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**LIFE SCIENCES AND  
PRODUCT LIABILITY UPDATE**

## **Conventional Wisdom No More: Recent Decision Calls Pharmaceutical Product Liability Defense Strategy Into Question**

*Conte v. Wyeth Inc., 08 C.D.O.S. 13931*

### **OVERVIEW**

On November 7, 2008, San Francisco's 1st District Court of Appeal issued a ruling that should have branded and generic pharmaceutical companies alike reassessing their product liability defense strategies. Reversing in part the trial court's holding, the court in *Conte v. Wyeth* held that a branded pharmaceutical company's common law duty of care "when providing product warnings extends not only to consumers of its own product, but also to those whose doctors foreseeably rely on the name-brand manufacturer's product information when prescribing a medication, even if the prescription is filled with the generic version of the prescribed drug."

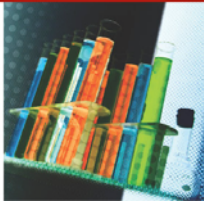
### **BRIEF FACTS**

Plaintiff Elizabeth Conte developed a serious neurological condition allegedly due to her long-term consumption of a generic form of Reglan<sup>®</sup> (metoclopramide) for gastroesophageal reflux disease. It is undisputed that the plaintiff took only the generic form of the medication.

She sued Wyeth, Inc. and three generic pharmaceutical companies (Purepac Pharmaceutical Company, Teva Pharmaceutical USA, Inc. and Pliva Inc.) under a variety of legal theories including failure of the companies to warn adequately of the dangers of long-term use of Reglan. The plaintiff claimed that the defendants "knew or should have known of a widespread tendency among physicians to misprescribe Reglan and generic metoclopramide for periods of 12 months or longer, even though the medication is only approved for 12 weeks of use, because the drugs [sic] labeling substantially understates the risks of serious side-effects from extended use."

### **THE TRIAL COURT'S HOLDING**

The trial court granted summary judgment in favor of all of the manufacturers. The court ruled in favor of Wyeth on two grounds, first that the plaintiff could not show that she or her physicians relied upon product warnings or labeling disseminated by Wyeth and second, that name-brand manufacturers owe no duty to individuals who take only generic versions of its product. Regarding the generic manufacturers, the trial court ruled in their favor on the grounds of federal preemption and the plaintiff's lack of reliance on their product warnings or labeling.



## THE APPELLATE COURT'S HOLDING AND ANALYSIS

The Appellate Court reversed the summary judgment in favor of Wyeth and affirmed the summary judgment in favor of the three generic manufacturers. The court ruled in favor of Wyeth on an issue that had not previously been addressed in California, on the grounds that “the common law duty to use due care owed by a name-brand drug manufacturer when providing product warnings extends not only to consumers of its own product, but also to those whose doctors foreseeably rely on the name-brand manufacturer’s product information when prescribing a medication, even if the prescription is filled with the generic version of the prescribed drug.” The court determined that it was foreseeable that a significant number of patients whose doctors rely on Wyeth’s product information for Reglan would be likely to have the generic version prescribed or dispensed to them and held 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 and the product causes injury, even though the defendant would not be liable in strict products liability because it did not manufacture or sell the product.”

The Appellate Court further concluded that the appellant “has shown there is a material factual dispute as to whether her doctor relied on Wyeth’s product information.” Wyeth argued that it had produced undisputed evidence that the appellant’s doctor did not rely on its product information when he prescribed Reglan to the appellant. The court, however, found that the doctor’s statement during his deposition that he had “probably” read Wyeth’s product information regarding Reglan in the *Physician’s Desk Reference (PDR)* during his residency training constituted a material factual dispute regarding whether information he had previously garnered from the *PDR* was a substantial factor in his decision to prescribe Reglan to the appellant.

Finally, the court affirmed the summary judgment in favor of the three generic manufacturers on the grounds that the appellant was unable to show that her doctor relied on any of the information supplied by the generic manufacturers. Because the Appellate Court affirmed the summary judgment in favor of the three generic manufacturers, it did not decide on the question of federal preemption with respect to inadequate drug labeling.

## FOR MORE INFORMATION

Please contact **Elizabeth B. Wright**, **Elizabeth D. Gobeil** or any member of our **Product Liability Litigation** or **Life Sciences** practice groups for more information.

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