

## Products Liability Law Daily Wrap Up, DEFENSES TO LIABILITY—DRUGS

### D. Kan.: Acne drug-based products liability claims against Mylan dismissed, (Jul. 25, 2019)

Products Liability Law Daily Wrap Up

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By Leah S. Poniatowski, J.D.

Claim preclusion and statute of limitations barred claims in second lawsuit filed because injury was "difference of degree" and could not be based on federal law.

An individual who alleged that her injuries from using the Amnesteem acne treatment drug had worsened and the manufacturer failed to update the warning on the drug could not survive the manufacturer's motion to dismiss, a federal district court in Kansas ruled. The court determined that there was privity among several of the newly-named parties and the originally-named parties to trigger claim preclusion, and that because her injuries were a "difference of degree" of those asserted in the original judgment, they were time-barred by state law ([Watson v. Mylan Pharmaceuticals, Inc.](#), July 18, 2019, Murgua, C.).

An individual used Mylan Pharmaceuticals' Amnesteem product, a Food and Drug Administration (FDA)-approved generic of the anti-acne drug Accutane®. She alleged injuries caused by her use of the product in 2014, and filed a products liability lawsuit in 2016 based on state law. Her claims were dismissed as preempted by federal law [see *Products Liability Law Daily*'s December 1, 2016 [analysis](#)], and a federal appellate panel affirmed the denial [see *Products Liability Law Daily*'s July 14, 2017 [analysis](#)]. In the present pro se and in forma pauperis cause of action, the individual asserted that her injuries worsened, and that the manufacturer failed to update the warnings for the drug's use. She included executives and affiliated corporations as defendants, naming Catalent Pharma Solutions, Mylan Labs, Genpharm, Bertek, Merck, Mylan N.V., Rajiv Malik, and Heather Bresch in addition to the originally-named Mylan Pharmaceuticals, Inc., and Mylan Inc.

**Claim preclusion and privity.** The court determined that there was privity between three corporations and the executives with Mylan Pharmaceuticals and, thus, claim preclusion applied. A party not initially named in a lawsuit may raise claim preclusion if that party is in privity with a party to the earlier judgment. According to applicable federal appellate precedent, there is privity between corporations and their parent corporations, subsidiary corporations, executives, and agents.

The present court explained that the current cause of action concerns the same transactional theory as the prior case, satisfying the first element of claim preclusion. There was privity between Mylan N.V., the parent company of Mylan Pharmaceuticals, the executives. Catalent, the alleged distributor and contract manufacturer of the drug, was in privity despite not falling into one of the specific categories because the relationship and similar litigation interests were sufficiently close, the court reasoned. Therefore, the individual's claims against those entities were barred.

**Statute of limitations.** Kansas' two-year statute of limitations applied to bar the individual's present claims because the injury alleged was one of a "difference of degree" and subject to the limitations period. Her actionable injury occurred more than two years before she filed the present lawsuit, evidenced by her filing the prior claim. Consequently, her claims were time-barred. Moreover, she could not toll the statute of limitations because she failed to meet the pleading requirements to support the theories of fraudulent concealment or equitable estoppel.

**Federal preemption.** The individual's claim that her lawsuit was brought under the federal Food, Drug, and Cosmetic Act failed because the Act does not allow for private lawsuits. Therefore, she failed to state a claim upon which relief could be granted.

The case is No. [18-04137-CM-JPO](#).

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Companies: Mylan Pharmaceuticals, Inc.; Mylan N.V.

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