Happy Labor Day - with Limited Warranties

Monday, September 05, 2011

We honor Labor today by doing very little labor ourselves. If we had our druthers, today would consist of little more than barbecue and indolence. But some members of the family seize upon every holiday as a cue for shopping. There are sales upon sales. For at least a part of today, we expect to stand in an aisle of one our nation's few electronics stores not yet in Chapter 11, listening to a 20 year old in a colorful polo shirt sling pseudo-techno blather at us. Eventually, he (sorry, but it usually is a he - the sort of guy whose online accomplishments against aliens and zombies far outstretches anything here on quotidian little Earth) will try to sell us an extended warranty.

There are two things you need to know about extended warranties. First, they are a sucker play. But if you are one of our typically suave, sophisticated readers, that bit of news hardly comes as a surprise. Second, the reference to warranties is our weak, desperate gambit for transitioning into today's case discussion. That won't surprise you, either.

In many of our posts, the resolution of the warranty claims comes almost as an afterthought. But in the two cases we'll look at briefly today, we're giving the warranty issue top-billing.

We hadn't noticed *Woodhouse v. Aventis*, 2011 U.S. Dist. LEXIS 98062 (W.D. Tex. June 23, 2011), until recently, even though it was filed a couple of months ago. The plaintiff alleged injuries from sleep-driving under the influence of Ambien. The defendant moved to dismiss all the claims. Motion granted. Now since we want to hightail it to the deck, and we know you don't really want to devote your day off to a legal blog, watch how quickly we do this: the failure to warn claim fails because of the learned intermediary doctrine, the strict liability claim is stricken by comment k, and the fraud claim is insufficiently particular. It's like it was drawn up on the board in Drug and Device Defense School. And then there are the warranty claims. As is not at all unusual in real life, the plaintiff received a sample box of the medicine. There was no sale. No sale, no warranty claim. And this is why at depositions we always ask about samples.

In *Coleman v. Boston Scientific Corp*., 2011 U.S. Dist. LEXIS 96315 (E.D. Cal. Aug. 29, 2011), the plaintiff alleged that she had been injured by a vaginal mesh device that, she claimed, had

been marketed deceptively. Here, by contrast to *Woodhouse*, the learned intermediary doctrine did not end the failure to warn claim, at least at the motion-to-dismiss stage. But it looks as if the plaintiff's claims might be time-barred by California's two-year statute of limitations. The court gave leave to file an amended complaint, to see if she could supply facts that would support invocation of the discovery rule. But the court dismissed the express warranty claim with prejudice, because there was neither privity nor reliance. The plaintiff argued that neither was required. The court disagreed; you need one or the other in California to assert a claim for breach of express warranty. Here, there was no privity, as there was no sale at retail. There was also no reliance, and now we espy the benign influence of *Twlqbal*: "Plaintiffs' conclusory allegations that Defendants advertised their products as safe and effective lack even general information describing such alleged conduct." 2011 U.S. Dist. LEXIS 96315 at *12.

There it is. That's not exactly the detailed analysis you'll get from the Thursday magnum opus. But those are useful cases that deserve a place in your armory when doing battle against warranty claims.

And now, as if Nature wishes to deliver a stern rebuke to our lassitude, the skies have opened up and are pouring all over our deck, our grill, our Hendrick's and cucumbers, our two-month backlog of New Yorkers stacked ambitiously/stupidly on the chaise lounge, and, indeed, on our fond hopes for an end-of-Summer party.