FRIER LEVITT
ATTORNEYS AT LAW

Manufacturer's *Labeling*

Frier Levitt has tools to help pharmaceutical/medical device manufacturers and distributors navigate the challenges faced by state and federal regulation of their products that are regulated by U.S. Food and Drug Administration ("FDA"), including, but not limited to, labeling and advertising, off-label promotion, and potential product liability issues.

There has been an evolution of First Amendment in the federal courts pertaining to the off-label promotion of the pharmaceutical/medical products. The importance of free speech in communicating information that may assist or help healthcare providers to establish the optimal patient care. In this vein, the Department of Justice ("DOJ") has shown some degree of reluctance to bring cases, including qui tam actions, stemming from off-label promotion despite their wide discretion in investigating and prosecuting cases at will. However, the uncertainty still exists as to what constitutes improper off-label promotion in the eyes of different government agencies.

Meanwhile, labeling and off-label promotion has been one of the main issues in products liability litigation involving pharmaceutical/medical devices. In such litigation against pharmaceutical/medical device manufacturers, plaintiffs have endeavored to assert that off-label promotion has had impacted healthcare providers' independent judgment in making a decision to prescribe a particular product, which ultimately may have contributed or caused damages to the plaintiffs. Plaintiffs also have claimed that the manufacturers failed to warn or provided an inadequate warning about certain adverse events.

Frier Levitt can navigate these complex regulatory and potential litigation frameworks and find solutions for pharmaceutical manufacturers.

Labeling and Advertising/Off-Label Promotion

It is well known that the U.S. Food and Drug Administration ("FDA") has long taken the position that a medical device or drug manufacturer who promotes any unapproved uses of FDA-approved devices/drugs is in violation of the Federal Food, Drug, and Cosmetic Act ("FDCA"). FDA has asserted that off-label promotion leads to misbrand-ing of the product and circumvention of the regulatory approval process that is taken to ensure product safety and efficacy.

It appears that FDA's position on off-label promotion has changed a bit. On June 12, 2018, FDA issued a statement about what was portrayed as a new effort to advance medical product communications to support drug competition and value-based healthcare. According to the statement, FDA is now approving "truthful and non-misleading" off-label promotion when directed to an audience of third party mayors. FDA's revised approach on

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Labeling and Advertising/Off-Label Promotion continued

FDA's revised approach on this critical issue has brought positive outcomes. For example, in 2016, the FDA issued 15 warning letters to drug and device manufacturers regarding alleged false or misleading advertising. In 2017, we saw only three such warning letters and one untitled letter.

This is in line with the evolution of First Amendment following the Supreme Court's decision in *Sorrell*, the Second Circuit's decision in *Caronia*, the *Amarin* decision and other rulings that have been made in the past several years.

Averse to this recent development, the pharmaceutical/medical device manufacturers should take cautionary steps when implementing the FDA's perspective on off-label promotion in their marketing strategy. Recently, FDA's Office of Prescription Drug Promotion (OPDP) sent a letter to a manufacturer because of statements made by the manufacturer's representative during a luncheon where healthcare professionals attended. According to the letter, the representative allegedly "minimized serious, life-threatening, risks associated with [a drug]" and "downplayed" risks of ["certain adverse events"] by suggesting healthcare providers should "not worry" about them. The letter describes the alleged off-label promotion as "especially concerning from a public health perspective," because the representative reportedly claimed the medication was "intended for new uses for which it lacks approval, and for which the labeling does not provide adequate directions for use."

As you know, physicians are permitted to prescribe drugs for off-label usage but the government has taken the position that when pharmaceutical companies' off-label promotion/marketing efforts *influenced* or *may have influenced* the physicians' *prescribing practice/behavior*, then the manufacturers have interfered. It should be emphasized that the manufacturers are allowed to relay *wholly truthful and non-misleading information* to physicians. By employing a carefully crafted action plan, not only can pharmaceutical companies contribute to the health care but also can continue to invest in research and development of drugs improving quality of life of the patients.

With the foregoing, despite the FDA's recent stance and attitude, manufacturers and distributors should continue to take a cautious approach with respect to labeling and promotion, regardless of the material's veracity.

Product Liability and Mass Tort

Off-label promotion is one of the core arguments brought by plaintiffs against the pharmaceutical/medical device manufactures in products liability/mass tort litigation. Despite the plaintiffs' contention, in the world of personal medicine and healthcare, the promotion of off-label uses is an integral part of the healthcare system.

To reiterate and reemphasize, once a drug/device is on the market after obtaining FDA approval, physicians may use the products, based on their clinical discretion, outside of the indicated usage approved by FDA. Indeed, much of what we know today about drugs and devices comes from physicians using them in the field in ways that they were not originally intended (aspirin as a blood thinner being among the most well-known example).

It is often the case where plaintiffs claim that the manufacturers illegally promoted the drug for off-label uses inconsistent with FDA's policy and regulation or provided misleading information to the physicians. As noted above, FDA and DOJ took the position that communicating wholly truthful and non-misleading information is within the realm of their policy and regulation. The issue comes down to whether the manufacturers in fact communicated truthful and accurate off-label information to physicians, who are the learned intermediaries.

Many states have adopted learned intermediary doctrine, which lays a duty on the manufacturers to warn users of the risks associated with its products by warning the prescribing physician of the

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proper use and risks of the manufacturer's products. In essence, the physician is the customer under the learned intermediary rule.Thus, it is the physician's duty to read and consider the materials from other medical sources and writings from the manufacturers. However, the fact that the prescriber may also have read or seen off-label promotion, does not change the fact that it was his duty to use all his training and experience, combined with his personal knowledge of the patient to treat the patient. Therefore, the mere conduct of providing off-label information should not be construed as off-label promotion.

Another important issue that must be discussed is innovator liability theory. This was first brought under the light in *Conte v. Wyeth*, 85 Cal. Rptr.3d 299 (Cal. App. 2008). Under this theory, brand manufacturers or New Drug Application ("NDA") holders could be liable for alleged injuries caused by the generic manufacturers or Abbreviated New Drug Application ("ANDA") holders. It is no secret that plaintiffs have been attempting to use this theory, mainly due to the deterrent effect of preemption on claims brought against the generic drug manufacturers, to hold manufacturers of branded drug products liable for injuries caused by competing generic products. Unfortunately, the courts have slowly started to recognize innovator liability.

In the meantime, FDA has withdrawn a proposed rule that would've required generic drug manufacturers to independently update their drug labels with new information. The proposed rule may have exposed generic manufacturers to product liability lawsuit stemming from a claim of failure to timely warn physicians of adverse events despite the current preemption defenses available for generic manufacturers originated in *PLIVA v. Mensing* in 2011 and *Mutual Pharmaceutical v. Bartlett* in 2013. However, it should be noted that the United States Supreme Court has accepted to review *Merck Sharp & Dohme Corp. v. Albrecht*, an appeal from the Third Circuit Court of Appeals' decision in *In re Fosamax (Alendronate Sodium) Products Liability Litigation*. The crux of the issue being presented to the Supreme Court is whether a state law failure-to-warn claim is preempted where the FDA has rejected a drug manu-facturer's proposed label warning about the health risks at issue and whether a jury, as opposed to the trial court, may be asked to look beyond the FDA's rejection and decide if the FDA would have approved a different warning had it been proposed by the manufacturer. The Supreme Court's analysis will reshape the way courts around the country decide whether and how the decisions of regulatory agencies would be interpreted.

That said, it is critical to review the labeling and promotional materials to avoid any unnecessary products liability/mass tort lawsuits.