What is an RLD and Why Does it Matter?

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Early last month we blogged about the case Moore v. Mylan, Inc., 2012 U.S. Dist. LEXIS 6897 (N.D. Ga. Jan. 5, 2012) – another post-Mensing generic preemption case. We noted that this was the first case to our knowledge to discuss in some detail plaintiffs' new RLD theory. If, like us, you had not until recently focused on generic pharmaceuticals we thought a little more detail might be helpful.

For starters, let's clarify that RLD in this context does not mean "red letter day," "remote location device," "restrictive lung disease," or "red light district." In FDA jargon, it stands for Reference Listed Drug. Let's throw two more familiar acronyms in the mix: NDA – New Drug Application and ANDA – Abbreviated New Drug Application. To keep it simple we think of the NDA holder as the "brand" manufacturer and ANDA holders as "generic" manufacturers. For an ANDA to be approved, the generic manufacturer has to establish that its drug is bioequivalent to the brand name drug. It is along NDA/ANDA lines that the Supreme Court's Mensing decision is anchored.

So, where does the RLD come in? It is exactly what it sounds like. It is the drug to which an ANDA applicant must "reference" for purposes of application submission and approval. Remember the Gatorade ad campaign "I want to be like Mike." Same idea. The ANDA/generic drug manufacturer points to the RLD and tells the FDA, I want to be like that. Now so long as the brand name product is still on the market, the NDA holder and the RLD holder are one and the same. No problem.

Where things get trickier is after the brand name drug leaves the market. Let's face it. This isn't an unusual situation. For the most part, once generic drugs enter the market, there is increasingly less incentive for the brand manufacturer to continue marketing, advertising and promoting the more-expensive and therefore often less-desired-by-consumers brand product. This can lead brand manufacturers to make a financially-based decision to get out of the market.

When a brand name drug is discontinued, the FDA moves it to the Discontinued Drug Product List and it can no longer be the RLD. Prospective ANDA applicants, however, still require an RLD to reference in their applications. So, the FDA unilaterally designates one of the ANDA holders – typically the market leader at the time – as the new RLD. See FDA, Final Rule, ANDA Regulations, 57 Fed. Reg. 17,950, 17,958 (Apr. 28, 1992).

Now that we know what an RLD is – why is it important? Plaintiffs' counsel, working hard to limit the reach and impact of Mensing, are espousing a new RLD theory that goes something like this: FDA's regulations impose new or additional responsibilities on a generic drug manufacturer whose product is unilaterally designated by FDA as an RLD once the brand-name RLD NDA drug is discontinued, and that Mensing is inapplicable under such circumstances.

This is really just wishful thinking. A story with no basis in fact; in other words -- complete fiction. We just quoted the FDA's regulations. In the absence of the brand drug, a generic drug is designated the RLD solely as the reference standard for bioequivalence. The FDA regulations go no further. They do not impose any new or additional responsibilities on the ANDA/RLD holder. The Supreme Court's decision in Mensing is based on the distinction in the labeling responsibilities between brand and generic manufacturers. Brand manufacturers are permitted to revise the label without prior approval through the CBE procedure, 21 C.F.R. § 314.70(c)(6)(iii)(A); while generic manufacturers cannot. Federal law, instead, "require[s] that the warning labels of a brand-name drug and its generic copy must always be the same." Pliva v. Mensing, 131 S.Ct. 2567, 2574-75 (2011). There is nothing in the RLD/ANDA regulations that even suggests that a generic RLD holder somehow obtains the ability to unilaterally change the label.

In fact, FDA has repeatedly stated that when an NDA is discontinued for reasons other than safety or effectiveness, "approved ANDAs that refer to the NDAs . . . are **unaffected** by the discontinued marketing of the products subject to those NDAs," and "[i]f FDA determines that labeling for these drug products should be revised to meet current standards, **the Agency** will advise ANDA applicants to submit such labeling." See FDA Notice, 75 Fed. Reg. 48,352, 48353 (Aug. 10, 2010) (emphasis added). So, when a brand manufacturer withdraws its product from the market and a generic manufacturer is designated the RLD holder, it is the FDA, not the RLD holder or any other generic manufacturer that bears the responsibility for updating product warnings.

Simply stated, plaintiffs have no support for their contention that a generic RLD holder steps into the shoes of the brand manufacturer. Fortunately, as we mentioned in our prior post, the court in Moore v. Mylan, Inc., seemed to understand that point:

"[P]laintiff has not shown how [defendant] acquired all of the same rights as a brand name drug manufacturer simply by manufacturing one drug that was an RLD. Plaintiff has not shown that [defendant's] manufacture of one RLD converted [defendant] into brand name drug manufacturer with the right to use the CBE process to change the label of any of its drugs.

Id. at *24. Hopefully other courts faced with plaintiffs' RLD theory will have a similar reaction.