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Law Rejecting "Innovator Liability" Theory Restores Civil Justice Sanity to Alabama

by John J. Park, Jr.

On May 1, 2015, Alabama Governor Robert Bentley signed into law a bill that overturns the Alabama Supreme Court's *Wyeth, Inc. v. Weeks* decisions and their adoption of "innovator liability."[1] In so doing, Act No. 2015-106 returns Alabama to the mainstream of tort law, deprives the plaintiffs' bar of a hospitable platform for product liability expansion, and salvages the state's reputation as a jurisdiction that is "open for business."

In the first of its two *Weeks* decisions,[2] the court held that Wyeth, the manufacturer of brand-name Reglan, could be held responsible for injuries suffered by a consumer who ingested only metoclopramide, the generic version of Reglan. The court held that even though Wyeth did not manufacture or sell the product that the plaintiff ingested, broad notions of "foreseeability" dictated that the brand-name manufacturer be liable for the supposedly defective warning on the generic drugmaker's product.

In his dissent from the court's initial opinion, Associate Justice Murdock observed that the court could not "give an answer that yields a just result for both plaintiffs and defendants in cases such as this."[3] Two U.S. Supreme Court opinions had precipitated the controversy faced by the Alabama Supreme Court in *Weeks*. In 2011, the U.S. Supreme Court ruled that federal drug regulations, which require that generic drugmakers' warning labels be identical to that of their "reference listed" brand-name drug, preempt state-law defective-warning claims against generic drugmakers.[4] Then, in June 2013, before the Alabama Supreme Court issued its second *Weeks* decision on rehearing,[5] the Court held that federal law also preempts state-law design-defect claims against generic drugmakers based on the adequacy of the drug's warnings.[6] The Court had held previously that federal law *does not* preempt state-law defective warning claims against brand-name manufacturers.[7]

After *Mensing* and *Bartlett*, some plaintiffs' lawyers sued the brand-name drugmakers for damages allegedly caused by generic drugs, asserting, contrary to bedrock tort law principles, that because the brand manufacturers drafted the warnings at issue, they had a legal duty to generic consumers.

With *Weeks*, the Alabama court joined one California appellate court[8] and two federal district courts,[9] all of which held that a brand-name drug manufacturer breached its duty of care for a product it did not produce

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[1] Act No. 2015-106, available at http://business.cch.com/plsd/Alabama2015-106.pdf (becomes effective Nov. 1, 2015).
[2] *Wyeth, Inc. v. Weeks*, 2013 WL 135753 (Ala. Jan. 11, 2013).
[3] *Weeks*, slip op. at 86.
[4] *PLIVA, Inc. v. Mensing*, 131 S. Ct. 567 (2011).
[5] *Wyeth, Inc. v. Weeks*, 159 So.3d 649 (Ala. 2014).
[6] *Mutual Pharmaceutical Co., Inc. v. Bartlett*, 133 S. Ct. 2466 (2013).
[7] *Wyeth v. Levine*, 555 U.S. 555 (2009).
[8] *Conte v. Wyeth, Inc.*, 85 Cal. Rptr. 3d 299 (Cal. App. 1st Dist. 2008).
[9] *Kellogg v. Wyeth*, 762 F. Supp. 2d 694, 699 (D. Vt. 2010); *Dolin v. SmithKline Beecham Corp.*, No. 1:12-cv-06403, slip op. (N.D. Ill. Feb. 28, 2014).

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or sell. Before the first ruling in *Weeks*, nearly 70 decisions from other courts, including four federal courts of appeals, rejected innovator liability.[10] In the 18 months between that first decision and the *Weeks* decision on rehearing, 12 more federal-court decisions, including two more federal courts of appeals, ruled against plaintiffs.[11]

The new law returns Alabama to the overwhelming majority rule on the liability of innovators for harms allegedly caused by copies of their products. It requires plaintiffs to prove that, among other things, the defendant designed, made, sold, or leased "the particular product the use of which is alleged to have caused the injury on which the claim is based, and not a similar or equivalent product." In contrast, "products not identified as having been used, ingested, or encountered by an allegedly injured party" will not support a claim for liability.

Act No. 2015-106 is broadly preemptive. The Alabama legislature prudently decided not to limit the law to pharmaceutical products or products where the market produces knock-offs or where a regulatory scheme permits or requires them. Both the majority, by defensively proclaiming it was not "plow[ing] new ground,"[12] and Justice Murdock in dissent,[13] understood that *Weeks* opened a Pandora's Box of liability for all businesses. As the Iowa Supreme Court stated in *Huck v. Wyeth, Inc.*:

> 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?[14]

The Alabama legislature also anticipated plaintiffs' claims where manufactured products were copied without the consent of the original manufacturer. The law states, "A person, firm, corporation . . . or other legal or business entity whose design is copied or otherwise used by a manufacturer without the designer's express authorization is not subject to liability . . . even if the use of the design is foreseeable."[15]

Justice Murdock, in his *Weeks* dissent, noted that the majority's opinion swept away the "critical dynamic" between risks and rewards that a predictable legal framework offers to businesses like pharmaceutical manufacturers.[16] Act No. 2015-106 restores the clarity lost in *Weeks*.

The law also communicates a message to the business community that Alabama's elected officials are serious about maintaining a fair and reliable civil justice system. Two decades ago, Alabama had earned a national reputation as a jackpot jurisdiction. In 2001, a *Time Magazine* story labeled Alabama "tort hell," a place "where corporate America bleeds for the public good."[17] Through several legal reform laws and a shift in the Alabama judiciary toward respect for the rule of law and traditional tort principles,[18] the state improved the reputation of its legal system, attracting such international companies as Airbus, ThyssenKrupp, Hyundai, Mercedes-Benz, and Honda in the process. The state's ability to communicate an open-to-business message would have been severely compromised had *Weeks*, and its radical innovator-liability theory, remained the law of Alabama.

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[10] *See* Victor E. Schwartz, Phil Goldberg & 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.

[11] *See Weeks*, 159 So.3d at 702-03 (Murdock, J. dissenting).

[12] *Id*. at 655 n. 2.

[13] *Id*. at 685.

[14] *Huck v. Wyeth, Inc.*, 850 N.W. 3d at 380.

[15] Act No. 2015-106, *supra* note 1.

[16] *Weeks*, 159 So.3d at 708.

[17] Gregory Jaynes, *Where the Torts Blossom*, June 24, 2001, available at http://content.time.com/time/magazine/article/0,9171,133908,00.html.

[18] *See* Forrest Latta, *State High Court Rulings Indicative of Alabama's Civil Justice Turnaround*, WLF Legal Opinion Letter, Oct. 5, 2012, available at http://www.wlf.org/upload/legalstudies/legalopinionletter/10-5-12Latta_LegalOpinionLetter.pdf.

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