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GENERICSWEB
THE SEARCH IS OVER

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Courts Are Divided on Whether Failure to Warn Claims Against Generic Drug Manufacturers Can Be Preempted

This year, the U.S. Supreme Court in Wyeth v. Levine will consider for the first time the preemption of state-law based claims in pharmaceutical products liability cases. Although the case involves a brand drug, the Supreme Court's ultimate decision will likely be vital in determining the availability and scope of the preemption defense for both brand and generic drug manufacturers. Awaiting the Supreme Court's decision in Wyeth v. Levine, several federal and state courts have addressed preemption in the context of claims against generic drug manufacturers. An analysis of these decisions indicates that the courts' various interpretations of the FDA's Changes Being Effected (CBE) labeling supplement regulation, 21 C.F.R. § 314.70(c), are crucial to their ultimate holdings. In Wyeth v. Levine, the Supreme Court of Vermont's holding of no preemption relied heavily on its interpretation of the CBE regulation.

In The FDA's stated policy is that a CBE supplement should be used only to strengthen or modify the labeling of an approved drug "to reflect newly acquired information" and when there is "reasonable evidence of a causal association." Furthermore, the FDA has concluded

that with regard to its most current labeling regulations, the CBE supplement process does not apply to generic drug manufacturers. Although some courts have adopted the FDA's position, other courts have not given deference to the FDA's interpretation of its CBE regulations, but instead have found against preemption largely based on their belief that state law (in the form of state court jury verdicts) upholding the necessity of additional and/or heightened warnings can be achieved by both brand and generic manufacturers via the CBE supplement process.

Let us now look at the current legal landscape to see how courts have decided cases raising these issues.

Courts Finding the Federal Preemption Doctrine Applicable to Generics

In Gaeta v. Perrigo Pharmaceuticals Co., 562 F. Supp. 2d 1091 (N.D. Cal., Nov. 9, 2007), the Northern District of California found that plaintiffs' claims were preempted by the federal Food, Drug, and Cosmetic Act insofar as the generic drug manufacturer's abbreviated new drug application (ANDA) would be jeopardized if additional warnings were required by state law since the generic drug's labeling would no longer be the "same as" the listed drug's labeling. See 21 C.F.R. §314.150(b)(10). In Gaeta, plaintiffs alleged that the generic over-the-counter version of ibuprofen caused liver failure, and such a warning should have been included in the generic ibuprofen's labeling. The FDA, however, had considered a warning for the risk of liver injury and concluded that the risk of liver injury was not scientifically supported by available data.

The U.S. District Court for the District of Minnesota also rejected a plaintiff's failure to warn claims on the basis of the federal preemption doctrine. In Mensing v. Wyeth, Inc., 562 F. Supp. 2d 1056 (D. Minn. 2008), the district court found that a generic drug manufacturer may not unilaterally change its drug's labeling absent FDA approval. Although the plaintiff claimed that the CBE supplement process could be utilized by a generic drug manufacturer, the court held that the CBE regulation does not permit a generic drug manufacturer to unilaterally change its products' labeling to be inconsistent with the branded drug. The district court held an irreconcilable conflict would arise if a generic drug manufacturer had to change its labeling due to state law requirements.

In Masterson v. Apotex Corp., 2008 U.S. Dist. LEXIS 60238 (S.D. Fla., Aug. 7, 2008), the plaintiffs alleged that their ingestion of paroxetine, the generic version of Paxil, caused birth

defects to their child. The plaintiffs asserted that generic drug manufacturers could seek labeling changes from the FDA as an exception to the federal requirement that the generic drug labeling be the "same as" the listed drug's labeling. The Southern District of Florida disagreed, finding that the presumption against preemption does not apply in the context of implied conflict preemption and adopted the analysis and conclusions of the Mensing court. The Masterson case was consolidated with two other matters venued in the Southern District of Florida, Bolin v. SmithKline Beecham, 2008 U.S. Dist. LEXIS 60241 (S.D. Fla., Aug. 7, 2008) and Valerio v. SmithKline Beecham, 2008 U.S. Dist. LEXIS 60242 (S.D. Fla., Aug. 7, 2008).

Another federal case holding that a generic drug manufacturer cannot unilaterally change its product's labeling by utilizing the CBE supplement process is Morris v. Wyeth, Inc., 2008 U.S. Dist. LEXIS 87734 (W.D. Ky., Oct. 24, 2008). The plaintiff alleged that the generic drug manufacturers failed to provide adequate warnings regarding the long-term effects of ingesting metoclopramide, the generic version of Reglan. Specifically, the plaintiffs alleged that the manufacturers failed to propose label changes to include the alleged risks of tardive dyskinesia associated with metoclopramide. The generic drug manufacturers argued that the imposition of heightened warnings under state law was in direct conflict with FDA requirements, and that plaintiffs' failure to warn claims should be preempted. The district court, in discussing the claims against the generic manufacturers, held that the FDA, as opposed to state court juries, has the sole responsibility of determining whether a generic drug manufacturer failed to notify the FDA or the medical community about any significant drug safety risk. The Morris decision was extended by the court to apply to two other cases venued in the Western District of Kentucky raising similar issues, Smith v. Wyeth, Inc., 2008 U.S. Dist. LEXIS 87684 (W.D. Ky., Oct. 24, 2008) and Wilson v. Wyeth, Inc., 2008 U.S. Dist. LEXIS 87726 (W.D. Ky., Oct. 24, 2008). In all of these cases, the district court concluded that a plaintiff's failure to warn claims were preempted by federal law insofar as the generic drug manufacturers could not unilaterally strengthen or otherwise modify their drug labels absent FDA approval.

Courts Finding the Federal Preemption Doctrine Inapplicable to Generics

In contrast to the cases discussed above, several federal and state courts have held that the federal preemption doctrine does not preclude plaintiffs from asserting failure to warn claims against generic drug manufacturers. Although dicta, the U.S. Court of Appeals for the Fourth Circuit posited that a generic drug manufacturer may change its product's

labeling utilizing the CBE supplement process. Foster v. American Home Products Corp., 29 F.3d 165 (4th Cir. 1994). The Fourth Circuit's decision in Foster has served as the basis for other federal and state courts to find against preemption. In Goldych v. Eli Lilly and Co., 2006 U.S. Dist. LEXIS 49616 (N.D. N.Y., Jul. 19, 2006), for example, the Northern District of New York adopted the holdings and rationale in Foster, albeit in dicta, insofar as a generic drug manufacturer was not a party to the case. In Foster, the plaintiff claimed that fluoxetine, the generic version of Prozac ingested by the decedent, led to the decedent's suicide.

The presumption against preemption was found to trump preemption by the Southern District of Alabama in Barnhill v. Teva Pharmaceuticals USA, Inc., 2007 U.S. Dist. LEXIS 44718 (S.D. Ala., Apr. 24, 2007). In Barnhill, the plaintiff alleged that consumption of cephalexin resulted in the plaintiff's developing Stevens-Johnson Syndrome. The generic drug manufacturer argued that the plaintiff's claims should be dismissed on the basis of conflict preemption insofar as a generic drug label cannot be modified absent FDA approval. The court held that generic drug manufacturers can comply with both FDA regulations and state law requirements necessitating strengthened warning labels.

The Western District of Washington also found the Foster court's reasoning to be persuasive. In Laisure-Radke v. Par Pharmaceutical, Inc., 2006 U.S. Dist. LEXIS 57158 (W.D. Wash., Mar. 29, 2006), the court held that a generic drug manufacturer may alter its labeling in a CBE supplement. The Laisure-Radke court concluded that the FDA requirement that a generic drug manufacturer have labeling the "same as" the brand drug does not prevent the generic drug manufacturer from changing its label after its ANDA has been approved.

The CBE supplement procedure was also determined to be a viable option for a generic drug manufacturer by the Superior Court of Massachusetts. In Kelly v. Wyeth, Inc., 22 Mass. L. Rep. 384 (Sup. Ct. 2007), the plaintiff alleged that the generic drug manufacturer failed to propose label changes to the FDA that would have strengthened the metoclopramide labeling. The Superior Court of Massachusetts held that the generic drug manufacturer's failure to provide the FDA with an opportunity to either accept or reject a labeling change under the CBE regulations precluded a finding of conflict preemption.

The New Jersey Superior Court also rejected a generic drug manufacturer's claim under the federal preemption doctrine. In Barhoum v. Barr Pharmaceuticals, Inc., (N.J. Super., L.

Div., Aug. 1, 2008), involving isotretinoin, the generic equivalent of the acne medication Accutane, the court determined that a generic drug manufacturer is permitted to add strengthened warnings to its drug's labeling.

In McKenney v. Purepac Pharmaceutical Co., 167 Cal. App. 4th 72 (Cal. App. 2008), the plaintiff alleged that the label of the generic manufacturer of metoclopramide contained false and/or misleading statements that substantially understated and downplayed the risk of tardive dyskinesia. The California Court of Appeal found no basis in the federal statutory scheme to distinguish between a generic drug and a brand drug in the ability of the manufacturers of both to strengthen product warnings.

The Eastern District of Louisiana also refused to dismiss a plaintiff's failure to warn claims on the basis of the federal preemption doctrine. In Demahy v. Wyeth, Inc., 2008 U.S. Dist. LEXIS 87014 (E.D. La., Oct. 28, 2008), the plaintiff alleged that the generic drug manufacturer failed to warn of the risk of neurological disorders from the long-term usage of metoclopramide. The generic manufacturer argued that the plaintiff's claims should be dismissed based on federal conflict and obstacle preemption. The court held, however, that only the plaintiff's claim of fraud on the FDA could be federally preempted under the U.S. Supreme Court's Buckman (531 U.S. 341(2001)) decision.

In Kellogg v. Wyeth, Inc., 2008 U.S. Dist. LEXIS 104073 (D. Vt., Dec. 17, 2008), the District Court of Vermont rejected the generic drug manufacturers' argument that the plaintiff's state law claims should be dismissed on the basis of the federal preemption doctrine. The plaintiff alleged that the manufacturers failed to properly warn of the risk of tardive dyskinesia and extrapyramidal symptoms in the labeling of the metoclopramide. The generic drug manufacturers contended that the CBE regulations do not apply to them. The Kellogg court, however, disagreed and found that the generic drug manufacturers may add additional warnings through the CBE supplement process if they have new information about health risks emanating from the use of their drugs.

Conclusion

Court decisions on this important issue cannot be reconciled. Without clarification from the U.S. Supreme Court or a further amendment to the FDA's CBE rules, courts are likely to continue to grapple with whether preemption applies to generic pharmaceutical manufacturers for failure to warn claims. As the foregoing analysis suggests, the tension

between the salutary purposes of the Hatch-Waxman Act (low-cost drugs widely and quickly available to patients) and the necessity to change label warnings when science or adverse event reports show a newly appreciated risk, presents a Hobson's choice to generic pharmaceutical companies, complicated by the FDA's own interpretation of its CBE regulations as inapplicable to them. It is hoped that with additional consideration of these issues in the appellate courts, at the FDA and in Congress as well, the coming year may result in important developments providing greater guidance to litigants, the courts and the generic pharmaceutical industry.

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