Memorandum
To: Remedies Associates, Spring 2015
Date: February 18, 2015
Re: In re Dry-Max Pampers Litigation – Remedies Review Exercise

I apologize profusely for the weather-related delays that have made it impossible for me to be with you in class on Monday, February 16 and today. We have been stranded in Nashville, Tennessee, but have been informed by Southwest Airlines that we will be able to return this evening around 9:00 PM. We’ll see.

REVISED ASSIGNMENTS

Rather than move forward on the assignment sheet, I think it best that we complete our review of the introductory material on damages. I propose the following changes:

Today, February 18, 2015 No class
Written assignment due in class and on TWEN -- Monday, February 23 by 5:30 PM
(See below for details)

Mon., February 23, 2015 Discussion of written assignment based on In re Dry Max Pampers Litigation


I will revise the assignment sheet going forward, but, for now, we will stay with the current sequence of readings.

SUBSTITUTE WRITTEN ASSIGNMENT

One of the perils of a review session is that preparation can be “spotty” (a nice way of saying that some of you will have done your homework, but others will not have done so). This exercise is an attempt to ensure that all of you will:

1. Use the “lost” class time effectively (but at your own pace);
2. Be prepared for a full discussion on Monday; and
3. Get a glimpse at what your Remedies exam will look like. (That exercise will be very similar to this one, so please consider this a “practice exam.”)

Please turn the page
A. Rationale for the written assignment

A course in Remedies is many things. Properly executed, a Remedies course is:

1. An excellent review of virtually all of your basic law school courses, especially torts, contracts, statutory interpretation, civil procedure, professional responsibility, and constitutional law.
2. An introduction to the theory and practice of “doing Justice” among the parties to a legal dispute. As you now know, how “Justice” is measured depends upon the nature of the damages done in the circumstances of the case.
3. An opportunity to apply the theory to practice problems.

Unfortunately, exams are often the first and only opportunity that a student gets to apply knowledge to facts. This is neither good instructional practice, nor adequate preparation for practice.

Standard 315 of the ABA Standards for Legal Education requires that every accredited law school program

shall conduct ongoing evaluation of the law school’s program of legal education, learning outcomes, and assessment methods; and shall use the results of this evaluation to determine the degree of student attainment of competency in the learning outcomes … (emphasis added)

This assignment is designed to show you how to analyze a problem.

B. The Assignment

As you have seen so far, disputes over available remedies assume that liability on the underlying substantive has been established. From this perspective, our review of the substantive law of remedies is retrospective; that is: We look backwards to the substantive law in order to determine what remedies are available, and under what circumstances.

Lawyers, however, do not practice retrospectively. Our job is to use the facts and the law to predict what remedies would be appropriate under the circumstances of our particular case.

This is the approach that we will use to analyze the In re Dry Max Pampers litigation. In order to get the maximum understanding from our upcoming review session, please answer, in writing, the following questions relating to the following materials in this order:

1. The Complaint
   a. The facts:
      i. Who was injured?
      ii. What exactly is (are) the injury or injuries that the plaintiffs are trying to remedy?
   b. The legal claims: For each of the allegations (counts) listed below, please provide tell me: 1) What, exactly, is the nature of the legal claim?; 2) What damages would (or should) be available if the allegations are true?; and 3) What facts pleaded in the complaint would support those remedies?
i. Count 1: Breach of implied warranty of merchantability (¶¶81-92, ¶83 references the state statutes governing this claim)

ii. Count 2: Breach of implied warranty of merchantability for a specific purpose. (¶¶ 93-99, ¶98 references the state statutes governing this claim)

iii. Count 3: Violation of the Various Unfair and Deceptive Trade Practices Acts (¶ 100-107, ¶103 references the state UDTPAs)


vii. Count 7: Strict Liability- Design Defect/Manufacturing Defect and Failure to Warn (against all P&G Companies) [¶¶ 135-144]

2. The Claim for Class Relief
   a. What facts indicate that this is an appropriate case for class relief under F.R.Civ. P. 23?
   b. What facts would (or could) support a claim by Proctor & Gamble that this is NOT an appropriate case for class-based relief under F.R.Civ.P. 23?

3. The actual case:
   a. After the Sixth Circuit sent the case back to Judge Black, the defendants renewed their motion to strike the class allegations.
   b. Plaintiffs did not oppose Defendants motion to strike because (quoting the Docket entry): “Plaintiffs do not oppose the motion to strike class allegations, as counsel has determined that this matter is ‘better pursued as a consolidated action on behalf of individual plaintiffs.’”
   c. The case was settled and dismissed with prejudice.

4. A hypothetical based on the case:
   a. Assume, for purposes of this hypothetical, that the now “consolidated action on behalf of individual plaintiffs” did not settle because Proctor & Gamble refused to pay any damages.
   b. Assume, for purposes of this hypothetical, that plaintiffs’ counsel, after considering the cost and expense of a trial, decided to dismiss the case with prejudice.
   c. Assume, for purposes of this hypothetical, that you represent Proctor & Gamble. Please tell me: Should P&G ask for sanctions under Rule 11?
      i. If not, what facts support that conclusion?
      ii. If so, what remedies should be requested and why? Another way of asking this question is: What facts support the Rule 11 remedies you propose?