The Role of FDA Approval in Drug Cases

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Stand up to a manufacturer's claim of compliance with FDA standards.

Since this is your first products liability case involving prescription drugs, you send a law clerk to the library to check out the preemption defense. You're relieved to discover there is none for prescription drugs, and immediately you conclude that the role of the Food and Drug Administration (FDA) in the case will be minimal. You will meet any defense of compliance with FDA standards with the tried-and-true argument that agency standards set only floors, not ceilings.

Big mistake. You may be about to bump your head against a regulatory ceiling.

Defendants in drug products liability cases--and any products case where the product has complied with regulatory standards (or at least has not violated any)--can effectively use the government agency, such as the FDA, as an out-of-court expert. The argument goes something like this:

> The FDA is a consumer advocate. It's on our industry's back all the time. If the agency finds something unsafe, it can take the product off the market in an instant. But the agency approved our product. And it has never canceled that approval.
>
> We have met the standards of the neutral experts at the FDA. Isn't it unfair to hold us to some different standard now when the only ones advocating that standard are the plaintiff's hired-gun experts?

Countering this seductive argument requires thoughtful work at every stage of litigation from discovery through closing argument. Bear in mind always that the manufacturer is the defendant and the product--not the regulatory agency and its decisions--is on trial. This article aims to help you effectively rebut a defense, not make regulatory issues the focus of your case.

Understand the argument

Understand first that any manufacturer in any industry can defend an allegedly defective product by pointing to its compliance with industry or government standards. But The Restatement (Second) of Torts provides that "compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."1

Your goal must be to not let the manufacturer paint the government agency as its "reasonable man."

Another way of looking at it is that the defendant is trying to make the government agency its out-of-court expert. This tactic is all the more effective because you cannot cross-examine the agency/expert.

With that in mind, you should ask the same questions you would ask any opposing expert:

Was the expert/FDA fully informed when it made its decision?

Have subsequent events outdated the agency's approval?

Was the agency biased or conflicted in some way, or was it just not able to do an effective job?

It is also important to understand why there is no federal preemption of products liability cases involving drugs. The reason is that FDA regulations provide that a manufacturer may change an approved drug label before FDA approval if the change is intended to add or strengthen warnings or instructions, or delete false or misleading claims for use or effectiveness.2

The regulations provide for this flexibility because even rigorous premarket testing involves at most a few thousand human subjects. A commonly prescribed drug will be used by millions once it is approved. Thus, most negative reactions to a drug turn up only after the drug is marketed.

Understand the agency

You also must understand the basic reality of the FDA before you start discovery, and you must effectively communicate this reality to the jury. The simple fact is that the FDA does no testing of drugs, contrary to popular assumption. Instead, the FDA relies on each manufacturer's candor and integrity in submitting data about its drugs both before and after approval.

Fundamentally, the FDA reads papers from manufacturers and holds meetings, sometimes with panels of outside experts. These meetings are usually non-adversarial--at least on the surface--and are aimed at reaching a consensus rather than an adjudicative-styled decision.

Congress passed the FDA Modernization Act of 1997 with the explicit purpose of speeding the time for approval of a new drug and requiring less proof of a new drug's efficacy.3 The FDA is only beginning to feel the effects of these changes.

Whether the statute will allow dangerous drugs to slip through the approval process will only be known with time. But it is certainly arguable that a court should attach less significance to a "quick and dirty" approval of a drug than it does to an approval that was granted under the old regime.

Your next step should be to take focused discovery of the manufacturer. Aim to puncture the idea that the FDA's approval of the drug was fully informed and show that whatever the facts were at the time of approval, experience with the drug since then argues for withdrawal of approval or more restrictive labeling.

Space does not permit full exploration of the various phases of testing involved in approving a new drug. But the questions you and your experts should consider while reviewing the manufacturer's files include the following:

Do the studies in fact reveal or forecast the injury suffered by your client?

Be sure to check foreign regulatory experience with the same drug and corporate affiliates of the manufacturer (domestic or foreign).

Why were some subjects kicked out of studies? Were they starting to show the side effect at issue?

Why were some people excluded from enrolling in studies? Did the protocol exclude the type of person most likely to suffer the injury at issue?

Were there enough preapproval "exposures" to pick up the injury at issue?

Even more critical is the review of adverse reaction reports received by the manufacturer after approval. But the context of such reports must be understood. The FDA estimates that no more than 1 in 10 adverse reactions is ever reported to the manufacturer or to the agency itself.

Hospitals and doctors have no legal duty to report adverse drug events, common as they are. Individual adverse reactions must be understood as the tip of the iceberg--as a signal for a need to investigate, but not stand-alone proof that the drug has caused the reaction.

That said, the FDA has elaborate rules requiring a manufacturer to promptly report any adverse reactions to a drug that are "unexpected" (not part of the existing labeling) and "serious" (resulting in hospitalization or death).4 A manufacturer must also promptly investigate such adverse reactions and report back to the FDA. The re-ports provide rich material for the following questions:

Did the manufacturer comply with each element of its own protocols and FDA requirements for spontaneous reports of adverse drug reactions? (Note that the FDA's "good manufacturing practice" regulations require that the manufacturer's protocols be in writing.)5 Were the adverse events reported? Were the reports timely?6 Were the reports accurate?

Did the manufacturer "promptly investigate" after filing the initial report and provide follow-up reports to the FDA? 7

Consider a motion to limit evidence

Even if you find good evidence of flaws in the regulatory approval process, the manufacturer still might defend at trial with an argument like this:

> The plaintiff contends the government was not fully informed when it approved our drug. The fact is that these extra facts dredged up by the plaintiff are of no great consequence in the overall scheme of things. And the proof of that is that the FDA has been made aware of all these facts and still has done nothing like what the plaintiff advocates.

This argument seeks to shield the defendant behind both the original agency approval as well as its inaction since approval.

You should consider a motion in limine to bar or limit evidence of the FDA's approval of the product and/or its lack of disapproval. Here is the outline of the argument.

1. Federal Rule of Evidence 403--the sideshow argument. Allowing such evidence improperly shifts the focus of the case away from the product--and away from the manufacturer and its knowledge--to the regulatory process and the FDA's role.
2. Out-of-court expert. The defendant is trying to use the FDA as an expert that endorsed the product's safety. This is unfair for two reasons. First, the FDA cannot be cross-examined in court on what it did and did not take into account. Second, plaintiff counsel cannot take full discovery from the FDA to learn why it acted as it did. The Freedom of Information Act exempts pre-decisional documents from disclosure.8 Moreover, in most cases it is impossible to depose FDA officials. The agency has regulations discouraging testimony and moves aggressively to quash subpoenas.9
3. Passage of time and change of circumstances. If significant time passed between the agency's approval of the product and the plaintiff's injury, the intervening circumstances make the approval irrelevant. This is particularly so when discovery has uncovered significant evidence of post-approval injuries.
4. Irrelevance of agency inaction. An agency's failure to take regulatory action against an alleged safety hazard does not mean that the agency has adequately investigated the issue, and it certainly does not mean that the agency approves the status quo.

Two U.S. Supreme Court cases are helpful in addressing the "agency inaction" issue: Freightliner Corp. v. Myrick and Heckler v. Chaney.

In Myrick, the plaintiffs brought design defect claims for a truck's failure to have an antilock braking system.10 The defendants argued that the National Traffic and Motor Vehicle Safety Act of 196611 preempted the suit because the National Highway Traffic Safety Administration (NHTSA) promulgated a regulation establishing stopping distance requirements for trucks.

The regulation was suspended, however, before the Myrick case due to a legal challenge by the manufacturers. Thus, no effective regulation existed at the time of Myrick's suit. The defendants argued

nonetheless that NHTSA's failure to en-act an effective regulation constituted a decision by the agency that no regulation was appropriate, thus preempting any effort by the states to regulate truck-stopping distances. In holding that lack of action by a federal agency does not imply that the agency believes no action is appropriate, the Supreme Court observed,

> There is no evidence that NHTSA decided that trucks and trailers should be free from all state regulation of stopping distances and vehicle stability. Indeed, the lack of federal regulation did not result from an affirmative decision of agency officials to refrain from regulating air brakes. NHTSA did not decide that the minimum, objective safety standard required by [the act] should be the absence of all standards, both federal and state. Rather, the lack of a federal standard stemmed from the decision of a federal court that the agency had not compiled sufficient evidence to justify its regulations.12

In Chaney, the Court's decision included the following helpful language.

> An agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all.13

Finally, you might argue that the manufacturer's evidence of regulatory compliance is just a backdoor way for the defendant to try to win a preemption argument before the jury that it could not win before the court. It is unrealistic to expect to exorcise the name of the government agency from any mention at trial. But a motion in limine can effectively cut off some of the more sweeping defense efforts to hide behind the agency's apron.

Explain the limitations on the FDA

At trial, you may want to point out the systemic limitations on the FDA as a way to explain the specific approval flaws you found in discovery. A recent article in the Journal of the American Medical Association (JAMA)14 provides rich fodder for direct examination of your experts or cross-examination of the defendant's. The authors conclude that "a more active and effective safety program for marketed drugs is essential to protect the public health."15

The authors say there are no reliable estimates of the annual number of preventable deaths and serious injuries from drugs.

They also note that no one at the FDA regularly studies or publishes information on whether preventable drug-related injuries stem from inadequate premarket testing, a breakdown in post-approval surveillance, doctor prescribing errors, or lack of patient compliance. A tiny office within the FDA, about to be renamed the Office of Post-Marketing Drug Risk Assessment, is responsible for monitoring the safety of some 5,000 approved drugs.

The authors point out that monitoring the safety of approved drugs is done mostly through the passive process of collecting case reports of adverse reactions. This process is "incapable of detecting many important potential dangers of approved drugs."16

Many of the flaws identified by the JAMA authors are not new. Read congressional watchdog agency reports about the FDA, and you will experience Yogi Berra's "deja vu all over again."17

There are other avenues for exploring the FDA's limitations. Compare the vast jurisdiction of the FDA with its limited resources devoted to ensuring the safety of marketed drugs. See the budget documents the agency regularly submits to Congress.

Also look for evidence of political pressure on the agency. Review industry newsletters for articles about the drug or related issues. Obtain an itemized list of donations from defendant drug companies or lobbying groups to members of Congress overseeing the FDA.18

Document the revolving door. Look for former FDA officials who now consult for or work for the defendant.

Finally, pound home the basic reality of the FDA described earlier: The FDA does no testing of its own and relies almost wholly on manufacturers to provide information about drugs.

Use jury instructions aggressively

Your motion in limine will provide much of the basis for aggressive jury instructions to inform the fact finder of the limited relevance of agency approval of the product. Instructions should also be drafted on the following issues:

First, statutes and regulations can provide a "standard of care" for measuring the manufacturer's conduct. This is true whether or not the manufacturer has violated these statutes and regulations. Key provisions to review include those on "failure to reveal facts material"19 and those on adequate directions for use and warnings against dangerous use.20 Helpful language can also be found in the "preambles" in the Federal Register that provide authoritative interpretation of regulations in the words of the FDA commissioner.21

Second, instructions on the elements of the plaintiff's claim should make clear that the plaintiff is claiming violations of state law. A manufacturer has a duty to comply both with state law and with any federal regulations, not simply one or the other.

Third, don't forget an instruction based on the restatement to the effect that compliance with federal regulation is only one piece of evidence and does not necessarily prove that the product was not defective.22

Finally, in an appropriate case you may want to use language from Myrick or Chaney on the limited significance, if any, of agency inaction about a safety hazard.

Emphasize the case theme

Remember ways to focus on your theme. A good series of questions to ask in closing argument or elsewhere in the case include:

Who owns the drug?

Who profits from the drug?

Who has the legal responsibility under state tort law to sell only safe products?

The answer to all those questions, of course, is "the defendant." And with your effective rebuttal of the government compliance defense, that is how the jury will see it, too.

Notes

1. RESTATEMENT (SECOND) OF TORTS S288C (1965). The new Restatement (Third) of Torts: Product Liability S4 (1997) leaves this principle intact.

2. 21 C.F.R. S314.70(c)(2) (1998).

3. Food and Drug Administration Act of 1997, Pub. L. No. 105-115, 111 Stat. 2296 (to be codified at 21 U.S.C. SS301n., 343-397).
4. See 21 C.F.R. S314.80.
5. 21 C.F.R. S211.
6. Understand the 15-day rule, which states that serious, unexpected adverse reactions must be reported to the FDA within 15 days. 21 C.F.R. S314.80(c)(1).
7. 21 C.F.R. S314.80(c)(1)(ii).
8. 5 U.S.C. S552 (1994).
9. 21 C.F.R. S601.51.
10. 514 U.S. 280 (1995).
11. 5 U.S.C. SS1381-1417 (current version at 49 U.S.C. SS30101-30169).
12. Myrick, 514 U.S. 280, 286-87.
13. Heckler v. Chaney, 470 U.S. 821, 831 (1985). For other helpful cases on the issue of limiting a defendant's use of agency approval, see Smith v. Atlantic Richfield Co., 814 F.2d 1481, 1486-88 (10th Cir. 1987) (holding admissible mine safety agency's approval of defendant's roof plans but finding that defense counsel's closing argument took the regulatory compliance defense too far); Kearney v. Kansas Pub. Serv. Co., 665 P.2d 757, 766 (Kan. 1983) (holding that natural gas utility was not entitled to introduce into evidence its compliance with federal regulations unless related to the specific negligence that was at issue in the case).
14. Thomas J. Moore et al., Time to Act on Drug Safety, 279 JAMA 1571 (1998).
15. Id. at 1571.
16. Id. at 1572.
17. For background information, see U.S. GENERAL ACCOUNTING OFFICE, DRUG REGULATION--FDA'S COMPUTER SYSTEMS NEED TO BE BETTER MANAGED (1986); U.S. GENERAL ACCOUNTING OFFICE, FDA CAN FURTHER IMPROVE ITS ADVERSE DRUG REACTION REPORTING SYSTEM (1982); U.S GENERAL ACCOUNTING OFFICE, FDA DRUG REVIEW: POST-APPROVAL RISKS 1976-85 (1990); U.S. GENERAL ACCOUNTING OFFICE, NON-PRESCRIPTION DRUGS--OVER-THE-COUNTER AND UNDEREMPHASIZED (1992); U.S. OFFICE OF TECHNOLOGY ASSESSMENT, POSTMARKETING SURVEILLANCE OF PRES CRIPTION DRUGS (1982).
18. Contact the Center for Responsive Politics, Inc., at 1320 19th St., N.W., Ste. 620, Washington, DC 20036, (202) 857-0044, or the Federal Election Commission at 999 E St., N.W., Washington, DC 20463, (202) 694-1000.
19. 21 U.S.C. S321(n); see 21 C.F.R. S1.21.
20. 21 U.S.C. S352(f); 21 C.F.R. SS201.5, 201.57(e) (prescription drugs); 21 C.F.R. S330.10(a)(4) (over-the-counter drugs).
21. See, e.g., Proposed Regulations Regarding Failure to Reveal Material Facts, 39 Fed. Reg. 33229, 33231 (Sept. 16, 1974); Preamble to Final Rule on Labeling of Prescription Drugs, Content and Format, 44 Fed. Reg. 37434 (June 26, 1979).
22. RESTATEMENT (SECOND) OF TORTS S288C.