

Rx for the Defense

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Overview

Physicians routinely prescribe FDA-approved drugs and medical devices to treat a condition or perform a surgical procedure for which the product has not yet been approved. Physicians may receive information about the success of such off-label use from colleagues, seminars, medical literature and, in some cases, from the manufacturer itself.

But off-label use of a prescription drug or device is often a mixed blessing for its manufacturers, which operate in a highly-regulated environment. While it's true that widespread off-label use of a prescription drug or device by medical practitioners can certainly boost a manufacturer's bottom line, the manufacturer cannot actually "promote" an unapproved use. FDA regulations allow manufacturers to promote only *approved* indications for drugs and devices. FDA permits a manufacturer to disseminate only educational, "non-promotional" materials about non-approved indications or uses, such as peer-reviewed medical journal articles and reports of clinical studies. FDA also requires that if a manufacturer wants to disseminate information about the new use, it have a pending application to FDA for approval of the new use, provide the FDA-approved labeling for the current indications or use and make it

clear that the off-label use of the product described in materials has *not* yet been approved by FDA.

Physicians, on the other hand, are free to prescribe an FDA-approved drug or to use an approved device for any use that is appropriate in the exercise of good medical judgment, whether or not that particular indication or use is separately approved by FDA. The agency itself recognizes that medical advances are due in part to the medical profession's innovations in therapy which trace their origin to an initially off-label use. Nonetheless, FDA prohibits manufacturers from promoting these uses, a concept may that seem somewhat counterintuitive to the manufacturer's sales and marketing personnel.

How do these competing interests play out when a doctor prescribes a drug or device for an off-label use and a patient who experiences a serious adverse reaction or a negative surgical outcome sues both doctor and manufacturer? If the defendant-doctor learned about this off-label use partially as a result of "non-promotional peer-reviewed journal articles" that have been supplied during a visit by the manufacturer's sales representative or at a conference sponsored by the manufacturer, will the doctor and manufacturer automatically be at odds in the litigation? In defending against this type of medical malpractice claim, is it generally in the doctor's self-interest to adopt the

plaintiff's theory that the manufacturer knew about a significant amount of such off-label use, or even improperly "promoted" the off-label use and gave inadequate warnings about the risks associated with that use? What about the manufacturer—is it generally in its self-interest to raise the doctor's off-label use of the product itself as a defense?

Both doctor and manufacturer can usually find a way to blame the other about an adverse event which is allegedly attributable to an off-label use. But far more often than not, the end result of this "strategy" is simply to make the plaintiff's case that much easier.

This article will briefly outline, from the manufacturer's perspective, the challenges faced by both physician and manufacturer in off-label use litigation, and some suggestions for minimizing the inevitable conflicts between their liability defenses so as to permit each defendant to increase the chance of a successful outcome.

The Defendants' Conflicting Interests

The defense of an off-label use case presents an intrinsic challenge for both physician and manufacturer. Since the physician uses the manufacturer's product, there is usually at least some pre-existing relationship. The physician may have even participated in clinical trials of the

product, and served as an outside medical advisor to the company or as a medical seminar speaker on the approved uses of the product. But when an off-label use claim is asserted, the physician and manufacturer often have different perspectives on liability issues. If the attorneys for the two types of defendants don't communicate early on in the case, the momentum of naturally divergent interests can quickly lead them to a wide fork in the road.

The Physician

In order to defend the plaintiff's medical malpractice claim, the treating physician defendant needs to demonstrate that the decision to use a drug or device off-label met the applicable standard of care. As discussed above, a physician is free to prescribe an approved drug or device to treat a patient, whether or not FDA has approved the product for the particular use at issue. Unlike the manufacturer, which is subject to strict liability for its failure to warn about significant risks associated with the product, the physician, a professional service provider, is usually only liable for medical negligence. This means the physician can essentially defend the case by relying on his or her expert's testimony that the off-label use in the particular situation was within the applicable medical specialty's standard of care. Of course, the physician still needs to be able to testify that he or she was familiar with the substance of the manufacturer's product labeling, which can only refer to *approved* uses.

So far so good—no real conflict between the physician's defense and the manufacturer's. But it can be expected that the plaintiff's medical standard

of care expert will testify that the off-label use was unnecessarily risky due to the availability of other, FDA-approved options, and that since the off-label use is by definition "not approved" by FDA, obviously FDA hasn't evaluated its safety. This argument has some appeal to a jury, given jurors' perception of FDA as the ultimate "safety check" for medical products.

The Manufacturer

A primary substantive defense asserted by a manufacturer is that its product labeling adequately warned the medical community about the risk of harm associated with the product when used for an indication set forth in the FDA-approved labeling. But by definition "off-label use" means that the doctor used the drug or device in a way that has not yet been evaluated by FDA, and thus the labeling itself can't tell the physician *how* to use it in this "unapproved" setting. There are at least three factual situations in which the manufacturer has to defend the adequacy of its warnings with the extra burden of off-label use allegations:

- 1) The manufacturer is unaware of widespread off-label use of its product and does not disseminate any information about it. The manufacturer can simply defend the failure to warn claim by pointing to the warnings it gave about the *approved* uses. True, this is easier said than done, but there are plenty of situations in which the manufacturer's warnings and instructions for use would likely have prevented the very adverse result alleged by the plaintiff, had they been heeded by the physician. (This is especially

true in the case of medical devices). The manufacturer can also win the case by establishing the separate defense that the treating physician was already aware of the potential risk associated with a particular off-label use of the product, despite the fact that the manufacturer didn't warn about it. The defenses of statutes of limitation and lack of causation due to the plaintiff's other medical conditions are also available.

- 2) The manufacturer is aware of a significant amount of off-label use, and perhaps even disseminates (in keeping with the FDA's regulations) peer-reviewed, educational, non-promotional literature to physicians. It's a tougher case to be sure, but the manufacturer still has the ability to win the case on the defenses of the treating physician's prior awareness of the risks, the "lack of medical causation" and statute of limitations, if applicable.
- 3) The plaintiff establishes that the manufacturer didn't just provide non-promotional information, but instead engaged in actual promotion of the off-label use in marketing materials, which are deemed "labeling" by FDA. In such an instance, a good plaintiff's attorney will argue that the product is considered "misbranded" under FDA regulations, and its manufacturer thus cannot establish that it met the FDA's labeling requirements. If the plaintiff has pled a fraud claim or other intentional tort against the manufacturer, the plaintiff's attorney will also likely argue at trial that increased sales are more important to the manufacturer than patient safety. Moreover, a jury's

finding of actual promotion of off-label use would deprive the manufacturer of a very powerful tool (FDA approval of the product's labeling) in establishing the overall adequacy of the warnings. However, the manufacturer can still raise the above-mentioned defenses if they are otherwise applicable.

Minimizing The Conflicts

Even without an allegation of off-label use, it seems safe to say that the greater the liability exposure to each defendant, the greater the temptation to blame the other for causing the plaintiff's damages. If it's true that this ultimately just paves the way for a successful plaintiff's case, how can the manufacturer enlist enough cooperation from the treating physician to avoid this result in off-label cases? Consider the following as means for achieving these goals:

Don't Cross-Complain Against The Physician.

There are not many situations in which it's a good idea to bring a cross-complaint or cross-claim against the physician. An adversarial pleading against the treating physician, whose testimony can make or break the manufacturer's case, effectively ends any real chance at cooperation by the physician's counsel and usually allows the plaintiff even more overall leverage in the case. Moreover, in the rare case where your manufacturer-client really wants to pursue a claim against the treating physician for equitable indemnity and contribution, it can do so in a separate action after the plaintiff's case is concluded.

Know The Regulatory History Associated With The Medical Product You Are Defending.

As soon as the company can supply the correspondence with FDA about the initial labeling and annual reports, adverse event reporting, labeling supplements, etc., review it with the company's in-house lawyer and its regulatory affairs person. You will want to determine early on the extent to which there were reports of adverse events allegedly associated with an off-label use and whether FDA expressed any concerns about it. If the specific event giving rise to the lawsuit was initially reported by the treating physician to the company or to FDA you will want to know what the treating physician had to say about it at or near the time of the event. Needless to say, you also want to make sure there isn't a letter or e-mail from FDA admonishing your client's regulatory personnel about some marketing activity that FDA considers "promotion" of off-label use.

If Possible, Meet With The Treating Physician's Attorney Early In The Case.

In every case, you will want to obtain the treating physician's medical records at the earliest opportunity. If possible, you should also obtain informally from the doctor's attorney any marketing materials or correspondence from your manufacturer client. This is just a starting point. As the manufacturer's counsel, you obviously want to know the physician's reasoning for using the product off-label, whether the physician felt he or she had sufficient knowledge

about the product from the existing warnings on the approved uses and/or whether the physician will claim that your client's sales representatives actually "promoted" the off-label use. If the physician's attorney is willing to discuss these issues with you, take the opportunity to do so. If the doctor already knew of the potential risks associated with the off-label use, and is expected to testify to that in deposition, you may have a shot at obtaining summary judgment on lack of causation. Conversely, if the doctor is expected to testify that your client promoted the off-label use and gave no information about the potential risks, your client is likely not going to obtain summary judgment, and may face serious exposure if the case were to go to trial.

Few things in life are free—expect the doctor's attorney to ask you for a similar preview of the company's version of these issues and its employees' anticipated deposition testimony.

Find And Develop The Common Factual Ground For Your Defenses.

While this may seem an impossible goal in some cases (and those cases certainly exist) there is usually a sufficient gray area in the facts to allow for each defendant to develop its case.

Depending upon the particular facts, there may be good statute of limitations defenses that both the physician and manufacturer can assert. There also may be some significant events in the plaintiff's medical history which can give rise to a lack of medical causation defense, which both defendants can

assert. There are also non-mutually exclusive substantive liability defenses.

For example, if the off-label use at issue is widely accepted among the relevant medical practitioners, the doctor can prevail by establishing that this was, in the doctor's medical judgment, the patient's best treatment option at the time. Even if the use is not particularly widespread, the doctor can successfully assert that he or she exercised appropriate medical judgment defense, especially if there are no other viable treatment options. If the physician has used the product extensively, he or she likely knows its attributes from various sources, and may also be able to testify that the existing warnings on approved uses were sufficient, even though the product was used off-label. Ask whether the doctor recalls any conversations or other communications about such use with the manufacturer's sales representatives

or medical advisors, and discuss the doctor's version with the company's sales/marketing people.

If the physician testifies that he or she had sufficient warning about the risks of the off-label use by virtue of the company's warnings about risks associated with the product's approved uses, then both the physician and the manufacturer can successfully defend the case. The doctor can establish that the applicable standard of care was met, without criticizing the adequacy of the manufacturer's warnings. The manufacturer, in turn, can show that its alleged failure to give a different warning was not the cause of the plaintiff's injury.

Conclusion

More often than not, the doctor's own potential malpractice exposure for using the product in the first place in an unapproved setting, knowing that there are no instructions or warnings about this use in the product's label-

ing (much less an FDA evaluation of its safety) is sufficient reason for the doctor to cooperate with the manufacturer, at least in the absence of facts showing actual promotion of off-label use by the manufacturer. Similarly, since physicians are both the manufacturer's customers and typically the central figures in the litigation, there is equal incentive for the manufacturer to work with the physician's counsel to minimize the inherent conflicts stemming from plaintiff's allegations of off-label use.

29 Mr. Schneeweis has over 25 years of litigation experience in the representation of clients in state and federal trial and appellate courts. He represents pharmaceutical and medical device manufacturers and other businesses in litigation ranging from claims of failure to warn and off-label promotion to trademark infringement and theft of trade secrets, and chairs the firm's Commercial Law practice group.

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