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BLOG

Defending Against Innovator Liability Lawsuits

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A minority of states have recognized a theory known as "innovator liability," which permits plaintiffs who only ingested *generic* medications to sue the corresponding *branded* pharmaceutical company. Plaintiffs use this theory to avoid federal preemption laws, which often protect generic manufacturers from liability for failure-to-warn claims. Plaintiffs typically argue that because the branded manufacturer created the label, and the label contained the allegedly inadequate warning, the branded manufacturer is liable for any harm.

As the number of innovator liability lawsuits grows, and plaintiffs attempt to establish the theory in new states, the question turns to what drug manufacturers can do to avoid liability? Several arguments have proven effective in defending against these lawsuits:

- Lack of personal jurisdiction: The plaintiff may not be able to establish personal jurisdiction since the plaintiff did not actually ingest the branded manufacturer's drug.
- Federalism concerns: Federal courts are often weary to expand liability under state law (such as through innovator liability) where a state court has not already done so.
- Harm previously unknown: A manufacturer may have no liability where it no longer manufactures the drug at issue and was unaware of the defect at the time it stopped manufacturing the drug.

These defenses may help drug manufacturers protect themselves from damages for products that they did not themselves produce.

For a more detailed analysis of defenses to innovator liability, see our recent Law360 article.

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