

Tuesday, November 29, 2011

Nevada Formally Adopts The Learned Intermediary Rule

When you add together the plurality (p. 958 n.16) and one of the dissents (p. 969) in Allison v. Merck & Co., 878 P.2d 948 (Nev. 1994), there's a majority in favor of the learned intermediary rule. Thus, we've included Nevada in [our post](#) that lists all of the states adopting the rule. Still, when we have to mix and match like that, there's a little doubt in the back of our minds that we're not on as sound ground as we might have liked.

No longer. In Klasch v. Walgreen Co., ___ P.3d ___, 2011 WL 5878054 (Nev. Nov. 23, 2011), we got a little Black Friday gift from the Nevada Supreme Court. Without even mentioning Allison, the court formally adopted the rule - this time unanimously - and, in the same case, extended it to pharmacists:

“Traditionally, the learned-intermediary doctrine has been used to insulate drug manufacturers from liability in products-liability lawsuits. Under the learned-intermediary doctrine, a drug manufacturer is immune from liability to a patient taking the manufacturer's drug so long as the manufacturer has provided the patient's doctor with all relevant safety information for that drug. It is then up to the patient's doctor—who has the benefit of knowing the patient's specific situation—to convey to the patient any information that the doctor deems relevant.

Jurisdictions adopting the learned-intermediary doctrine in the context of pharmacist/customer tort litigation have put forth a similar rationale: that between the doctor and the pharmacist, the doctor is in the best position to warn the customer of a given medication's generalized risks. Or, viewed more pragmatically, the doctrine prevents pharmacists from constantly second-guessing a prescribing doctor's judgment simply in order to avoid his or her own liability to the customer. In this sense, the learned-intermediary doctrine preserves the pharmacist's role as a conduit for dispensing much-needed prescription medications.

Because we believe that these public-policy considerations are sound, we adopt the learned-intermediary doctrine in the context of pharmacist/customer tort litigation. Accordingly, Nevada pharmacists have no duty to warn their customers of the generalized risks inherent in the prescriptions they fill.”

2011 WL 5878054, at *3 (footnotes to out-of-state learned intermediary cases omitted).

All is not sweetness and light, however, in Klasch - at least not for pharmacies. The court holds that pharmacies having actual knowledge of a "customer-specific risk" can be liable for not notifying either the doctor or the customer of that risk. Id. at *5. Although the facts look pretty bad for the plaintiff (the doctor prescribed with knowledge of the alleged risk, id. at *1), that wasn't the basis of the pharmacy's summary judgment motion, so the court reversed while practically inviting the defendant to try again on a fuller record. Id. at *5-6.