

## Products Liability Law Daily Wrap Up, SUPREME COURT—PREEMPTION—U.S.: Target and Teva take preemption conflict to the Supreme Court, (Mar. 1, 2016)

By Susan Lasser, J.D.

The manufacturer and the marketer of a generic drug prescribed for pain relief have asked the U.S. Supreme Court to review a ruling by the Illinois Court of Appeals holding that they could not rely on a federal preemption defense in a state-law products liability and fraud action. They argue in their petition to the Court that the appellate court's decision conflicts with the Supreme Court's findings in [Mutual Pharmaceutical Co., Inc. v. Bartlett](#), 133 SCt 2466 (2013) ([Target Corp. v. Guvenoz](#), Docket No. 15-1081, petition filed February 25, 2016).

The case stems from a patient's taking the generic version of the brand name drug, Darvocet®, and subsequently becoming a spastic quadriplegic and dying. The patient's widow asserted claims against Teva Pharmaceuticals USA, Inc. (the manufacturer) and Target Corporation (the marketer) alleging that her husband's taking the medication caused his illness and death. The patient was given a prescription for Darvocet, but when he filled his prescription at a Target pharmacy, he purchased the generic version manufactured by Teva. After ingesting the recommended dose, he suffered a cardiac arrest, which caused serious brain injury and, later, his death. Target and Teva moved to dismiss the complaint on the ground that federal law preempted the widow's claims.

**Illinois appellate court ruling.** The Illinois Court of Appeals determined that the widow's claims survived the preemption defense asserted by the manufacturer and marketer (see *Products Liability Law Daily*, March 30, 2015 [analysis](#)). The defendants claimed that even though the drug was unsafe, they were operating under a safe harbor provided by federal law. The Illinois court, however, found that the marketer and manufacturer were mistaken in their readings of federal precedent. The court held that a claim against a generic manufacturer could proceed under Illinois law when the claim did not allege that the manufacturer should have altered the design or labeling of a drug in contravention of federal requirements. Therefore, the court ruled that irrespective of the Food, Drug, and Cosmetics Act's sameness requirement, because the widow claimed that the drug should not have been sold (a "stop-selling" theory) or that Target and Teva engaged in fraud, the claims were not preempted by federal law.

**Question presented.** The defendants petitioned the Supreme Court to answer the following question: "Whether the decision of the Illinois Appellate Court, which permits personal-injury plaintiffs in Illinois to proceed with the very 'stop-selling' theory of liability this Court rejected as 'incompatible with our pre-emption jurisprudence' in *Mutual Pharmaceutical Co. v. Bartlett*, 133 S. Ct. 2466 (2013), should be summarily reversed."

**Supporting argument.** According to the manufacturer and seller, the Illinois Court of Appeals' decision conflicts with the Supreme Court's ruling in *Bartlett*. They claim that the widow's stop-selling claim was indistinguishable from the stop-selling claim rejected in *Bartlett*, which held that a court cannot avoid the conflict between state and federal law by holding that a generic manufacturer should stop selling its product altogether. The Court said that the stop-selling rationale was incompatible with a preemption defense because "an actor seeking to satisfy both his federal- and state-law obligations is not required to cease acting altogether in order to avoid liability." The defendants complain the appellate court found that the current case was not controlled by *Bartlett* because the widow was not claiming that the defendants should have altered their product design or product labeling, but rather should have stopped selling their product. They argue that the plaintiff in *Bartlett* raised the same claim as the widow—arguing that the generic manufacturer should have withdrawn its generic drug product from the market—and it was rejected by the Supreme Court. Thus, the defendants maintain that the Illinois appellate court's decision directly contradicts that of the High Court.

The case is Docket No. 15-1081.

Attorneys: Jay P. Lefkowitz (Kirkland & Ellis LLP) for Target Corp. and Teva Pharmaceuticals USA, Inc.

Companies: Target Corp. and Teva Pharmaceuticals USA, Inc.

Cases: CourtDecisions SupremeCourtNews PreemptionNews WarningsNews DrugsNews

©2016 CCH Incorporated and its affiliates and licensors. All rights reserved.

Subject to Terms & Conditions: [http://researchhelp.cch.com/License\\_Agreement.htm](http://researchhelp.cch.com/License_Agreement.htm)

