New Mexico's Learned Intermediary Doctrine: On the Ropes?

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On August 22, 2008, New Mexico's United States District Court Judge James O. Browning issued a memorandum opinion and order on Eli Lilly's motion for summary judgment in a case involving a murder/suicide allegedly relating to the use of Lilly's prescription antidepressant, Prozac.[2] Judge Browning denied Lilly's motion, largely based on his predictions about how New Mexico's Supreme Court would view the learned intermediary doctrine.

The learned intermediary doctrine, a creature of prescription pharmaceutical and medical device litigation, has been defined and applied by New Mexico's Court of Appeals in three cases, generally as follows: "The manufacturer's duty to warn is fulfilled if it warns the physician, not the patient." *Serna v. Roche Labs*, 101 N.M. 522, 524, 684 P.2d 1187, 1189 (Ct. App. 1984); *see also Perfetti v. McGhan Medical*, 99 N.M. 645, 662 P.2d 646 (Ct. App. 1983); and *Hines v. St. Joseph's Hosp.*, 86 N.M. 763, 527 P.2d 1075 (Ct. App. 1974).

In addressing whether to apply the doctrine in the federal court case, Judge Browning recognized his task was to divine how the New Mexico Supreme Court would address the question of the applicability of the learned intermediary doctrine if faced with the issue. Judge Browning declined to certify the question to the New Mexico high court because the rule allowing certification applies only where there are no controlling decisions from New Mexico appellate courts. Browning recognized the controlling nature of the Court of Appeals' opinions in *Serna*, *Perfetti* and *Hines*, citing the existence of the opinions as the basis for not certifying the question to the state's Supreme Court. Judge Browning went on to opine that New Mexico's Supreme Court would not follow the Court of Appeals' decisions in the prior learned intermediary cases.

Judge Browning predicts New Mexico would join West Virginia as the only states to expressly reject the doctrine for several reasons including: (1) New Mexico has adopted strict products liability, in part, as a risk-spreading tool, and, according to the court, the learned intermediary doctrine would be inconsistent with that notion[3]; (2) the learned intermediary doctrine would leave the patient uncompensated without a compelling justification for doing so[4]; (3) the learned intermediary doctrine is outdated, according to the court, in light of direct-to-consumer advertising and the "do it yourself doctor"

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[2] *Rimbert v. Eli Lilly*, United States District Court for the District of New Mexico Cause No. CIV-06-0874.

[3] Note that New Mexico adopted strict products liability in 1972, approximately two years before the earliest of the Court of Appeals' decisions in the learned intermediary cases. Also, two of the three learned intermediary cases were contemporaneously presented to the New Mexico Supreme Court for review, which the Supreme Court declined.

[4] Judge Browning rejected the argument that liability could and should fall upon the physician who fails to convey the manufacturer's warnings to the patient.

phenomenon illustrated by patients conducting medical research through internet resources such as WebMd.com[5]; and (4) notwithstanding the physician-patient relationship, according to Judge Browning, the manufacturer, not the physician, may be in the best position to warn the patient because of the manufacturer's presumably superior access to drug-specific information.

The court further rebuked Lilly's plea that, if the court rejected the learned intermediary doctrine, it should do so only prospectively. In the court's view, the New Mexico Supreme Court has "clearly foreshadowed" its rejection of the doctrine in other cases dealing with strict products liability. Thus, according to the court, it is not unfair that Lilly has relied on some combination of *Serna, Perfetti* and *Hines* for over 30 years.

The 105-page opinion spanned other topics relating to products liability actions, and included comments from the court to the following effect: (1) inadequate product warnings may be the proximate cause of an injury where neither the doctor nor the patient reads the warnings; and (2) Restatement Second (Torts) Section 402, comment k (exception for "unavoidably unsafe" products) may be applicable only where the manufacturer shows the product cannot be made safe through better warnings without destroying the product.

Procedurally, it is interesting to note the court has previously stayed proceedings on Lilly's federal preemption motion pending the United States Supreme Court's opinion in the *Levine* case.

Because Judge Browning's opinion does not affect state court cases (state court judges remain bound by *Serna, Perfetti* and *Hines* unless the New Mexico Supreme Court decides to the contrary), and because the court's opinion does not bind other federal judges, it is unclear whether *Rimbert* will be impact other litigation in New Mexico.

[5] The patient in the Lilly case had not apparently done web research or received direct-to-consumer advertising relating to Prozac.