point the court relies on *Thomas v. Hoffman-Laroche, Inc*., 949 F.2d 806 (5th Cir. 1992), where the Fifth Circuit rejected the contention that causation can be presumed from an inadequate warning. This is the first discussion of *Thomas* we've seen in a while and is, as far as we know, the first use of *Thomas* in Alabama.

The court certainly puts *Thomas* to good use. "Heed" means that the learned intermediary would have incorporated the additional risk into the risk-benefit calculation, but there was no evidence that didn't happen here. And it's not as if the plaintiff pointed to some bit of missing information. It was an issue of where the information resided in the label. "Stated differently, the warning label was not wrong, it simply was not forceful enough. Because there is no evidence that a more forceful warning would have changed Dr. Jaalouk's decision to prescribe cephalexin, Plaintiff has failed to establish proximate cause." *Id*. at * 22.

The plaintiff's claim for negligent failure to conduct post-marketing surveillance evolved. At first, the defendant read that claim the way most of us would, and responded with evidence showing that the defendant followed FDA regulations requiring the reporting of adverse events for its drug. It fulfilled whatever post-marketing surveillance duty it had. But the plaintiff argued that the defendant was negligent because it "did not track the adverse event experience of *other* cephalexin manufacturers." *Id*. at * 24 (emphasis in original). There is no such duty. So much for that claim.

Finally, the breach of implied warranty of merchantability claim turned on *dicta* in an Alabama Supreme Court decision. Alabama law generally does not recognize a cause of action for breach of implied warranty of merchantability for inherently dangerous products. The issue is whether there's an exception for products that affect a "significant number of persons." *Id*. at * 25. Well, maybe there is and maybe there isn't? (Guess which way we vote.) But it doesn't matter because it doesn't look like there have been more than two cases of SJS-from-cephalexin in the United States from 1992 to 2008. The plaintiff offered an unreliable study and

some bad math to suggest a bigger number, but the court didn't buy it. *Id*. at * 26-27.

In short, the court blew the whistle.