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Iowa High Court Exposes Pharma "Innovator Liability" for What it Is: Deep-Pocket Jurisprudence

by Victor E. Schwartz and Phil Goldberg

The Supreme Court of Iowa's *Huck v. Wyeth, Inc.* decision is worthy of study by every state supreme court justice, legal scholar, and casebook author in America. It is the first decision in the field of tort law to openly recognize a blame shifting theory for what it is: "deep-pocket jurisprudence."

The authors first wrote about this particular blame-shifting theory, called "innovator" or "competitor" liability, for Washington Legal Foundation in a *Legal Opinion Letter* on February 8, 2013.[1] In a nutshell, this theory attempts to place liability on the manufacturer who innovated a product even for someone who never bought or used that company's product. Rather, plaintiffs in these cases allege injury solely from comparable products made by others. Here, the product was a prescription drug. The plaintiff sued the brand-name manufacturer of a drug despite fully admitting to taking only generic versions of that drug.

Plaintiffs' lawyers have been throwing this theory around for twenty years. Nearly a hundred state and federal courts have rejected this theory; only four have accepted it. This summer, the Supreme Courts of Iowa and Alabama became the first state high courts to consider this issue. The Alabama Court, on re-hearing, affirmed a ruling from last year to allow the theory.[2] The Iowa Court parted ways with and specifically took on the Alabama Court's ruling, calling it an "outlier" and explaining why its adoption is hollow and unsound. With perfect clarity, it said blaming one company for allegations against another is "deep-pocket jurisprudence [which] is law without principle."[3]

The courts did agree on one thing: fundamentals of product liability law, including under the *Second* and *Third Restatements*, limit claims to companies that made or sold the product. The difference is that the Alabama Court followed the plaintiffs' lawyer playbook and let them circumvent this principle. The Court said that regardless of whose drug a person took, it was "foreseeable" to the innovator that physicians would rely on its warning and other materials when writing prescriptions filled by generics. Thus, a person taking only generic drugs can still sue a brand-name drug manufacturer by simply alleging misrepresentations in those materials.[4]

The Iowa Court countered that this takes "foreseeability" too far. The U.S. Court of Appeals for the Sixth Circuit, which also ruled against competitor liability this summer, explained: "generic consumers' injuries are not the foreseeable result of the brand manufacturers' conduct, but of the laws over which the brand manufacturers have no control."[5] When a patient takes only generics, she severs any connection with the brand-name drug's manufacturer.

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[1] Victor E. Schwartz, Phil Goldberg, and Cary Silverman, *Warning: Alabama Court's Blame-Shifting Pharma Decision Will Have Serious Side Effects*, WLF Legal Opinion Letter, Feb. 8, 2013, *available at* http://www.wlf.org/upload/legalstudies/legalopinionletter/02-08-2013SchwartzGoldbergSilverman_LegalOpinionLetter.pdf.

[2] *Wyeth, Inc. v. Weeks*, Case No. 1:10-cv-602 (Ala. Aug. 15, 2014), *available at* http://freepdfhosting.com/a84f20bf6c.pdf (hereinafter "*Weeks II*").

[3] *See Huck v. Wyeth Inc.*, 850 N.W.2d 353, 380 (Iowa 2014).

[4] *See* Claire Prestel, *Brand-Name Liability for Inadequate Drug Labels*, Trial Magazine, Aug. 2014.

[5] *In re Darvocet*, -- F.3d --, 2014, WL 2959271, *34 (6th Cir. 2014).

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Indeed, brand-name drug companies do not engage in any action that makes or suggests that generics use their materials. Federal law mandates that generic drug companies use the "same" warnings as the brand-name drugs. The Alabama Court tried to use this fact to confine its ruling to the pharmaceutical context, perhaps to assuage fears among other industries.[6] Tort law history, though, repeatedly demonstrates that once a court introduces a liability-expanding principle in litigation against one industry, it migrates to others. For example, strict products liability initially applied only to cosmetics and food, but now covers all products.

The Iowa Court got to the heart of this issue: "Where would such liability stop? If a car seat manufacturer recognized as the industry leader designed a popular car seat, could it be sued for injuries sustained by a consumer using a competitor's seat that copied the design?"[7] "[T]o expand tort liability to those who did not make, or supply, the injury-causing product used by plaintiffs involves policy choices and social engineering more appropriately within the legislative domain."[8]

The Iowa Court also rebuffed the Alabama Court's novel argument that states can shift liability to brand-name drug manufacturers because users of generics may not have anyone else to sue—the epitome of deep-pocket jurisprudence. In recent years, the U.S. Supreme Court has held that federal law preempts failure-to-warn claims against generic drug manufacturers, but may not preempt similar claims involving brand-name drugs.[9] The Supreme Court reasoned that if a drug's warnings are deemed inadequate, generics could not change the warnings without pre-approval by FDA, but brand-name drug manufacturers may be able to.

The Iowa Court made clear that it would "not contort Iowa's tort law in order to create liability for brand manufacturers."[10] Rather, Congress should address any "unfairness" from *Mensing* and, in doing so, can make these decisions in the context of national health policy. The Court then noted that plaintiff's lawyers failed to "articulate any persuasive case that public health and safety would be advanced through imposing tort liability on brand defendants for injuries caused by generic products."[11] By contrast, "extending liability to brand manufacturers for harms caused by generic competitors would discourage investments necessary to develop new, beneficial drugs by increasing the downside risks."[12]

Another important development this summer was the Sixth Circuit's ruling. The federal appellate court, in a lengthy opinion, reminded federal judges to follow state law, even if they have a personal affinity for this theory. Even law students are familiar with the U.S. Supreme Court mandate in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) that a Federal court sitting in diversity is *bound* to follow state law.

In what may be an unprecedented chastisement, the Sixth Circuit called out one of the two Federal district courts that adopted innovator liability, *Dolin v. SmithKline Beecham Corp.*, No. 1:12-cv-06403 (N.D. Ill. Feb. 28, 2014). "We disagree with the *Dolin* court's holding."[13] Illinois "case law indicates that Plaintiffs' misrepresentation claims would . . . fail for lack of product identification."[14]

Forms of deep-pocket jurisprudence have pervaded and distorted tort law for more than a century. The Supreme Court of Iowa brought the misplaced predicate of "deep pocket" liability into the open, condemned it, and reminded us that sound public policy should guide tort law. The U.S. Court of Appeals for the Sixth Circuit reminded judges of their responsibility to follow the appropriate state jurisdiction's law, not personal views of maverick tort theories. Both courts are to be commended.

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[6] *Wyeth II*, slip op. at 6, n. 2.
[7] *Huck*, 850 N.W.2d at 380.
[8] *Id.* at 376.
[9] *Compare PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) with *Wyeth v. Levine*, 555 U.S. 555 (2009).
[10] *Huck*, 850 N.W.2d at 380.
[11] *Id*. at 377.
[12] *Id.*
[13] *In re Darvocet* at *33.
[14] *Id.* at *34.

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