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Generic Drug Manufacturers And Failure To Warn: What duty is there after *Pliva v. Mensing?*

By Peter S. Reichertz

The Supreme Court ruled on June 23, 2011, that generic drug manufacturers cannot be sued for a failure to warn under state tort law, as long as their labeling complies with the FDA mandated labeling for the innovator drug product. While the Court had previously declined to find that federal regulation and approval of drug labeling of an innovator drug preempted state tort law in *Wyeth* v. *Levine*, 555 US 555 (2009), the Court ruled 5-4 in *Pliva* that the comprehensive scheme for approval of generic drugs under the 1984 Hatch-Waxman amendments required generic manufacturers to use the same labeling as the innovator brand name product. Since the law and FDA regulations, as conceded by the Food and Drug Administration (FDA), preclude a generic company from obtaining approval of labeling different from the innovator brand name product, the Court held it was not possible for a generic manufacturer to comply with both federal and state law. As such, under the doctrine of impossibility, they ruled federal law was supreme and state tort laws on failure to warn were preempted. In so finding, they held that the issue of "impossibility" turns on whether the private party could independently do under federal law what state law requires of it. In this case, they held that generic manufacturers could only ask FDA to change labeling and could not do so without FDA approval, and thus could not act independently.

As stated by the Court:

> The *non obstante* provision suggests that pre-emption analysis should not involve speculation about ways in which federal

> agency and third-party actions could potentially reconcile federal duties with conflicting state duties. When the "ordinary meaning" of federal law blocks a private party from independently accomplishing what state law requires, that party has established pre-emption.

The Court ruled at length upon the FDA's interpretation of its authority. FDA conceded that a generic company could not obtain approval of a CBE-30 (Changes Being Effected in 30 day supplement) to add additional warning language to labeling, and that its only alternative if it chose to do so was to propose new warnings to the FDA if they believed they were necessary. At that point the Agency is to work with the brand name manufacturer "to create a new label". The appellant manufacturers and FDA did not agree as to whether there was such a duty. The Court did not rule on that issue, since it found that pre-emption applies, even if there were such a duty.

Both the majority opinion conceded, and the dissent made a big point of, the fact that the result of the decision resulted in a situation where an individual's right to seek relief for failure to warn turns on whether he/she took a generic or brand name of a product. As noted in the majority opinion:

> We recognize that from the perspective of Mensing and Demahy, finding pre-emption here but not in Wyeth makes little sense. Had Mensing and Demahy taken Reglan, the brand-name drug prescribed by their doctors, Wyeth would control and their lawsuits would not be pre-empted. But because pharmacists, acting in full accord with state law, substituted generic metoclopramide instead, federal law pre-empts these lawsuits. See, e.g., Minn. Stat. §151.21 (2010) (describing when pharmacists may substitute generic drugs); La. Rev. Stat. Ann. §37:1241(A)(17) (West 2007) (same). We acknowledge the unfortunate hand that federal drug regulation has dealt Mensing, Demahy, and others similarly situated.

> But "it is not this Court's task to decide whether the statutory scheme established by Congress is unusual or even bizarre." Cuomo v. Clearing House Assn., L.L.C., 557 U. S. ___, ___ (2009) (THOMAS, J., concurring in part and dissenting in part) (slip op., at 21) (internal quotation marks and brackets omitted). It is beyond dispute that the federal statutes and regulations that apply to brand name drug manufacturers are meaningfully different than those that apply to generic drug manufacturers. Indeed, it is the special, and different, regulation of generic drugs that allowed the generic drug market to expand, bringing more drugs more quickly and cheaply to the public. But different federal statutes and regulations may, as here, lead to different pre-emption results. We will not distort the Supremacy Clause in order to create similar preemption across a dissimilar statutory scheme. As always, Congress and the FDA retain the authority to change the law and regulations if they so desire.

Given this ruling, what duty do generic manufacturers have if they become aware of new information as to the safety of a drug? Generic drug manufacturers still have pharmacovigilance duties under 21 C.F.R. § 314.80, and may become aware of data that they believe requires a labeling change. While the Court did not rule there was a duty to take any action, the FDA made it clear in their briefing that there was an obligation to bring such information to their attention and request a label change. As stated by the Court:

> According to the FDA, the Manufacturers could have proposed—indeed, were required to propose—stronger warning labels to the agency if they believed such warnings were needed. U. S. Brief 20; 57 Fed. Reg. 17961. If the FDA had agreed that a label change was necessary, it would have worked with the brand-name manufacturer to create a new label for both the brand-name and generic drug. Ibid.

> The agency traces this duty to 21 U. S. C. §352(f)(2), which provides that a drug is "misbranded . . . [u]nless its labeling bears . . . adequate warnings against . . . unsafe dosage or methods or duration of administration or application, in such manner and form, as are necessary for the protection of users." See U. S. Brief 12. By regulation, the FDA has interpreted that statute to require that "labeling shall be revised to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug." 21 CFR §201.57(e).
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> According to the FDA, these requirements apply to generic drugs. As it explains, a " 'central premise of federal drug regulation is that the manufacturer bears responsibility for the content of its label at all times.' " U. S. Brief 12–13 (quoting Wyeth, 555 U. S., at 570–571). The FDA reconciles this duty to have adequate and accurate labeling with the duty of sameness in the following way:
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> Generic drug manufacturers that become aware of safety problems must ask the agency to work toward strengthening the label that applies to both the generic and brand name equivalent drug. U. S. Brief 20.

There are questions left open on this issue, including the lack of any clarity on whether this is indeed a statutory duty. If it is, what is the consequence if a generic manufacturer becomes aware of a safety issue with one of its product and does not act to bring the matter to FDA? In addition to the potential misbranding charges which FDA's interpretation suggests, will the knowing failure to bring the matter to FDA result in liability under a negligence or other theory? Or is the only possible liability a potential violation of the Federal Food Drug and Cosmetic Act? (the Act) Would a plaintiff claiming a generic

manufacturer did not pursue its duty to request a label change face the defense that there is no private right of action with regard to a generic manufacturer's duty as outlined by FDA?

In addition, as discussed at same length in the dissent, what happens when the brand name product is discontinued as frequently occurs after generics enter the market? Who, if any one, may be exposed to failure to warn issue? If, as FDA frequently does, FDA lists the first generic as the Reference Listed Drug for purposes of bio-equivalence studies, does that "generic" manufacturer get put in the place of the brand name company in the analysis? While it may appear to be the last word on generic drug manufacturer labeling for failure to warn under state law, *Pliva* may not totally absolve generic drug manufacturers from product and other liability if they become aware of safety data and do not act to address the issue.

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