The opinion of the Court was delivered by

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O'HERN, J.  
    Our medical-legal jurisprudence is based on images of health care that no longer exist. At an earlier time, medical advice was received in the doctor's office from a physician who most likely made house calls if needed. The patient usually paid a small sum of money to the doctor. Neighborhood pharmacists compounded prescribed medicines. Without being pejorative, it is safe to say that the prevailing attitude of law and medicine was that the “doctor knows best.” Logan v. Greenwich Hosp. Ass'n, 465 A.2d 294, 299 (Conn. 1983).  
    Pharmaceutical manufacturers never advertised their products to patients, but rather directed all sales efforts at physicians. In this comforting setting, the law created an exception to the traditional duty of manufacturers to warn consumers directly of risks associated with the product as long as they warned health care providers of those risks.  
    For good or ill, that has all changed. Medical services are in large measure provided by managed care organizations. Medicines are purchased in the pharmacy department of supermarkets and often paid for by third-party providers. Drug manufacturers now directly advertise products to consumers on the radio, television, the Internet, billboards on public transportation, and in magazines. For example, a recent magazine advertisement for a seasonal allergy medicine in which a person is standing in a pastoral field filled with grass and goldenrod, attests that to “TAKE [THE PRODUCT]” is to “TAKE CLEAR CONTROL.” Another recent ad features a former presidential candidate, encouraging the consumer to “take a little courage” to speak with “your physician.” The first ad features major side effects, encourages the reader to “talk to your doctor,” and lists a brief summary of risks and contraindications on the opposite page. The second ad provides a phone number and the name of the pharmaceutical company, but does not provide the name of the drug.  
    The question in this case, broadly stated, is whether our law should follow these changes in the marketplace or reflect the images of the past.

We believe that when mass marketing of prescription drugs seeks to influence a patient's choice of a drug, a pharmaceutical manufacturer that makes direct claims to consumers for the efficacy of its product should not be unqualifiedly relieved of a duty to provide proper warnings of the dangers or side effects of the product. Not in book

**Direct-to-Consumer Advertising** second section pg. 271  
    It is paradoxical that so pedestrian a concern as male pattern baldness should have signaled the beginning of direct-to consumer marketing of prescription drugs. Upjohn Company became the first drug manufacturer to advertise directly to consumers when it advertised for Rogaine, a hair-loss treatment. Jon D. Hanson & Douglas A. Kysar, Taking Behavioralism Seriously: Some Evidence of Market Manipulation, 112 Harv. L. Rev. 1420, 1456 (1999). The ad targeted male consumers by posing the question, "Can an emerging bald spot . . . damage your ability to get along with others, influence your chance of obtaining a job or date or even interfere with your job performance?" Ibid. (footnotes omitted). A related ad featured an attractive woman asserting suggestively, "I know that a man who can afford Rogaine is a man who can afford me." Ibid. (footnote omitted).

Advertising for Rogaine was the tip of the iceberg. (the court later mentions medicine for allergies, nail fungus, hypertension, and depression)

Pressure on consumers is an integral part of drug manufacturers' marketing strategy. From 1995 to 1996, drug companies increased advertising directed to consumers by ninety percent. In 1997, advertising costs of pharmaceutical products surpassed the half-billion dollar mark for the first time, “easily outpacing promotional efforts directed to physicians.” These efforts are not just an essential part of manufacturers' marketing plans; they are an extremely successful one. As of December 1998, “because of its testimonials” in print and broadcast media by renowned personalities, sales of a product that treats male impotence had increased to $788 million, with approximately 7.5 million prescriptions having been written.

The American Medical Association (AMA) has long maintained a policy in opposition to product-specific prescription ads aimed at consumers. A 1992 study by the Annals of Internal Medicine reports that a peer review of 109 prescription ads found 92 per cent of the advertisements lacking in some manner.  The difficulties that accompany this [type of advertising] practice are manifest. "The marketing gimmick used by the drug manufacturer often provides the consumer with a diluted variation of the risks associated with the drug product." Even without such manipulation, "television spots lasting 30 or 60 seconds are not conducive to 'fair balance' [in presentation of risks} Given such constraints, pharmaceutical ads often contain warnings of a general nature. However, "[r]esearch indicates that general warnings (for example, see your doctor) in [direct-to consumer] advertisements do not give the consumer a sufficient understanding of the risks inherent in product use." Consumers often interpret such warnings as a "general reassurance” that their condition can be treated, rather than as a requirement that “specific vigilance” is needed to protect them from product risks.

Traditionally, companies had a legal duty to warn consumers directly of dangers associated with their products. An exception developed, however, in the area of pharmaceutical drugs: Manufacturers do not have to warn consumers as long as they have warned physicians adequately. This Learned Intermediary Rule made sense in the “doctor knows best” world described at the start of this case, a setting where consumers are dependent on their doctors for advice and information about prescription drugs.

The respected Judge John Minor Wisdom explained the rationale behind the learned intermediary doctrine. His perspective reflects the then-prevalent attitude about doctor-patient relationships:

        *This special standard for prescription drugs is an understandable exception to the Restatement's general rule that one who markets goods must warn foreseeable ultimate users of dangers inherent in [the] products. . . . Prescription drugs are likely to be complex medicines, esoteric in formula and varied in effect. As a medical expert, the prescribing physician can take into account the propensities of the drug, as well as the susceptibilities of [the] patient. [The physician's] task [is to weigh] the benefits of any medication against its potential dangers. The choice [the physician] makes is an informed one, an individualized medical judgment bottomed on knowledge of both patient and palliative. Pharmaceutical companies then, who must warn ultimate purchasers of dangers inherent in patent drugs sold over the counter, in selling* *prescription drugs are required to warn only the prescribing physician, who acts as a “learned intermediary” between manufacturer and consumer.*

A more recent review summarized the theoretical bases for the doctrine as based on four considerations.  
        First, courts do not wish to intrude upon the doctor-patient relationship. From this perspective, warnings that contradict information supplied by the physician will undermine the patient's trust in the physician's judgment. Second, physicians may be in a superior position to convey meaningful information to their patients, as they must do to satisfy their duty to secure informed consent. Third, drug manufacturers lack effective means to communicate directly with patients, making it necessary to rely on physicians to convey the relevant information. Unlike [over the counter products], pharmacists usually dispense prescription drugs from bulk containers rather than as unit-of-use packages in which the manufacturer may have enclosed labeling. Finally, because of the complexity of risk information about prescription drugs, comprehension problems would complicate any effort by manufacturers to translate physician labeling for lay patients.

 These premises … are all (with the possible exception of the last) absent in the direct-to-consumer advertising of prescription drugs.)

First, with rare and wonderful exceptions, the “'Norman Rockwell' image of the family doctor no longer exists.

Second, because managed care has reduced the time allotted per patient, physicians have considerably less time to inform patients of the risks and benefits of a drug. In a 1997 survey of 1,000 patients, the F.D.A. found that only one-third had received information from their doctors about the dangerous side effects of drugs they were taking.

 Third, having spent $1.3 billion on advertising in 1998, drug manufacturers can hardly be said to “lack effective means to communicate directly with patients when their advertising campaigns can pay off in close to billions in dividends.

 Concerns regarding patients' communication with and access to physicians are magnified in the context of medicines and medical devices furnished to women for reproductive decisions. In MacDonald v. Ortho Pharmaceutical Corp., 475 N.E.2d 65 (Mass.), cert. denied, 474 U.S. 920, 106 S. Ct. 250, 88 L. Ed.2d 258 (1985), the plaintiff's use of oral contraceptives allegedly resulted in a stroke. The Massachusetts Supreme Court explained several reasons why contraceptives differ from other prescription drugs and thus “warrant the imposition of a common law duty on the manufacturer to warn users directly of associated risks.” Id. at 136-37. For example, after the patient receives the prescription, she consults with the physician to receive a prescription annually, leaving her an infrequent opportunity to “explore her questions and concerns about the medication with the prescribing physician.” Id. at 137. Consequently, the limited participation of the physician leads to a real possibility that their communication during the annual checkup is insufficient. Id. at 138. The court also explained that because oral contraceptives are drugs personally selected by the patient, a prescription is often not the result of a physician's skilled balancing of individual benefits and risks but originates, instead, as a product of patient choice. Id. at 137. Thus, “the physician is relegated to a . . . passive role

When a patient is the target of direct marketing, one would think, at a minimum, that the law would require that the patient not be misinformed about the product. It is one thing not to inform a patient about the potential side effects of a product; it is another thing to misinform the patient by deliberately withholding potential side effects while marketing the product as an efficacious solution to a serious health problem. Further, when one considers that many of these “life-style”

consumer protection becomes imperative, because these drugs are, by definition, not medically necessary.

The direct marketing of drugs to consumers generates a corresponding duty requiring manufacturers to warn of defects on the product. The FDA has established a comprehensive regulatory scheme for direct-to-consumer marketing of pharmaceutical products.

The majority holds that the plaintiffs can argue in tort that the manufacturers of Norplant misinformed them, substanualy “contributing to their use of a defective pharmaceutical product”

**Pollock, Judge dissenting**

Norplant is not an over-the-counter drug. It can be obtained only with a doctor’s prescription. To insert Norplant, a physician or other health care professional anesthetizes an area in the patient’s upper arm, makes a one-eighth inch incision, and implants six capsules just below the patient’s skin. Similar surgery is required to move the capsules.

The use of Norplant thus requires significant involvement of the prescribing physician. Even Norman Rockwell would recognize the procedure as one performed in accordance with the traditional physician-patient relationship. The invasiveness in the Norplant procedure, moreover, would give any patient pause and a physician cause to evaluate the risks.

The majority identifies four premises underlying the learned intermediary doctrine that it asserts are inapplicable when a manufacturer advertises the drug directly to consumers …..contrary to the majority, those four considerations remain relevant to the implantation of Norplant**.**

First, the Norplant System must be implanted surgically. Implicit in the performance of a surgical procedure is respect for the physician-patient relationship. The physician is in the best position to take into account the propensities of the drug and the susceptibilities of the patient, and to give a highly individualized warning to the ultimate user based on the physician’s specialized knowledge. Second, the physician is the only person who can communicate with the patient to obtain patient’s informed consent to the procedure. Third, a pharmaceutical company, such as Wyatt, cannot provide an adequate warning label to each individual about the potential side-effects and risks associated with the device. Each patient has individualized risks associated with surgical procedures. Lastly, the Norplant implant, far more than other birth control devices, is a complex contraceptive system that requires detailed instructions and warnings.