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Courts, Post-*Conte*, Decline to Recognize Innovator Liability Theory

Areas of Interest

- **Product Liability & Mass Torts**
- **Supreme Court & Appellate**
- **United States**

In February and March of 2009, US District Courts in the Northern District of Texas and the Western District of Oklahoma as well as the Iowa District Court for Sac County all rejected the invitations of plaintiffs-consumers of generic drugs to recognize claims against name brand manufacturers for allegedly failing to warn doctors about the risks associated with the generic product. *See Schrock v. Wyeth, Inc., et al.*, --- F.Supp.2d ----, Case No. CIV-080453-M, 2009 WL 635415 (W.D. Okla. Mar. 11, 2009); *Cousins v. Wyeth Pharma., Inc., et al.*, No. 3:08-CV-0310-N, (N.D. Tex. Mar. 10, 2009); *Huck v. Trimark Physicians Group, et al.*, No. LACV018947, (Iowa Dist. Ct. Feb. 27, 2009).

These three rulings come on the heels of the decision in *Conte v. Wyeth, Inc., et al.*, 85 Cal. Rptr. 3d 299 (Cal Ct. App. 2008), in which a California appellate court became the first US court to recognize the so-called "innovator theory" of products liability. The *Conte* court held that Wyeth, a name brand manufacturer, has a duty to warn patients whose doctors allegedly rely on Wyeth's labeling information in prescribing medication, regardless of whether the patient's prescription is ultimately filled with the name brand drug or a generic version manufactured by another company. On January 21, 2009, the California Supreme Court declined petitions to review the appellate court decision in *Conte* thereby exposing name brand manufacturers to potentially permanent and boundless liability. (For more information on *Conte*, see Mayer Brown's Client Alert "California Becomes First State to Recognize Innovator Liability.")

Despite *Conte*, the *Schrock*, *Cousins* and *Huck* courts each ruled, on summary judgment, that name brand manufacturers of Reglan® (a prescription drug used to treat gastroesophageal reflux disease) did not owe a duty to any of the plaintiffs who allegedly developed tardive dyskinesia after ingesting a generic version of Reglan® manufactured by other companies. Although none of the plaintiffs ingested a name brand Reglan® product, each asserted that name brand manufacturers could still be held liable for allegedly failing to adequately warn doctors about the risks associated with generic metoclopramide.

In the most expansive of these three opinions, the *Schrock* court rested its ruling on five separate but related conclusions. First, that each drug manufacturer, name brand or generic, is responsible for its own product. Thus, regardless of the theory of liability advanced, responsibility for the alleged defect must be traced to the proper defendant.

Second, that, contrary to plaintiffs' contention, the FDA regulatory scheme does not impose a "heightened duty" on brand name manufacturers to warn about generic products.

Third, that plaintiffs had available to them products liability claims against the generic manufacturers that made the allegedly injurious product, and so there was no need to endorse novel theories of product liability. This conclusion was, in part, based on the court's separate holding that plaintiffs' failure to warn claims against the generic manufacturers were not preempted by federal law.

Fourth, that plaintiffs' theory of innovator liability was "inconsistent with Oklahoma law, precedents from other jurisdictions and sound public policy." Plaintiffs did not purchase any Reglan® product manufactured by the name brand defendants and therefore could not satisfy the fundamental requirement of product identification.

Fifth and finally, the *Schrock* court noted that 24 courts in 14 states had rejected this same proposition.

Accordingly, the court held that in the absence of any relationship between plaintiffs and the name brand manufacturers, a recognition of innovator liability would "extend the concept of duty beyond reason and good sense as a matter of public policy."

In the near term, innovator liability will be considered by courts in a number of additional jurisdictions. However, the early returns suggest that the California Court of Appeals' ruling in *Conte* may not be the catalyst for a dramatic shift in product liability law or for the expansion of liability against name brand manufacturers that some had suggested.

If you have any questions or require specific advice on any matter discussed in this Client Alert, please contact the authors of this Client Alert, Henninger S. Bullock at +1 212 506 2528 and Andrew J. Calica at +1 212 506 2256.

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