HUNTON& WILLIAMS

EMERGING ISSUES IN CONSUMER LITIGATION

ALERT FROM THE LITIGATION TEAM

November 2008

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California Court Extends Drug Manufacturer's Duty to Warn to Users of Generic Versions

A California appellate court has held that a name-brand drug manufacturer's duty of care in disseminating information about the drug can extend to users of generic versions of that drug. *Conte v. Wyeth, Inc.*, 2008 WL 4823066 (Cal. App. 1st Dist. Nov. 7, 2008).

The *Conte* defendant, Wyeth, is the manufacturer of Reglan, a name-brand drug for gastroesophageal reflux disease. Plaintiff alleged that she had been injured by a generic form of Reglan because her physician prescribed the generic in reliance on Wyeth's inadequate warnings about Reglan. The trial court granted Wyeth summary judgment, holding that Wyeth did not have a duty to warn physicians about drugs it did not sell or manufacture.

The appellate court reversed, holding that Wyeth could be liable under a negligent misrepresentation theory even if it did not make the generic drugs used by the plaintiff. Wyeth had successfully argued to the trial court that this was essentially a strict products liability case so it could be liable only if it had sold or manufactured the drug alleged to have caused the plaintiff's injury.

The court agreed that Wyeth could be liable under a products liability theory only if it sold or manufactured the drug the plaintiff used. But the court held that because the plaintiff's claim was for negligent misrepresentation, Wyeth's liability was not limited to those persons who had used products Wyeth manufactured. The court stated that it was relying on the general principle that "a defendant who authors and disseminates information about a product manufactured and sold by another may be liable for negligent misrepresentation where the defendant should reasonably expect others to rely on that information." *Id.* at *6. The court cited *Hanberry v. Hearst Corp.*, 276 Cal. App.2d 680 (1969), for that proposition — a case holding that a defendant who endorsed a third party's product for the purpose of encouraging the public to purchase that product may be liable to a plaintiff who relied on the endorsement and was injured because the product was not as represented in the endorsement.

Having rejected Wyeth's claim that it could not be liable simply because it did not manufacture the drug the plaintiff used, the *Conte* court considered whether Wyeth had a duty to the plaintiff. Under California law, the foreseeability of harm is a central determinant of a defendant's duty. Citing the fact that generic and

name-brand versions of drugs are biologically equivalent, the court held that it was "eminently foreseeable" that plaintiff's physician would rely on Wyeth's representations about Reglan in prescribing a generic version. 2008 WL 4823066, at *8. The court also held that the other factors that California law looks to when determining whether a duty of care exists in a novel situation — e.g., the closeness of the connection between the defendant's conduct and the plaintiff's injury, the morality of the defendant's conduct, the policy goal of preventing future harm, and the consequences to the defendant and the broader community of imposing a duty of care — gave additional support for extending Wyeth's duty to users of generics. *Id*. at *8-9.

The court acknowledged that its decision was contrary to decisions in other jurisdictions, particularly *Foster v. Am. Home Prods. Corp.*, 29 F.3d 165 (4th Cir. 1994), which held that manufacturers of name-brand drugs cannot be liable under a misrepresentation theory for injuries caused by generic drugs. *See* 2008 WL 4823066, at *12. In breaking with *Foster*, the *Conte* court argued that *Foster* rested on an unargued presumption that a manufacturer could not be liable for negligent misrepresentation if it did not make the product. *Id*. at *11. Having rejected that presumption, the *Conte* court concluded that it could then reject *Foster*'s conclusion about the limit on the defendant's potential liability.

The holding in *Conte* relies upon the court's distinction between the principles applicable to misrepresentation claims and product claims, and the impact of the case will likely depend on whether courts in other jurisdictions will also recognize this distinction. Cases like *Foster* suggest that most will not. If, however, other jurisdictions adopt the *Conte* court's reasoning, the effect will be to expand significantly a name-brand defendant's duties.