Generic Drug Manufacturers Cannot Be Required to Issue Prop. 65 Warning That Conflicts With Brand Name Mfr. Warning

PROPOSITION 65, WARNINGS, APPELLATE CASES, LITIGATION, LEGAL, US FDA, PRODUCTS OF INTEREST

By ROGER PEARSON, April 7, 2023

The First District Court of Appeal has upheld a trial court's dismissal of a Proposition 65 plaintiff's case, **CEH v. Perrigo Company**[1)] , that would have required generic drug manufacturers to place a warning label on their products. The Court held that requiring a warning would violate the federal requirement that the generic manufacturers' label be identical to that used by the brand name manufacturers.

The defendants in this case are manufacturers and sellers of over-the-counter (OTC) antacids with the active ingredient rantidine. In addition to these OTC companies, rantidine-containing antacids are also sold under the brand name Zantac. In September 2019 an independent laboratory found significant quantities of the chemical n-nitrosodimethylamine (NDMA) in rantidine antacids. NDMA is listed as a carcinogen under Prop. 65.

The U.S. Food and Drug Administration (FDA) issued a public alert, which caused several manufacturers to voluntarily withdraw their products. Despite the alert and a subsequent FDA request, the Prop. 65 plaintiff group, the Center for Environmental Health (CEH), filed a lawsuit against several OTC manufacturers and retailers which CEH claimed continued to sell the products. CEH subsequently added some brand names sellers of Zantac as defendants. The trial court granted a demurrer without leave-to-amend in favor of the OTC defendants. It also granted a demurrer with leave-to-amend in favor of the brand name defendants.

CEH subsequently filed a third-amended complaint against only the brand name defendants. That case remains before the trial court. CEH also filed an appeal of the dismissal of its case against the OTC defendants. It is that case that the First District has now resolved in favor of those defendants.

Legal Background

FDCA

The federal Food, Drug, and Cosmetics Act (FDCA) requires a manufacturer seeking federal approval to market a new drug to prove to the Food and Drug Administration (FDA) that the drug is safe and effective. Meeting those requirements requires the manufacturer to engage in lengthy clinical trials. In 1984 Congress adopted a new law (the Hatch-Waxman Act) intended to encourage the manufacturer

of "bioequivalent" generic drugs. Such manufacturers could use an abbreviated procedure to bypass some of the clinical trials. In addition to ensuring that their products are the same biologically as the approved brand-name drug, the generic manufacturer also must show that its labeling is the same (the "sameness doctrine").

The FDCA contains a provision, **Section 379r**[2] , expressly preempting state law regarding OTC drugs. California legislators succeeded in carving out an exception to that preemption that by its language only covers Prop. 65. However, while the Prop. 65 warning requirement is protected against express preemption, courts have ruled that it is not protected against what is known as "conflict preemption." That occurs when both federal and state law cover the same subject and it is impossible to comply with both requirements. In such a case federal law prevails.

Prop. 65 Self Exception

What is known as the Prop. 65 warning requirement is contained in **Health and Safety Code section 25249.6**[3] , which provides that no one shall expose a person to a Prop. 65 listed carcinogen or reproductive toxicant without first providing a "clear and reasonable warning." That section contains an exception in **section 25249.10(c)**[4] . in the case of an "exposure for which the federal law governs warning in a manner that preempts state authority;" what the Court refers to as "Proposition 65's self-exception."

The Court's Decision

Application of the Prop. 65 Self-Exception

The Court first engages in a discussion of the meaning of the Prop. 65 self-exception as it applies to this case. "The true dispute on appeal is whether Proposition 65's self-exception means as CEH claims, that 'compliance with Proposition 65 by any means must be completely impossible for Proposition 65 to be entirely exempted' or as the generic-drug defendants claim, that a defendant is not liable under section 25249.6 if all possible warnings are preempted by federal law. We conclude that the generic-drug defendants have the better argument."

The result of the above conclusion, says the Court, "means that Proposition 65's self-exemption applies, and CEH's action against the generic-drug defendants cannot go forward if federal law governs warning in a manner that preempts state law governing warning. Thus, the determinative issue is whether it is possible for the generic-drug defendants to provide warnings about their products that satisfy both Proposition 65 and federal law. If it is possible, then federal law governing warnings does not preempt state authority governing warning."

CEH Identifies No Method by Which the Defendants Could Both Comply With the Duty of Sameness and Give Warnings that Satisfy Prop. 65

The Court notes that a generic-name applicant for FDCA registration under the abbreviated procedure must propose labeling for the new drug that is the same as the labeling approved for the brand-name drug. Given that limitation the Court concludes that unless CEH can identify a means to comply with Prop. 65 that does not constitute labeling under the FDCA, then the generic-drug defendants cannot comply with their duty to warn under Prop. 65 and meet their obligation to repeat the brand name warning (which does not contain the Prop 65 warning. This creates conflict preemption, which overcomes the express preemption provisions of section 379r.

CEH proposed two ways by which the generic defendants could provide a Prop. 65 warning without changing their labeling; point-of-sale warnings and warnings in public advertising. The Court cites a

series of state and federal decisions which collectively create a broad definition of labeling under the FDCA. Applying those decisions, the Court concludes that both methods proposed by CEH fit within the definition of labeling. Therefore, the Court concludes that CEH failed to demonstrate a way to comply with both state and federal requirements and the Court upholds the lower court ruling.

The Court does acknowledge that CEH still has a claim against the brand name sellers. Should CEH win that case and force those sellers to change their labels to include a Prop. 65 warning, then the generic manufacturers would have to change their labels to conform. Until that happens CEH cannot require the generic manufacturers to comply with Prop. 65.

Resources for this article

1. CEH v. Perrigo Company
https://prop65clearinghouse.com/cases/7166

2. Section 379r
https://www.law.cornell.edu/uscode/text/21/379r

3. Health and Safety Code section 25249.6
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?sectionNum=25249.6.&lawCode=HSC

4. section 25249.10(c)
https://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=HSC&sectionNum=25249.10