When an Expert Spreads it on Too Thick

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This is the Drug and Device Law blog, but sometimes we discuss cases that do not involve drugs or medical devices. We do so when the cases offer some sort of principle or object lesson that might prove useful. Such is the case with *Kidd v. Conagra Foods, Inc.*, 2012 U.S. Dist. LEXIS 2725 (N.D. Ga. Jan. 9, 2012). It is from the peanut butter MDL.

Truth be told, we've always loved peanut butter. It's a yummy source of protein. It also carries a whiff of nostalgia. It seemed to the Drug and Device Law Toddler that a peanut butter and jelly sandwich was an absolutely unimproveable lunch item, especially with the chunky version of peanut butter. Our dietary proclivities have acquired more sophistication over the years, but old habits and tastes die hard. Once we were defending a criminal case and the prosecutor proposed to resolve the case by giving us a PBJ. Wow - not only would our client avoid jail time, but we'd get a scrumptious snack out of the deal. Turns out we were right about no jail time, but wrong about the culinary component -- PBJ meant "probation before judgment." Like peanut butter itself, the outcome seemed bittersweet.

Peanut butter is more complicated now. The peanut allergy is far and away the most common serious adverse food reaction. About one percent of kids are allergic to peanuts, and today the use of peanuts and peanut butter in schools is subject to all sorts of restrictions. The Drug and Device Law Daughter told us that there's either one peanut-butter-friendly table or one no-peanut-butter table at her school cafeteria -- we cannot remember which it is. Either way, it's nothing like our simple peanut butter days (definitely not salad days) munching PBJs en masse during the Johnson administration. Who knew that peanut butter would become the stuff of product liability?

The *Kidd* case is not about an allergy. Instead, it is a personal injury action where the plaintiff alleged that he contracted salmonella from peanut butter. (And not just any salmonella -- Salmonella Tennessee. Query whether a state wants a disease strain named after it. This is hardly Chamber of Commerce stuff.) The defendants filed a motion for summary judgment, which was denied because the testimony of the plaintiff doctor expert "created an issue of fact as to the cause of the Plaintiff's illness." 2012 U.S. Dist. LEXIS 2725 at *20. The court then ordered that the allegedly contaminated peanut butter be tested. Guess what? It tested negative for salmonella. That should end the case, right? Would you be surprised to learn that the plaintiff expert explicitly based his opinion "on the assumption that the Plaintiff's peanut butter was contaminated"? *Id*. at *21. Would you be surprised to learn that the plaintiff expert testified that if the peanut butter in question "tested negative for salmonella, he would change his opinion."? *Id*. at *22.

Would you be surprised to learn that the expert turned out to be utterly shameless?

After the peanut butter tested negative, the plaintiff's expert submitted a second affidavit, now saying that the negative test was unreliable. For instance, he opined, maybe the salmonella contaminated only a small portion of the plaintiff's peanut butter.

Is it any wonder that some people call some expert witnesses jukeboxes or saxophones, because they play any tune requested?

Perhaps it was the sheer effrontery of the expert's contradictory opinions, but the court was having none of it. First, the court held that the expert's opinion was untimely. The MDL had set forth deadlines for filing global expert opinions, and an opinion on the reliability of salmonella testing was deemed to be global rather than case-specific. *Id*. at *23. Second, the expert was simply not qualified to opine on the reliability of salmonella testing. He was "a medical doctor, not a microbiologist or an expert on food testing." *Id*. Third, the plaintiff's new opinion asserted "that 87% of peanut butter tests result in false negatives for salmonella contamination," but supplied no authority for that statistic. *Id*. at *24. Thus, the opinion was unreliable. And now going back to the original opinion, since it "was based upon the false assumption that the Plaintiff's peanut butter was contaminated by salmonella," the expert's opinion would now be entirely disregarded. *Id*.

We like the court's opinion for a couple of reasons. As in the cases we discusssed in our Rules Matter posts (here and here), the court gave real teeth to its deadlines. Further, the court resisted the matador technique of waving issues by, leaving it to the jury to decide whether the expert was more strumpet than scientist. Instead, the court actually performed its role as gatekeeper. Of course, it's possible that the court was emboldened to do the right thing because an additional fact surfaced after the original summary judgment motion: the plaintiff's treaters testified that "they did not diagnose the Plaintiff with Salmonella because there was no evidence to support such diagnosis." *Id*. at *25. The case, in short, was an outrage and needed to go.

A court is smart to shut down an expert who blatantly speaks out of both sides of his mouth. It's even easier for the court to do that when it is so obvious that the truth is sticking to the roof of the expert's mouth.