Plaintiffs Finding Pain Pump Cases to be a Real Pain

Tuesday, November 01, 2011

If you are like us you may be feeling a little sluggish this morning. Perhaps you're stumbling out of a candy-induced sugar coma or trying to explain to a four-year old why fairy wings were only OK for school yesterday (or both). So, we thought we'd keep our post simple today. Simple because you've all seen it before. Another pain pump case down the drain.

Last week in Esposito v. I-Flow, 2011 U.S. Dist. LEXIS 122570 (E.D. Pa. Oct. 24, 2011), the Eastern District of Pennsylvania did what the Western District of Pennsylvania did last year in Kester v. Zimmer Holdings, Inc. which we discussed here and here -- dismissed the case for (1) failure to state a claim under Pennsylvania law, (2) failure to plead fraud with particularity under Rule 9(b), and (3) failure to plead with the specificity required by Twiqbal. Again, we are left scratching our heads about what the plaintiffs' lawyers bringing the pain pump cases are thinking. Courts across the country have dismissed pain pump cases as insufficient and speculative under Twiqbal. But that doesn't seem to deter plaintiffs' counsel from wheeling out the same tired, non-specific, collectively vague and overall pathetic allegations in these cases.

We said we'd keep it simple – made easy for us since plaintiffs decided to take a tried and failed approach – so here it is:

1. No strict liability or breach of implied warranty claims for medical devices in Pennsylvania. Esposito, 2011 U.S. Dist. Lexis 122570, *13-15. This isn't the first time the Pennsylvania federal courts have had to remind Pennsylvania plaintiffs that they can't bring these claims, and we doubt it will be the last.

2. You can't lump defendants together on a fraud claim. Id. at *9-13. Again it's not new law, but worth reiterating. Plaintiffs, if you lump defendants together as a single, faceless entity – you don't satisfy Rule 9(b):

"Such a manner of pleading does not provide Defendants with the particular content of any alleged fraudulent statements or misrepresentations, when such alleged misrepresentations may have been made, or the specific Defendants who may have made them. Thus, the Complaint does not fulfill the purpose of the Rule 9(b) pleading requirement: to provide notice of the precise misconduct with which defendants are charged in order to give them an opportunity to respond meaningfully."

Id. at *12-13. In Esposito, the court was particularly troubled by the fact that plaintiff had sued both the manufacturer of the pain pump and several entities that may have manufactured the medication in the pain pump. Not only did plaintiffs lump all these defendants together, the complaint only referred to "pain pumps" – without a single mention of the medications that may have been used in the pumps. Id. at *13.

3. You can't lump defendants together on a negligence claim either. Id. at *15-19. Here the court looked at causation – an essential element of a negligence claim – and you can't have causation if you don't identify which defendant allegedly caused plaintiff's injury. Relying on a litany of pain pump cases, the court found:

"[A] complaint is not adequately plead if it names several defendants whose products might have been used, but does not actually identify which defendants' products allegedly caused the injury."

Id. at *18. The Esposito complaint, therefore, didn't pass Twiqbal muster because it named several defendants, "but fail[ed] to pinpoint which products from which specific Defendants caused Plaintiff's injuries." Id. Sort of like the chocolate stain on your carpet – it could have been your son's Milky Way or your daughter's Kit Kat (or your husband's Crunch bar for that matter) – but without more, your claim isn't going to hold up and you should just clean it up yourself (come to think of it, you may have dropped a crumb or two yourself).

4. No express warranty claim without an allegation of an express statement. This one really doesn't need any further explanation.

So, we are left with the question – is this just sloppy work by plaintiffs' lawyers or are these cagey attempts to craft complaints that just squeak by? To see just how little they need to plead to stay alive. If the latter, they obviously aren't there yet and need to go back to the drawing board. For our clients' sake, we hope they keep tossing up this same garbage. From an intellectual curiosity standpoint, we're interested in whether they'll ever get it right. For now, if you need a little hair of the dog – try drinking your coffee from a chocolate cup.