

Alabama Update

Thursday, November 03, 2011

Back in April, we put up a [post](#) complaining about Weeks v. Wyeth, 2011 WL 1216501 (M.D. Ala. March 31, 2011), one of the few courts anywhere not to dismiss a Conte-type non-manufacturer liability claim for failure to state a claim. Instead, contrary to five prior Alabama decisions (and literally scores of cases nationwide, [see](#) our branded in generic case [scorecard](#)), Weeks allowed a plaintiff who solely used a generic product (and only paid generic prices) to proceed with a pure foreseeability/fraud claim against the “brand name” manufacturer of a drug that the plaintiff never used.

Anyway, after restating all our gripes about [Conte-style non-manufacturer liability](#), we closed that post with:

“We can only hope that appropriate appellate supervision - preferably by the Alabama Supreme Court - isn't long in coming.”

We're pleased to tell you that this wish, at least, has come true. The defendant in Weeks (we're involved, so we can't say much) sought certification, and at the end of July the district court judge in Weeks granted the request to certify the question. Here's a [copy of that order](#).

More importantly, On October 17, 2011, the Alabama Supreme Court accepted the certification. Here's a copy of the [high court's order](#). Also, here's the language of the certified question, as the court accepted it:

“Under Alabama law, may a drug company be held liable for fraud or misrepresentation (by misstatement or omission), based on statements it made in connection with the manufacture or distribution of a brand-name drug, by a plaintiff claiming physical injury from a generic drug manufactured and distributed by a different company?”

As our [scorecard](#) indicates, while three federal appellate courts (Foster (4th), Mensing (8th - the part that the Supreme Court did not reverse), and Smith (6th)) have rejected expanding brand name liability along the lines that the plaintiffs seek in Weeks – no state high court has ever addressed this type of liability theory. Weeks will be the first.

We'll be rooting for a big D win, and we'll let you know if and when that happens.