Alabama high court grants rehearing over brand-drugmaker liability

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By Terry Baynes

(Reuters) - The Alabama Supreme Court on Thursday agreed to reconsider arguments over whether a brand-name drug company can be held liable for injuries allegedly caused by a competitor's product.

The ruling was a boost for the drugmaker Wyeth, which is seeking to overturn the Alabama court's prior decision that allowed brand drugmakers to be sued for injuries allegedly caused by generic copycat drugs. The case could have significant implications for the pharmaceutical industry as well as consumers harmed by generic drugs.

In January, the state high court found that plaintiff Danny Weeks could sue Wyeth, the maker of brand-name heartburn drug Reglan, for failing to warn about the possibility of developing a neurological disorder that causes involuntary movements, even though Weeks had taken the generic version of the drug made by two different manufacturers. The Alabama justices had reached their decision based on court filings, without hearing oral argument on the issue.

The court found that because pharmacists can automatically substitute generic drugs for brand-name prescriptions, the brand manufacturer could have foreseen that a physician prescribing Reglan would rely on its product warning, even if the patient ultimately used the generic.

The ruling was, in part, a reaction to the landmark U.S. Supreme Court ruling Pliva v. Mensing, in which the court in 2011 dramatically curtailed the ability of consumers to sue generic drug manufacturers for failing to warn consumers about the dangers of their medicines.

In that case, the Supreme Court found that because federal law requires generic drugmakers to copy the labels of their brand-name counterparts, they could not be held liable for failure-to-warn claims, which have historically been the basis for the vast majority of product-liability lawsuits against drug manufacturers.

Plaintiffs' lawyers have been searching for paths around the Mensing roadblock. One of them is the theory underlying Danny Weeks's case against Wyeth, known as "innovator liability." Lower courts in California and Vermont have allowed such liability, but the Alabama court, with its ruling in January, was the first state high court to reach the same conclusion, triggering an outcry from the pharmaceutical industry, business groups and defense lawyers.

'BEDROCK PRINCIPLE'

Wyeth, owned by Pfizer Inc, asked the Alabama court for a rehearing with oral argument. The company was backed by amicus briefs from the pharmaceutical industry group Pharmaceutical Research and Manufacturers of America, the U.S. Chamber of Commerce and other business groups.

They argued that the ruling undermined a "bedrock principle" of tort law: that a company can only be liable for its own products.

The Alabama Supreme Court granted that request on Thursday in a brief, two-line order, saying the oral argument would be held in September.

Wyeth welcomed the decision on Thursday.

"The order provides the Company with its first opportunity to present oral argument before the Supreme Court of Alabama and reinforce the well-established legal principle that a business should not be held liable for a product it

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did not manufacture or market," said Pfizer's chief litigation counsel Michael Parini in a statement. The January decision conflicts with the "vast majority" of courts across the country, including four federal appeals courts to address the issue, he added.

Weeks's lawyer, Christopher Hood of Heninger Garrison Davis, did not immediately respond to a request for comment.

John Beisner, a product liability lawyer at Skadden, Arps, Slate, Meagher & Flom not involved in the case, said the court's January ruling, if it stands, would expand liability to individuals not in the chain of production.

"You could have a company, for example, that decides it no longer wants to be in the business of manufacturing a particular item," Beisner said. "But the fact that at some point it introduced the drug in the market, it could be liable in the future, even though it has decided not to make it anymore. That raises some considerable due process concerns."

William Curtis, who represents hundreds of plaintiffs in personal-injury lawsuits over Reglan across the country, said the claims should not be characterized as "innovator liability." Rather, they are straightforward misrepresentation claims that have long been part of tort law, he said.

"It's not that the innovator is liable forever. If you misrepresent the dangers in your label and others rely on it, you're responsible," he said.

The case is Wyeth Inc v. Weeks, Alabama Supreme Court, No. 1101397.

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