

Defending Against Innovator Liability Lawsuits

JULY 14, 2020

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.

1 Min Read

Authors

[Christopher Essig](#)

[Matthew Saxon](#)

Related Locations

Chicago

Washington, DC

Related Topics

Innovator Liability

Related Capabilities

Litigation/Trials

Product Liability & Mass Torts

Medical Devices

Related Regions

North America

Related Professionals



Christopher Essig



Matthew Saxon

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.