

California Supreme Court Denies Review of First Appellate District's Decision in *Conte v. Wyeth* Regarding Liability of Brand-Name Drug Manufacturer for Injuries Experienced by Patient Who Took Generic Drug

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On January 21, the California Supreme Court declined to review the decision issued by the California Court of Appeal for the First Appellate District in *Conte v. Wyeth* (Case Nos. A116707, A117353; California Supreme Court No. S169116). The Court of Appeal's decision, issued in November 2008, held that Wyeth could be liable for failing to warn the plaintiff's doctor of certain side effects even though the plaintiff had not taken Wyeth's drug, but rather had taken a generic equivalent. In other words, under the First District's decision, an innovator drug company can potentially be liable for injuries suffered by a plaintiff who did not ingest their product.

Plaintiff Conte sued Wyeth, manufacturer of the branded drug Reglan®, as well as several manufacturers of the generic version, after she developed the neurological disorder tardive dyskinesia following four years of taking metoclopramide, the generic version of Reglan. Conte asserted claims for fraud, fraud by concealment, and negligent misrepresentation against Wyeth; and negligence, strict liability, negligence per se, and breach of warranty against the generic manufacturers. There was no dispute that Conte had taken only the generic, not the branded, version of Reglan. The trial court granted Wyeth's motion for summary judgment, holding that Conte did not show that she or her doctor relied on any product warning or labeling disseminated by Wyeth, and that an innovator drug manufacturer owes no duty to people who take only the generic version of the branded drug.

In an unprecedented decision, the California Court of Appeal for the First Appellate District reversed the trial court, holding that "the common law duty to use due care owed by a name-brand prescription drug manufacturer . . . 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 a generic version. (Slip Op. at 1.) The court stated that a factual question remained as to whether Conte's doctor had relied on Wyeth's product labeling and information.

For example, the doctor testified that he had "probably" read Wyeth's Reglan information during his residency, that he generally refers to the *Physicians' Desk Reference (PDR)* when prescribing, and that he believed information in the *PDR* was accurate. Further, the court was not persuaded by Wyeth's proximate cause argument that a different warning would not have affected the prescribing doctor's decision to prescribe metoclopramide. Perhaps most significantly, the court rejected the argument that plaintiff had simply renamed a typical drug product liability case as a case about fraud and misrepresentation. In the former, it is axiomatic that a plaintiff must prove that he or she was injured by the defendant's product before he or she can recover from that defendant. With the latter, the court

focused simply on the foreseeability that Wyeth's product information could be relied on by the prescribing doctor for a patient taking a generic version of a Wyeth drug.

The First District's decision in *Conte* raises the following possible implications:

- Innovator drug manufacturers could become, in essence, the "insurer" for the generic versions of their drugs regardless of when the drugs went off-patent.
- When a class of drugs carries the same FDA-imposed product information, a plaintiff might avoid summary judgment if his or her doctor testifies only that he or she may have read the labeling of one of the manufacturers in the class, and a manufacturer could therefore be held liable for injuries to a patient who took a different drug in the same class.
- Straightforward product liability claims, with their inherent requirements of product identification and protections of the learned intermediary doctrine, could be restyled as fraud or misrepresentation claims where the court focuses only on foreseeability.
- In the past, other states have, over time, adopted California's tort law doctrines, raising the possibility that innovator drug manufacturers could find their potential liability increased in other states as well.

The *Conte* opinion derived from the summary judgment stage of the case, so it is possible that if the case is tried, the facts will establish that the prescribing doctor did not, in fact, read or rely on Wyeth's product labeling, or that he would have prescribed metoclopramide in any event. Alternatively, even if the jury returns a verdict in favor of the plaintiff, another panel from a different appellate district may reach the opposite conclusion as the court in *Conte*, thereby establishing a conflict that the California Supreme Court will have to review and resolve. Until then, however, in light of the California Supreme Court's denial of Wyeth's petition for review, the decision currently stands as a possible harbinger of increased liability under California law for innovator drug manufacturers.

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