Client Alert

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Alabama Legislature Says No to Innovator Liability

By James W. Huston, Erin M. Bosman and Julie Y. Park

On April 29, 2015, the Alabama Senate passed a bill, SB80, "to provide that a manufacturer is not liable . . . for damages resulting from a product it did not design, manufacture, sell, or lease." Sponsored by Senator Cam Ward, the bill supersedes the Alabama Supreme Court's controversial holding in *Wyeth, Inc. v. Weeks*, No. 1101397, 2014 WL 4055813 (Ala. Aug. 15, 2014).[1]

Weeks represented the only instance in which a state supreme court held that a brand drug manufacturer, or innovator, could be liable for injuries caused by a generic version of the drug that the innovator did not manufacture because of the innovator's primary labeling responsibilities. *Weeks* held that it was foreseeable that patients and medical practitioners would read and rely on the innovator's label, regardless of whether the patient took the innovator's drug or the generic. By so holding, the court set itself apart from the vast majority of jurisdictions, which have rejected innovator liability.

The text of the bill reads as follows:

> In any civil action for personal injury, death, or property damage caused by a product, regardless of the type of claims alleged or the theory of liability asserted, the plaintiff must prove, among other elements, that the defendant designed, manufactured, sold, or leased the particular product the use of which is alleged to have caused the injury on which the claim is based, and not a similar or equivalent product. Designers, manufacturers, sellers, or lessors of products not identified as having been used, ingested, or encountered by an allegedly injured party may not be held liable for any alleged injury. A person, firm, corporation, association, partnership, or other legal or business entity whose design is copied or otherwise used by a manufacturer without the designer's express authorization is not subject to liability for personal injury, death, or property damage caused by the manufacturer's product, even if use of the design is foreseeable.

The new law thus limits liability to entities in the chain of commerce for the product that allegedly caused injury. Under this new statutory regime, the brand manufacturers in *Weeks* would likely have succeeded in moving to dismiss the plaintiffs' claims.

[1] For our previous commentary on *Weeks*, *see* "*Weeks II*: Innovator Liability Finds a Sweet Home in Alabama," Morrison & Foerster Client Alert (Aug. 20, 2014); and "*Weeks* Defies Years of Jurisprudence, Allowing Innovator Liability for Generic Drugs," Morrison & Foerster Client Alert (Jan. 16, 2013).

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According to media reports, Alabama Governor Robert Bentley is expected to sign the bill. Unfortunately for any brand drug companies currently defending claims of injury from generic drugs, the bill doesn't go into effect for six months.

The pharmaceutical industry will find this bill helpful in reducing liability exposure where the innovator drug company had no role in the underlying injury. This strong action by the Alabama legislature will also cut off a growing area of generic drug litigation, closing the door on one of the few viable causes of action for plaintiffs alleging injury from generic drugs. Plaintiffs' counsel have been seeking new theories of liability since the Supreme Court's landmark decision in *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011), which completely changed the litigation landscape. There, the Supreme Court held that failure-to-warn claims against generic drug companies were preempted because it was impossible for generic drug companies to independently change their labels.

Three other states—California, Illinois, and Vermont[2]—have had state or federal courts hold that innovator liability is a viable cause of action. It is unlikely that any of these states' legislatures will follow Alabama's lead in passing similar legislation. For now, brand drug companies can take comfort in the Alabama legislature's quick and decisive reaction to what many viewed as the wrong result in *Weeks*.

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[2] *Conte v. Wyeth, Inc.*, 168 Cal. App. 4th 89 (2008; *Dolin v. SmithKline Beecham Corp.*, No. 12 C 6403, 2014 WL 804458 (N.D. Ill. Feb. 28, 2014); *Kellogg v. Wyeth, Inc.*, 762 F. Supp. 2d 694 (D. Vt. 2010).

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