



A PRESCRIPTION FOR CONFLICT: OPIOID STATE TORT CLAIMS RAISE SERIOUS FEDERAL PREEMPTION QUESTIONS

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The past year has seen an onslaught of lawsuits alleging that manufacturers' marketing of opioid analgesics for long-term use was misleading or contained inadequate warnings. There are, of course, serious public health concerns regarding prescription opioids that are illegally distributed and misused. However, the choice in these lawsuits to target drug manufacturers—rather than the third parties that illegally diverted or distributed the drugs—conflicts with the Food and Drug Administration's (FDA) expert scientific judgment regarding the proper use of opioids to treat chronic pain, raising significant preemption and primary jurisdiction issues.

As the Supreme Court has said, state tort law is "a potent method" of regulating products. *Riegel v. Medtronic*, 552 U.S. 312, 324 (2008). Indeed, the objective of the opioid tort actions is openly regulatory. For instance, the judge presiding over the multi-district litigation of more than 100 of these suits stated that his "priority is finding a way to dramatically reduce the number of opioids in circulation," and "to do it in 2018."¹ But as another court considering opioid suits has warned, courts have "no expertise" in this field, and the claims at issue could impact the "public's right to access this apparently important set of drugs." *People of the State of California v. Purdue Pharma*, 2015 WL 5123273 (Cal. Super. Aug. 27, 2015).

Balancing the benefits and risks of opioid prescriptions for chronic pain and determining the appropriate warnings is a policy judgment that "fall[s] within the purview of the FDA," *ibid*, the expert scientific body legally charged with creating uniform national standards for drug approvals and warnings. FDA has been closely involved with the issues presented by opioid analgesics and repeatedly found that they are both necessary and effective for treating long-term pain, which is itself a "public health priority."

In light of FDA's extensive regulation and oversight of opioid analgesics for long-term use, courts and litigants should tread carefully in assessing whether particular claims and suits are preempted or should be stayed while FDA continues its review of these issues.

FDA Approval of Opioids for Long-Term Use and Chronic Pain

Prior to the 1990s, opioid analgesics were primarily used for acute pain and cancer pain. However, "[s]tudies showing inadequate treatment of chronic non-cancer pain by physicians led to an increased use of opioids."² Since extended release, long-acting (ER/LA) opiates were first developed and approved for use in the late 1980s and 1990s, FDA has been extremely active in regulating required warnings. In July 2001, for example, FDA added stronger warnings to the OxyContin label limiting some uses and requiring additional warnings regarding drug abuse and dependence.

¹ See Emily Field, *Judge Urges Speedy Pace for Opioid MDL Amid Crisis*, Law360 (Jan. 9, 2018).

² <https://www.fda.gov/Drugs/DrugSafety/InformationbyDrugClass/ucm338566.htm>.

Although FDA is well aware of the potential for abuse, it has determined that

[w]hen prescribed and used properly, opioids can effectively manage pain and alleviate suffering—clearly a public health priority. Chronic pain is a serious and growing public health problem: it ‘affects millions of Americans ... and is rising in prevalence.’³

Further, FDA has found that “opioid drugs are a critical tool in managing pain and relieving patient suffering,” and that withdrawing its approval of such drugs “would result in an unacceptable setback for public health.”⁴

In recent years, FDA has explicitly addressed concerns over the abuse of ER/LA opioids, and the appropriate warnings for such drugs. In 2013, FDA assessed a citizen petition from the Physicians for Responsible Opioid Prescribing (PROP) requesting labeling changes to strengthen the warnings on the risks of long-term ER/LA opioid use. The petition requested that FDA (1) strike the term “moderate” from the indication allowing opioids to be used for non-cancer pain, (2) add a maximum daily dose for non-cancer pain, and (3) add a maximum duration of 90-days continuous daily use for non-cancer pain.

After reviewing the petition, the 1,900+ comments, and the scientific evidence available, FDA granted only the part of the petition requesting that “moderate” be struck from the indications. FDA, however, “decline[d] to specify or recommend a maximum daily dose or duration of use for any opioid at this time.” The agency concluded that current evidence did not support the request for a 90-day limit. However, FDA “determined that more data are needed about the safety of long-term use of opioids,” and ordered manufacturers to conduct post-market approval studies assessing the safety of long-term use (*i.e.* longer than 12 weeks) of opioid analgesics. Currently, ER/LA opioid analgesics are approved “for the management of pain severe enough to require daily, around-the-clock, long-term opioid treatment and for which alternative treatment options are inadequate.”

Preemption Issues with Opioid Tort Suits

Unsatisfied with the scope of these warnings, plaintiffs (including state and local governmental entities) have brought a spate of state tort actions against ER/LA opioid manufacturers, alleging that their marketing was misleading and contained inadequate warnings. Over 100 lawsuits are currently pending in Ohio, New York, Maryland, Mississippi, Illinois, California, New Hampshire, Missouri, Oklahoma, Tennessee, Arkansas, Oregon, South Carolina, and New Mexico, and in an MDL pending in the Northern District of Ohio.

These actions generally allege that the manufacturers misrepresented the benefits or failed to disclose the risks associated with long-term use of ER/LA opiates to treat “chronic pain.” In addition to damages and costs, the actions generally seek declaratory and injunctive relief requiring manufacturers to change their communications about opioid use for chronic pain. These claims raise substantial federal preemption issues.

Legal Background on Preemption of Failure-to-Warn Claims. Under the doctrine of implied preemption, federal law preempts conflicting state law where a private party could not comply with both the state and federal requirements, or where the state law presents an obstacle to the execution of the full purposes and objectives of Congress. Under several Supreme Court cases, state-law tort claims that would require warnings inconsistent with the FDA-approved drug labeling are preempted. Due to differences in the regulatory regime, the preemption standard is somewhat different for brand-name and generic drugs.

For brand-name drugs, the lead case is *Wyeth v. Levine*, 555 U.S. 555 (2009). *Wyeth* recognized that FDA’s “changes-being-effected” process (CBE) allows manufacturers to add or strengthen warnings or instructions

³ FDA Response to Citizen Petition by Physicians for Responsible Opioid Prescribing, available at <https://www.regulations.gov/document?D=FDA-2012-P-0818-0793>.

⁴ FDA Response to Citizen Petition re: ER/LA Opioids, available at <https://www.regulations.gov/document?D=FDA-2005-P-0325-0014> (quotation omitted).

about dosage and administration without FDA preapproval, but “the FDA retains authority to reject labeling changes made pursuant to the CBE regulation in its review of the manufacturer’s supplemental application.” *Id.* at 571. Accordingly, where there is “clear evidence that FDA would not have approved a change to [the drug’s] label,” then claims that the manufacturer should have given such warnings are preempted. *Ibid.*

Following *Wyeth*, several lower courts have held that FDA’s “rejection of a citizen petition may constitute clear evidence that the FDA would have rejected a manufacturer-initiated change to a drug label.” *Cervený v. Aventis, Inc.*, 855 F.3d 1091, 1105 (10th Cir. 2017). In *Cervený*, for instance, the Tenth Circuit held that claims that a manufacturer should have given additional warnings concerning the pregnancy drug Clomid were preempted, because FDA considered the same issues in a citizen petition and held that the additional warnings were not warranted by the scientific evidence. Several other courts, including the Sixth Circuit, the Southern District of California, and the Supreme Judicial Court of Massachusetts, have also found state tort claims preempted where FDA has previously considered and rejected a citizen petition requesting the same or substantially similar warnings, or a request to remove the drug from the market. See *Reckis v. Johnson & Johnson*, 471 Mass. 272, 28 N.E.3d 445 (2015); *Rheinfrank v. Abbot Labs, Inc.*, 680 Fed. Appx. 369, 385 (6th Cir. 2017) (dismissing state tort claims as preempted where FDA “twice refused” manufacturers’ attempts to strengthen a label).

For generic drugs, FDA regulations do not allow manufacturers to use the CBE process to add new warnings; instead, generic manufacturers can only change the label to match the brand-name label. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011). Accordingly, claims that generic manufacturers should have strengthened warnings are preempted, because federal law prohibits the manufacturers from “making any unilateral changes to a drug’s label.” *Mutual Pharmaceutical Co. Inc., v. Bartlett*, 570 U.S. 472 (2013).

Furthermore, letters to healthcare providers are part of a drug’s “labelling,” and cannot contain additional or different warnings. *PLIVA*, 131 S. Ct. at 615. Statements made in advertisements must likewise be consistent with a drug’s FDA-approved labeling. See *Strayhorn v. Wyeth Pharmaceuticals*, 737 F.3d 378 (6th Cir. 2013). Accordingly, the same preemption standard applies to claims that additional warnings should have been given in letters or advertisements as to claims challenging the warning labels disseminated with drugs. *Ibid.*

Finally, under *Buckman Co. v. Plaintiffs’ Legal Committee*, 531 U.S. 341 (2001), tort suits also cannot challenge FDA’s decision-making process or claim that manufacturers should have presented additional information about a drug’s risks to FDA. The plaintiffs in *Buckman* contended that the manufacturer made fraudulent statements to FDA, leading the agency to improperly approve a medical device. *Id.* at 347. The Supreme Court held that state tort claims alleging the manufacturer failed to disclose important risks or information to FDA would conflict with the agency’s rigorous application review process, enforcement policies, and the non-interference with the practice of medicine, and thus such claims are impliedly preempted. *Id.* at 351.

The Failure-to-Warn Claims for ER/LA Opioids Raise Serious Preemption Issues. The claims in the ER/LA opioid cases raise significant preemption issues under the decisions discussed above. While the lawsuits claim manufacturers should have given additional warnings or ceased marketing opioids for chronic pain, FDA has thoroughly considered the issue and determined that ER/LA opioids should be approved to treat chronic pain. In its response to the PROP citizen petition, FDA specifically considered, and rejected, requested label changes to remove the chronic pain indication, as well as changes that would have imposed a 90-day duration limit and that would have set a maximum daily dosage. Just as in *Cervený*, FDA’s rejection of the PROP citizen petition constitutes clear evidence that it would not have approved such warnings, and any state tort claims asserting that similar warnings should have been given are impliedly preempted. *Cervený*, 855 F.3d at 1105. This same preemption standard applies whether the claims assert that the additional warnings should have been given in the labelling itself, or in the marketing of the drug.

To hold otherwise would lead to a scenario where manufacturers would be subjected to liability or even directly required to include additional warnings that FDA has specifically considered and rejected. Any such

holding would plainly conflict with FDA's considered judgment that the scientific evidence does not support the additional warnings, and that ER/LA opioids can "effectively manage pain" including chronic pain. Allowing tort suits to conflict with FDA's judgment would interfere with its ability to impose uniform drug regulations based in its scientific expertise, instead leading to inconsistent case-by-case "regulation" by lay juries around the country, *Riegel*, 552 U.S. at 324, which could end up creating a "chilling effect on the prescription of these drugs for those who need them most," *People of the State of California*, 2015 WL 5123273, at *2.

Primary Jurisdiction

The doctrine of primary jurisdiction also helps prevent state-tort-law interference with FDA's authority to regulate and promulgate uniform standards for drugs. Where an administrative agency is currently undertaking proceedings on topics which "will contribute to a meaningful resolution of the lawsuit," a trial court should stay court proceedings until the agency has made a final determination on those topics. The purpose of the doctrine is to promote harmonized relationships between courts and the administrative agencies, like FDA, which are charged with regulating particular areas or industries and promulgating uniform national standards. Courts consider "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." *Syntek Semiconductor Co., Td. v. Microchip Tech. Inc.*, 307 F.3d 775, 781 (9th Cir. 2002).

In its response to the PROP citizen petition's request to eliminate the approval of opioids for treatment of chronic non-cancer pain, FDA announced that, pursuant to its statutory authority, it would require manufacturers to conduct post-market clinical studies by 2018 "to assess the known serious risks of misuse, abuse, hyperalgesia, addiction, overdose, and death associated with long-term use of opioid analgesics."⁵

Accordingly, the opioid cases are ripe for application of the primary jurisdiction doctrine. Because FDA is currently collecting additional scientific evidence and has stated that their results may lead to changes to the current labels for opioids, there is a very real possibility that a subsequent FDA decision will conflict with a state court judgment issued while FDA is undertaking its review. FDA's labeling mandates require national uniformity in order to be effective. Moreover, evaluating the post-market clinical studies requires exactly the sort of scientific expertise that Congress has tasked FDA with developing. Finally, staying these actions until FDA has completed its review of the studies on the long term effects of ER/LA opioids will allow the courts hearing these cases to have the benefit of FDA's scientific expertise on precisely the issues at bar, and they may in fact be dispositive of the claims.

Applying these factors, at least one court stayed a state tort action brought against a pharmaceutical manufacturer for its advertising and marketing of its ER/LA opioid drug, finding that the suit involves the "public's right to access this apparently important set of drugs, along with appropriately making certain that medical personnel are properly informed of the risks and benefits of the drugs," and that these "determinations fall within the purview of the FDA" and should be left to the agency to consider in the first instance. *People of the State of California v. Purdue Pharma*, 2015 WL 5123273 (Cal. Super. Aug. 27, 2015).

Conclusion

Illegal distribution and misuse of opioid analgesics presents serious public health concerns. However, opioid analgesics are also a "critical tool in managing pain and relieving patient suffering," when used properly. Balancing the risks and benefits of these drugs and determining the appropriate level of warnings falls squarely within the scientific expertise of FDA, which has been and continues to be heavily involved in the area. State tort suits claiming that manufacturers gave inadequate warnings on the use of opioid analgesics to treat chronic pain thus present a serious risk of conflicting with the FDA's expert judgment in this area. Courts and litigants should give close attention to the potential preemption and primary jurisdiction issues in these suits.

⁵ <https://www.regulations.gov/document?D=FDA-2005-P-0325-0014>.