The Learned Intermediary And Implied Warranties

Thursday, November 10, 2011

In a relatively recent case, Currier v. Stryker Corp., 2011 WL 4898501 (E.D. Cal. Oct. 13, 2011), the court stated, with respect to a claim for implied warranty:

"Because this is a medical implant case, and the [complaint] alleges that the product was surgically inserted in a hospital, the Court cannot plausibly infer from the [complaint] that Plaintiff relied on anything other than his physician's skill and judgment in selecting the . . . product, nor that any purchase of the product was based on a warranty from the manufacturer to Plaintiff. The Court cannot plausibly infer that there is a relationship between the Defendants and Plaintiff that would allow Plaintiff to state a breach of warranty claim."

Id. at *4. The court seems to be saying that, in a prescription medical product liability case, there can't be an implied warranty claim unless the plaintiff, as opposed to the prescribing physician, relied on the alleged warranty. That's useful. We're sure that this is to some extent grounded in the general California rule requiring privity in express warranty cases, but we thought we'd take a look and see what else may be out there.

The first place we checked, obviously, is the case that the court cites for the proposition, Adams v. I-Flow Corp., 2010 WL 13399488 (C.D. Cal. March 30, 2010), and sure enough, we find pretty much the same thing. "In the context of prescription medical devices and pharmaceuticals, the transaction is between the manufacturer and the physician, not the patient." Id. at *4. The complaint was simply "devoid of any facts suggesting that plaintiffs relied upon anything other than their physicians' skill and judgment in selecting and prescribing the [drugs and devices]." Id.

Both Currier and Adams cite another California case, Blanco v. Baxter Healthcare Corp., 70 Cal.Rptr.3d 566 (App. 2008), and there we find more of the same:

"Here, there is no evidence [plaintiff] relied on [defendant manufacturer's] judgment that the [product] was appropriate for her. Rather, she relied on her physician's skill and judgment to select the [product], as evidenced by the fact it was prescribed by a licensed physician. Accordingly, we conclude [plaintiff] cannot sue [defendant] for breach of implied warranties."

Id. at 582. See also Evraets v. Intermedics Intraocular, Inc., 34 Cal. Rptr.2d 852, 857 (App. 1994) (no implied warranty claim where plaintiff "relied upon his physician's skill or judgment to select or furnish a suitable product"); Crayton v. Rochester Medical Corp., 2011 WL 475009, at *15-16 (E.D. Cal. Feb. 4, 2011) (no implied warranty where plaintiff "relied on the advice of his doctors"); Quatela v. Stryker Corp., ___ F. Supp.2d ___, 2010 WL 7801786, at *2 (N.D. Cal. Dec. 17, 2010) ("[plaintiff] necessarily relied on the judgment of the medical professionals who treated her"); McCarty v. Johnson & Johnson, 2010 WL 2629913, at *6 (E.D. Cal. June 29, 2010) ("Plaintiff relied on the advice of her doctor and the doctor chose the device"); Sherman v. Stryker Corp., 2009 WL 2241664, at *3 (C.D. Cal. March 30, 2009) (following Evraets); Chandler v. Chiron Corp., 1997 WL 464827, at *8 (N.D. Cal. July 28, 1997) (following Evraets).

Well, that pretty much kills California law. Have any other states used the presence of a learned intermediary selecting prescription medical products and making prescriptions as a reason for barring implied warranty cases?

It comes up, or did, with some frequency in cases attempting to impose absolute liability on pharmacists. That's been rejected just about everywhere, and the rationales differ, but as to implied warranties, reliance on prescribing doctors is one of the biggies. A North Carolina court held that physician reliance precluded warranty liability:

> "Here the drug purchased by plaintiff was not available to the general public in the sense that it was available for purchase by any customer who came in the drug store, selected it from the shelf, and paid the price therefor. It was available only to those who had previously seen their physician and obtained from the physician a prescription directing the druggist to supply the drug. Obviously the plaintiff patient did not rely on the druggist's skill or judgment in assuming that the drug would be fit for its intended purpose. This reliance had been properly placed with her physician."

Batiste v. American Home Products Corp., 231 S.E.2d 269, 276 (N.C. App. 1977). See also McKee v. American Home Products Corp., 782 P.2d 1045, 1050 n.5 (Wash. 1989) (quoting Batiste with approval).

A New York case followed this same rationale, holding that there are no implied warranties because patients are relying on their physicians rather than on anybody else's representations:

"[I]mplied warranties are conditioned on the buyer's reliance upon the skill and judgment of the seller but when a consumer asks . . . to obtain a drug which is not otherwise available to the public . . ., he places that confidence and reliance in the physician who prescribed the remedy. . . . [T]here is no cause of action for breach of any implied warranties."

Bichler v. Willing, 397 N.Y.S.2d 57, 59 (N.Y.A.D. 1977) (pharmacy case). See also Ingram v. Hook's Drugs, Inc., 476 N.E.2d 881, 885-86 (Ind. App. 1985) (quoting with approval reliance language in Bichler and Batiste).

Texas seems to follow the same principle, at least where the implied warranty of fitness for a particular purpose is concerned. This warranty, has an explicit causation/reliance requirement. Thus, in Ackermann v. Wyeth Pharmaceuticals, 471 F. Supp.2d 739 (E.D. Tex. 2006), aff'd on other grounds, 526 F.3d 203 (5th Cir. 2008), the court held:

"[T]here is no showing that [plaintiff] was relying on [defendant's] skill or judgment. To the contrary, he was relying on the skill and judgment of [the prescriber]. [The product], like most drugs, is also indicated for other disorders, therefore, it could not be said that [the defendant] would have reason to know of the particular purpose for which [the drug] would be used. The Court concludes that Plaintiff may not prevail on her claims for breach of an implied warranty."

Id. at 745.

We found similar language in a Georgia case, albeit not as extensive, that there's no implied fitness warranty where the plaintiff relied upon the prescribing physician rather than the drug manufacturer:

"[B]ecause the patient is legally deemed to rely on the physician and not the package labeling for this warning, [plaintiffs] cannot show they were relying on the seller's skill or judgment to select or furnish suitable goods, as is required to prove an implied warranty of fitness for a particular purpose."

Presto v. Sandoz Pharmaceuticals Corp., 487 S.E.2d 70, 75 (Ga. App. 1997).

An older case in Florida holds pretty much the same thing, again in an implied warranty of fitness case. The plaintiff patient simply didn't rely on the drug company, but rather on her physician, in choosing a drug:

"Obviously, the patient-purchaser did not rely upon the judgment of the retail druggist in assuming that the drug would be fit for its intended purpose. This confidence had been placed in the physician who prescribed the remedy."

McLeod v. W. S. Merrell Co., Division of Richardson-Merrell, Inc., 174 So.2d 736, 739 (Fla. 1965). It's good language, and like some of the decisions already discussed, is directed moslty against pharmacy strict liability.

A different sort of case arose in Delaware. The court rejected an implied warranty of fitness claim for lack of reliance where the doctor (as opposed to the patient) didn't rely:

"[The prescriber] did not rely on [defendant's] "superior skill" in selecting a [product] for a [surgical] procedure, because it was not "[defendant's] place" to "practic[e] medicine" or decide for the doctor whether to use a particular [device]. Plaintiff proffers no evidence that [the prescriber – or anyone else – relied on [defendant's] representations about the [product] in deciding whether to use [it]."

Guinan v. A.I. duPont Hospital for Children, 597 F. Supp.2d 485, 514 (E.D. Pa. 2009) (applying Delaware law), rev'd on other grounds, 393 Fed. Appx. 884 (3d Cir. 2010).

So what can we say about reliance on prescribing physicians, as opposed to on product manufacturers, as a defense in implied warranty litigation? Well, it's certainly dispositive in California. It also looks quite strong in implied warranty of fitness for a particular purpose cases. Elsewhere, we'd say there's enough favorable precedent to support making the reliance argument against implied warranty claims, although we'd recommend making it in conjunction with other arguments to avoid making bad law.