ALERTS AND UPDATES

In Drug Products Liability, Pa. Supreme Court Denies Attempt to Introduce "Failure-to-Warn" Theories of First Impression

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On April 18, 2011, the Pennsylvania Supreme Court denied a plaintiff's petition for allowance of appeal in *Cochran v. Wyeth, Inc.*,[1] effectively halting the plaintiff's attempt to introduce theories of first impression that would have directly affected the landscape of drug products liability law. By denying the petition, the court essentially agreed with the Superior Court of Pennsylvania, which held that a plaintiff could not prove causation if she did not actually suffer from a drug's undisclosed risks.

Plaintiff Nancy Cochran ingested the diet drug, Redux—a product of Pfizer, which was later acquired by Wyeth—for less than one year from November 1996 to August 1997. She alleged that the warnings about Redux were inadequate regarding the risk of valvular heart disease (VHD). Cochran, however, developed primary pulmonary hypertension (PPH), not VHD; and her treating physician properly warned her about the risk of PPH from ingesting Redux. The plaintiff maintained that Redux's warnings were faulty because they failed to warn of the danger of VHD, even though she did not develop that disease. Although she had not developed VHD, she claimed that Wyeth's failure to warn about VHD was the proximate cause of her developing PPH. During the trial, the plaintiff's physician testified that he would not have prescribed the drug if he had known about the risk of VHD associated with Redux. The court granted summary judgment in favor of Wyeth, ruling that Wyeth's warnings with regard to PPH were adequate because the company informed the plaintiff's physician that Redux may cause PPH. However, because Cochran suffered from PPH and not VHD, the trial court said she could not establish that Wyeth's failure to warn of the risk of VHD was the proximate cause of her particular injury.

The Superior Court of Pennsylvania agreed with the trial court's decision that, in a failure-to-warn case, the plaintiff has to suffer from the actual condition of which a drug company failed to warn. The plaintiff's claim here was so novel that the court found no case law in Pennsylvania or elsewhere directly on point, and the supposedly parallel cases cited by both sides offered the court little or no help. Instead, the court looked to the legal theory of "informed consent," governing injuries purportedly caused by a doctor's failure to warn a surgical patient of all the possible risks of surgery. Informed-consent case law dictates that if the patient does not suffer the injury of which the surgeon failed to warn, proximate cause between injury and failure to warn cannot be established. As the Pennsylvania Superior Court stated, "an unrevealed risk . . . however unpardonable, is legally without consequence. [N]egligence unrelated to injury is nonactionable." The panel therefore affirmed the trial court's dismissal of the plaintiff's complaint.

Notwithstanding the Pennsylvania Supreme Court's denial of the plaintiff's petition to review the particular issues in this matter, it is likely that plaintiffs will continue to try to push the proverbial envelope in similar failure-to-warn drug cases. If this happens, drug companies will now have the *Cochran* ruling available as well-reasoned precedent for how the court should respect basic tort law principles as proximate cause and the requirement for actual injury in these cases.

For Further Information

If you have any questions about the information addressed in this *Alert*, please contact Sharon L. Caffrey, Rafael C. Haciski, any member of the Products Liability and Toxic Torts Practice Group or the attorney in the firm with whom you are regularly in contact.

Note

1. *Cochran v. Wyeth, Inc.*, 2011 Pa. LEXIS 911 (Pa. Apr. 18, 2011).