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U.S. Supreme Court Issues Decision in *Wyeth v. Levine* Rejecting FDA Labeling Pre-emption Argument

On March 4, 2009, the Supreme Court issued a striking blow to the pharmaceutical industry when, in a 6-3 vote (Justice Alito, Chief Justice Roberts and Justice Scalia dissenting), the Court ruled that state-law claims for failure to include an adequate warning on a pharmaceutical label are not pre-empted by the federal Food and Drug Administration's (FDA) prior approval of the product's label.

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In effect, this opinion affirms the right of plaintiffs to assert state common law claims against pharmaceutical companies based on personal injuries stemming from prescription drugs approved by the FDA, and significantly impedes the pharmaceutical industry's ability to obtain early dismissal of state-law failure-to-warn claims.

The Underlying Case

At issue in *Wyeth v. Levine* was a lawsuit by Diana Levine of Vermont, who went to a clinic seeking treatment for migraine headaches. Her treatment included an injection of Phenergan, an anti-nausea drug, by the "IV push" method, whereby a drug is injected directly into a patient's vein. The clinic administered the drug through the "IV push" method, a method which provides more rapid relief, despite the fact that the FDA-approved label expressly disclosed the grievous risks associated with this mode of administration. Unfortunately, the drug inadvertently entered Ms. Levine's artery, she developed gangrene, and doctors were forced to amputate her forearm.

In her state-court damages action against Wyeth, the manufacturer of Phenergan, Levine argued, inter alia, that Wyeth was negligent in that it failed to provide an adequate warning about the significant risks of administering Phenergan by the "IV-push" method, even though the drug's label had been approved by the FDA. A Vermont jury awarded her $6.7 million in damages. The Vermont Supreme Court upheld the award, ruling that FDA drug regulations do not prevent a company from being sued pursuant to state common law over drug labeling, and rejecting Wyeth's argument that it had been placed in an untenable position: having to comply with federal law, given the requirement that the FDA approve drug labels, and being punished by the state court for not using a different, more extensive label.

Wyeth argued that Ms. Levine's lawsuit, which was based on Vermont law, should be pre-empted by federal drug regulations. Wyeth further asserted that the FDA knew of the drug's risks and benefits and instructed it to use labeling that accommodated both, and it was not free to change the warnings on the label without violating federal law.

The Decision

The Supreme Court, in an opinion authored by Justice John Paul Stevens, rejected Wyeth's arguments that: (1) it would have been impossible to change Phenergan's label to comply with state law obligations because doing so would have violated federal laws that require labeling changes to be approved by the FDA; and (2) requiring Wyeth to comply with a state-law duty to provide a stronger warning than that approved by the FDA would stand as an obstacle to the accomplishment of Congress' purposes in the Food, Drug, and Cosmetic Act (FDCA) of entrusting an expert federal agency with drug labeling decisions.

No Federal Pre-emption of State-Law Negligence Claims

First, the Supreme Court addressed, and rejected, Wyeth's argument that Levine's state-law claims were pre-empted because it was impossible for Wyeth to comply with both the state-law duties underlying Levine's claims and its federal labeling duties. Specifically, Wyeth argued that unilaterally changing the Phenergan label would have violated federal law governing unauthorized distribution and misbranding of drugs. The Supreme Court held that, although a manufacturer generally may change a drug label only after receiving FDA approval of a supplemental application, the agency's "changes being effected" (CBE) regulation permits certain preapproval labeling changes that "add or strengthen a contraindication, warning, precaution, or adverse reaction" or to "add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product." Thus, pursuant to the CBE, Wyeth unilaterally could have strengthened the warning about IV-push administration of Phenergan; it need not have first sought FDA approval.

The Supreme Court further explained that, even in light of the 2008 amendment to the CBE, which provides that a manufacturer may only change its label "to reflect newly acquired information," Wyeth still could have revised Phenergan's label, as the definition of "newly acquired information" is not limited to new data, but also encompasses "new analyses of previously submitted data." Consequently, as amputations continued to occur after Phenergan injections resulted in gangrene, Wyeth could have analyzed the accumulating data and added a stronger warning about IV-push administration of the drug.

In sum, the Supreme Court found that Wyeth's "cramped" reading of the CBE regulation and its assertion that changing the Phenergan label would have violated federal law were based on a fundamental misunderstanding that the FDA, rather than the manufacturer, bears primary responsibility for drug labeling. Instead, "it has remained a central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times. It is charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market." Thus, "absent clear evidence that the FDA would not have approved a change to Phenergan's label," the Supreme Court concluded that it was not impossible for Wyeth to comply with both federal and state labeling requirements.

Duties That Exist Under State Law Do Not Interfere with FDA Labeling Regulations or Congress' Purpose

Second, the Court addressed Wyeth's argument that requiring it to comply with a state-law duty to provide a stronger warning would interfere with both the purposes and objectives of the federal drug labeling regulation and Congress' purpose of entrusting an expert agency with drug labeling decisions. The Court found this argument meritless, as it relied on an untenable interpretation of congressional intent and an overbroad view of an agency's power to pre-empt state law. The Court found that the "most glaring" problem with Wyeth's argument was that all evidence of Congress' purposes showed an intent to bolster consumer protection against harmful products, not limit it. In addition, the Court reasoned that "[i]f Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA's 70-year history." Therefore, Congress' silence on the issue, coupled with its awareness of the prevalence of state tort litigation, provided the Court with "powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness."

Despite evidence indicating that Congress did not regard state tort litigation as an obstacle to achieving its purposes, Wyeth argued that, because the FDCA requires the FDA to determine that a drug is safe and effective under the conditions set forth in its labeling, the agency must be presumed to have performed a precise balancing of risks and benefits and to have established a specific labeling standard that leaves no room for different state-law judgments. In support of this argument, Wyeth relied on the preamble to a 2006 FDA regulation governing the content and format of prescription drug labels which declared that the FDCA establishes "both a 'floor' and a 'ceiling,'" so that FDA approval of labeling pre-empts conflicting or contrary state law. The Court, however, reasoned that because Congress has not authorized the FDA to pre-empt state law directly, the Court needed only determine what weight to accord the FDA's opinion based on its thoroughness, consistence and persuasiveness. Under this standard, the Court concluded that the preamble did not merit deference; it was at odds with evidence of Congress' purposes and it reversed the FDA's longstanding position that state law is a complementary form of drug regulation without providing a reasoned explanation. Therefore, the Court concluded that Ms. Levine's common-law claims did not stand as an obstacle to the accomplishment of Congress' purposes in the FDCA.

Joining Justice Stevens in the majority were justices Anthony Kennedy, David Souter, Ruth Bader Ginsburg, Stephen Breyer and Clarence Thomas. Justice Thomas issued a concurrence. Chief Justice John Roberts and Justices Antonin Scalia and Samuel Alito dissented, stating that the case "illustrates that tragic facts make bad law" and that "[t]he court holds that a state tort jury, rather than the Food and Drug Administration, is ultimately responsible for regulating warning labels for prescription drugs."

Impact on the Pharmaceutical Industry

The Court's decision in *Wyeth v. Levine* is significant for the pharmaceutical industry for a number of reasons. First, the decision puts drugmakers

on notice that they - not the FDA - are primarily responsible for ensuring the proper labeling of their products. Consequently, drug companies will have to be much more careful and diligent about informing the FDA, doctors and consumers of any potential risks associated with a particular product. When a potential risk or adverse consequence is discovered, companies now must consider changing their label immediately, rather than waiting for the FDA to order a label change, to keep it current with the latest warning information, or directly informing doctors of dangers associated with the administration of their products. Second, the Court's ruling against pre-emption significantly undermines the industry's primary means of receiving early termination of product liability suits based on an alleged failure-to-warn. Nevertheless, the decision does not completely vitiate the pre-emption defense; it may still be available where the FDA considered and rejected the very labeling changes advocated by the plaintiff. While this exception significantly limits the scope of the available defense, pre-emption considerations should remain a part of the company's decisions with regard to drug labeling and warnings. It is now, more than ever, essential that pharmaceutical companies and their counsel preserve a clear record of accepted and rejected changes, both pre- and post-market, as well as any proposals for revised labeling, instructions and/or warnings.

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This advisory is for guidance only and is not intended to be a substitute for specific legal advice. If you would like further information, please contact the Edwards Angell Palmer & Dodge LLP attorney responsible for your matters or one of the attorneys listed below:

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