Getting Better

Monday, June 13, 2011

We included "Getting Better" among our allusions to Beatles songs in one of last week's posts. It's a light ditty from the Sergeant Pepper album and is an interesting example of a Lennon-McCartney song (on some early albums -- er, LPs, er CDs -- the writing credit for their songs was listed as "McCartney-Lennon") because the optimistic McCartney-esque "it's getting better" is counterbalanced by Lennon's murmuring of "it couldn't get much worse." We side with McCartney on this issue and, indeed, on most issues. In the movie **Vanilla Sky**, the Kurt Russell character describes himself as a guy whose favorite Beatle used to be Lennon but, now that he's the father of kids and has seen a few things, his favorite Beatle was now McCartney. We agree. Life is tough enough, and we need silly love songs more than primal screams.

One doesn't have to believe in the myth of human perfectability to have a healthy respect for progress. In this society, in this culture, at this time, things mostly are getting better. One might not have said that in Europe in 1100 or 1939. We hear a lot of grousing now about how our kids might grow up in a tougher world than ours. But improvements are all around us. Just look at dentistry. And American beer. Probably not preemption law.

Anyway, we should all support efforts to improve on things. Which brings us to the rule against admitting evidence of subsequent remedial measures. In one sense, it's easy to see why subsequent remedial measures might be relevant to a claim of product defect. If the issue is whether a product should have been safer, does the manufacturer admit as much by making the product safer? A reflexive affirmative answer to that question is facile and foolish. The competitive marketplace is reason enough for manufacturers to try to improve their products. Further, at any given time, there is a state of the art. It's simply unfair to suggest that a subsequent improvement proves that the earlier version was defective.

Maybe it would be possible to explain to juries that making a product better doesn't mean that the old product was bad. But one suspects that evidence of a subsequent remedial measure inevitably makes the defendant pay a judicial price for progress. That possibility might, at the margins, discourage some improvements. We don't want that. Consequently, as a policy

measure, evidence of subsequent remedial measures is usually precluded. Here is what Federal Rule of Evidence 407 provides:

"When, after injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent remedial measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."

That seems clear enough. In a moment, we'll see that it's not invariably so clear. The words "subsequent" and "remedial" possess a surprising amount of elasticity.

Every now and then we encounter courts that do not take Rule 407 (or the state analogue) seriously. Those courts look for ways to admit the evidence of a subsequent remedial measure, usually by stretching the exception for "feasibility." In an individual case, the broad policy behind the evidentiary exclusion might seem to recede in importance, and some judges succumb to the temptation to let the jury sort things out. Some of those bad opinions are published. We're not naming them here, because we don't particularly feel like doing research for plaintiff lawyers. Most of the opinions are not published, and are part of the legion of bad decisions that every day evade review or correction and disappear in the mists of time.

There is an interesting application of Rule 407 in *Pusey v. Becton Dickinson & Co.*, 2011 WL 2200144 (E.D. Pa. June 7, 2011). In early 2008, up through July 11, 2008, the plaintiff underwent a breast expansion procedure, which involved use of saline inflation of tissue expanders. The saline was in certain syringes Becton manufactured. On July 17, 2008, the plaintiff's doctor came to the belief that the plaintiff's breast became infected. Meanwhile, between July 15 and 23 of 2008, the doctor received a notice from Becton recalling syringes due to packaging issues. A key issue in the case was whether the recall of the syringes was a subsequent remedial measure that should have been excluded from the case:

"[T]he plaintiffs suggest that the Rule's operation turns not on the occurrence of harm -- and not even on the event from which the harm arises -- but on the "recognition" of harm. This is a transparent attempt to stretch Rule 407 to cover the facts of this case since "[t]he recall letter is dated July 15, 2008, [and] Dr. Noone became aware of Mrs. Pusey's infection on July 17, 2008." … But the Rule is not ductile enough to withstand plaintiffs' manipulations. Plaintiffs' complaint asserts that Judith developed an infection within forty-

eight hours of the procedure performed on July 11, 2008…. Because Becton's recall notice of July 15, 2008 followed the occurrence of harm to Judith, evidence of the recall is inadmissible under Rule 407."

Pusey, 2011 WL 2200144 at * 7. Three reactions to that: (1) Wow, the timing was close; (2) this was an instance where the plaintiff's furnishing pf details in the complaint amounted to a self-inflicted wound; and (3) we love the word "ductile."

But wait, there's more. The syringes recalled were from a number of lots where there was a concern that unit package seal integrity may have been compromised for some of them. The syringe used by the doctor to treat the plaintiff came from one of the recalled lots. But there was no evidence that the particular syringe was defective. That made it easy for the court to dispose of the plaintiff's claims: "because plaintiffs must show *this* syringe was defective in order to succeed on their strict liability or warranty claims -- which they most assuredly have not done -- we must grant Becton's motion for summary judgment as to the Puseys' claims for strict products liability, breach of warranty of merchantability, and breach of warranty of fitness." *Id*. at * 11 (emphasis in original).

And we're still not done with the issue of subsequent remedial measure. Before the product recall, the defendant had conducted an investigation. One would expect that. These things cannot always happen immediately. The question is whether evidence of that investigation can be introduced by the plaintiff. The court points out that the Third Circuit has "not squarely ruled on the question of whether post-injury investigations qualify as subsequent remedial measures." *Id*. at * 8. If the investigation led to the remedial measure, is it part of the remedial measure? It turns out not to matter in the Pusey case, because the investigation of the syringes preceded the plaintiff's injury. That is, it was not "subsequent," whether it was "remedial" or not. Thus, the court would admit evidence of the investigation, even though it would not admit evidence of the recall that resulted from the investigation.

In the end, all of the plaintiff's claims in *Pusey* were dismissed. But what would happen if that weren't so, and the defendant faced a trial where its investigation was admissible, and the defendant had the choice of admitting or excluding evidence of the recall? We're not sure how we'd feel about a case where the plaintiff introduced evidence that our client had started thinking about recalling or improving the product, but the jury did not learn of the actual recall or improvement. Who benefits from such an incomplete story? If punitive damages are at

issue, and if there is a unitary as opposed to bifurcated trial -- and sometimes from the defense perspective a unitary trial is favorable -- then is the defendant better off telling the jury that it did the right thing and recalled or improved the product?

To quote our favorite Beatle: Maybe