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Dear Doctor Letters: Lessons in Statutory Interpretation, Preemption, Proximate Causation, and Subsequent-Remedial Measures

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I. INTRODUCTION

Dear Doctor letters (also referred to as Dear Healthcare Provider or “DHCP” letters) are an important avenue of communication between pharmaceutical manufacturers and the professionals who prescribe and administer drugs. The letters were developed as a tool for manufacturers to effectively provide healthcare professionals with key information about a drug. But how are Dear Doctor letters used by drug manufacturers in practice—to properly relay new black box warnings, or to (improperly) advertise new drug uses? Where do Dear Doctor letters fit into the FDA’s regulatory scheme—and is FDA approval required before sending out such letters (we say yes)? What impact might a Dear Doctor letter have on litigation? Could it be seen as an admission that the drug label was inadequate?

This article first discusses the applicable FDA regulations and guidance material, including the standards for when, how, and to whom Dear Doctor letters should be issued. Next, the article reviews the extent to which federal preemption principles apply to Dear Doctor letters as outlined by the Supreme Court in the landmark generic case *Pliva v. Mensing*. The article

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then analyzes the role of Dear Doctor letters in litigation in a post-Mensing world, including whether Dear Doctor letters can be used to show causation and whether Dear Doctor letters are admissible evidence at trial. The article concludes with practical tips related to sending out Dear Doctor letters.

II. FDA REGULATIONS AND GUIDANCE REGARDING DEAR DOCTOR LETTERS

A. 21 C.F.R. § 200.5

21 C.F.R. § 200.5 is the only Dear Doctor letter regulation, and has been on the books since 1975.¹ Despite a myriad of changes in FDA regulations over nearly four decades, 21 C.F.R. § 200.5 has not had a single revision since 1975. The regulation is short, straightforward, and very specific about things such as typeface and font size, but it poses many ambiguities for pharmaceutical manufacturers and distributors. In full, the regulation provides:

§ 200.5 Mailing of important information about drugs.

Manufacturers and distributors of drugs and the Food and Drug Administration occasionally are required to mail important information about drugs to physicians and others responsible for patient care. In the public interest, such mail should be distinctive in appearance so that it will be promptly recognized and read. The Food and Drug Administration will make such mailings in accordance with the specifications set forth in this section. Manufacturers and distributors of drugs are asked to make such mailings as prescribed by this section and not to use the distinctive envelopes for ordinary mail.

- (a) Use first class mail and No. 10 white envelopes.
- (b) The name and address of the agency or the drug manufacturer or distributor is to appear in the upper left corner of the envelope.
- (c) The following statements are to appear in the far left third of the envelope front, in the type and size indicated, centered in a rectangular space approximately 3 inches wide and 2 1/4 inches high with an approximately 3/8 inch-wide border in the color indicated:
 - (1) When the information concerns a significant hazard to health, the statement:

IMPORTANT

1. See Reorganization and Republication, 40 Fed. Reg. 13996 (Mar. 27, 1975).

DRUG
WARNING

The statement shall be in three lines, all capitals, and centered. “Important” shall be in 36 point Gothic Bold type. “Drug” and “Warning” shall be in 36 point Gothic Condensed type. The rectangle’s

bo

order and the statement therein shall be red.

(2) When the information concerns important changes in drug package labeling, the statement:

IMPORTANT
PRESCRIBING
INFORMATION

The statement shall be in three lines, all capitals, and centered. “Important” shall be in 36 point Gothic Bold type. “Prescribing” and “Information” shall be in 36 point Gothic Condensed type. The rectangle’s border and the statement therein shall be blue.

(3) When the information concerns a correction of prescription drug advertising or labeling, the statement:

IMPORTANT
CORRECTION
OF DRUG
INFORMATION

The statement shall be in four lines, all capitals, and centered. “Important” shall be in 36 point Gothic Bold type. “Correction,” “Of Drug,” and “Information” shall be in 36 point Gothic Condensed type. The rectangle’s border and the statement therein shall be brown.²

1. “Important” Information Standard

Repeated throughout 21 C.F.R. § 200.5 is the “important information” standard, cautioning manufacturers and distributors not to waste the time of physicians and other health care professionals with trivial information and updates.³ But what constitutes “important” information? According to the regulation, Dear Doctor letters are meant to convey “important information about drugs to physicians,” including information concerning “a significant hazard to health,” “important changes in drug package labeling,” or “a correction of prescription drug advertising or labeling.”⁴ While the

2. Mailing of Important Information about Drugs, 21 C.F.R. § 200.5 (2013).

3. *Id.*

4. 21 C.F.R. § 200.5 (emphasis added).

regulation sheds some light on what kind of information may be the subject of a Dear Doctor letter, it leaves much room to determine when that information is “important” or “significant” enough to send out in a mailer.⁵

a. FDA Request for Dear Doctor Letter

The easiest case to meet the “important information” criterion is when the FDA requests a manufacturer or distributor to send out a Dear Doctor letter by a certain date. Indeed, if the letter is expected to be sent out, and it is not sent soon enough (or not sent at all), the FDA may elect to take action by issuing a press release or public health advisory.⁶ In our experience, in nearly all cases it is better for the manufacturer or distributor to craft the Dear Doctor letter rather than to leave it to the FDA to alert healthcare professionals.

b. Important New Information

One common sense, well-recognized condition for whether information is important is whether it is “new.”⁷ The idea is that if the information has been adequately publicized in the medical literature, there is no need to “alert” healthcare professionals to what they should already know through their required, continuing medical education.

In addition to highlighting that the information should be new, the FDA has provided draft guidance on what should be included in each of the three categories of Dear Doctor letters: (1) Important Drug Warning, (2) Important Prescribing Information, and (3) Important Correction of Drug Information.⁸

c. Important Drug Warning

The FDA suggests that an “Important Drug Warning” letter “should be used to convey important new safety information that ‘concerns a

5. Courts have not clarified the meaning of “important information”—rather, they have shown a penchant for simply parroting the words of the regulation. *Weiss v. Fujisawa Pharm. Co.*, 464 F. Supp. 2d 666, 675 (E.D. Ky. 2006) (“the regulations encourage drug manufacturers to periodically send important information . . . to health care providers”) (emphasis added).

6. See FOOD & DRUG ADMIN., CTR. DRUG EVALUATION & RESEARCH, NDAS: “DEAR HEALTH CARE PROFESSIONAL” LETTERS 4 (2003), available at <http://www.fda.gov/downloads/AboutFDA/CentersOffices/CDER/ManualofPoliciesProcedures/ucm082012.pdf>.

7. See FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY AND FDA STAFF: DEAR HEALTH CARE PROVIDER LETTERS: IMPROVING COMMUNICATION OF IMPORTANT SAFETY INFORMATION 2 (2010) [hereinafter 2010 Guidance for Industry], available at <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM233769.pdf>.

8. 21 C.F.R. § 200.5.

significant hazard to health' (21 C.F.R. § 200.5) and, therefore, could affect the decision to use a drug or require a change in behavior concerning use of the drug (e.g., a specific type of monitoring)."⁹ More specifically, this type of Dear Doctor letter "should be used for information that is to be incorporated into one or more of the following labeling sections: **BOXED WARNINGS, CONTRAINDICATIONS, or WARNINGS AND PRECAUTIONS.**"¹⁰ The following are examples of "Important Drug Warnings":

- Previously unknown serious or life-threatening adverse reactions
- Clinically important new information about a known adverse reaction
- Identification of a subpopulation at greater risk in whom the drug should be used with added caution (e.g. patients with renal or hepatic failure, HIV+ patients)
- Identification of a subpopulation in whom the drug is contraindicated
- Drug interaction or medication error that may result in a serious or life-threatening adverse reaction¹¹

Some recent exemplar Dear Doctor letters falling under the category of "Important Drug Warning" are a January 2012 letter concerning potential side effects of type-2 diabetes drug Bydureon,¹² and an August 2012 letter issued concurrently with a "Black Box" warning¹³ for the anti-malaria drug,

9. 2010 Guidance for Industry, *supra* note 7, at 3.

10. *Id.*

11. *Id.*

12. Letter from Lisa Porter, Vice President, Amylin Pharmaceuticals, Inc., to Healthcare Professionals (Jan. 2012), available at http://www.pdr.net/drugpages/product_safetyalert.aspx?ha=1000137.

The Bydureon letter warned of two potential risks associated with Bydureon: Medullary Thyroid Carcinoma ("MTC") and Acute Pancreatitis. The letter also provided information on how to assess patients for these risks and how to avoid prescribing Bydureon to at-risk patients, including a specific recommendation for "[r]outine monitoring of serum calcitonin or using of a thyroid ultrasound if MTC is suspected."

13. A "Black Box" label reflects the most serious warning that can be given about any particular drug, and indicates that medical studies have shown the drug carries a significant risk of serious or even life-threatening adverse effects. See FOOD & DRUG ADMIN., GUIDANCE FOR INDUSTRY: WARNINGS AND PRECAUTIONS (Oct. 2011), available at <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm075096.pdf>. Manufacturers may be forced by the FDA to implement black box warnings on particular drugs. See 21 C.F.R. § 314.520 and 601.42 ("Approval with restrictions to assure safe use").

Quaaliquin.¹⁴

As discussed below, Dear Doctor letters are considered part of a drug's labeling,¹⁵ and the FDA's guidance makes clear that if the important drug information is not "important" enough to wind up in the package insert, it probably should not be the subject of a Dear Doctor letter.

d. Important Prescribing Information

"Important Prescribing Information" letters "should be used to convey important changes to prescribing information other than those changes that should be described in an Important Drug Warning Letter[.]"¹⁶ The letter "should ordinarily be used to convey substantive changes to the INDICATIONS AND USAGE and DOSAGE AND ADMINISTRATION sections."¹⁷ The FDA provides the following examples:

- A change in the INDICATIONS section intended to minimize risk or improve effectiveness
- A change to the dose or dosage regimen intended to minimize risk or improve effectiveness¹⁸

Again, this is the kind of information that would make a drug manufacturer or distributor believe that a change in the label was in order. Of note, the FDA cautions that such an "Important Prescribing Information" letter "should not be used merely to announce a new indication."¹⁹ In other words, this is not a letter to advertise new uses for the drug, but rather to reduce the risk and increase the effectiveness for previously indicated uses.

Some sample Dear Doctor letters falling under the category of "Important Prescribing Information" are a November 2011 Dear Doctor letter advising that the FDA had revoked its approval of Avastin for the treatment of metastatic breast cancer,²⁰ and a June 2011 letter with new

14. Letter from Matthew Davis, Senior Vice President, AR Scientific, Inc., to Healthcare Provider (Aug. 16, 2012), available at http://www.pdr.net/drugpages/product_safetyalert.aspx?ha=1000138. The Dear Doctor letter contained the text of the Black Box warning, which advised that "[t]he risk associated with Quaaliquin use in the absence of evidence of its effectiveness in the treatment or prevention of nocturnal leg cramps outweighs any potential benefit" and identified thrombocytopenia and chronic renal impairment as possible adverse effects of the off-label use.

15. See *infra* Section II(B).

16. See 2010 Guidance for Industry, *supra* note 7, at 3.

17. *Id.*

18. *Id.* at 3-4.

19. *Id.* at 4.

20. Letter from Hal Barron, Chief Medical Officer, Genetech, to Healthcare Professional (Nov. 18, 2011) available at <http://www.pdr.net/drugpages/hapdf/1176-11%20PDRAIrt%20>

dosage and administration instructions for the chronic kidney disease drugs, Aranesp and Epogen/Procrit.²¹

e. Important Correction of Drug Information Letter

The third category, the “Important Correction of Drug Information” letter, should be used “to correct false or misleading information or other misinformation in prescription drug promotional labeling and advertising that is the subject of a Warning Letter or other Agency action.”²² In our experience, this kind of letter is the least likely to be initiated by the manufacturer or distributor, with the hopes that the FDA or consumer groups may not find the information to be misleading. However, once the manufacturer or distributor realizes that there is materially false or misleading information in its label or advertising, we have found that the best avenue to remedy the issue is to take control of how to frame it, rather than wait for the FDA to issue a warning letter about the alleged misinformation.

One example of an “Important Correction of Drug Information” letter is a November 2011 letter concerning the correction of “false and misleading promotion” of Feraheme® following an FDA warning letter.²³ The letter explained that the manufacturer’s website previously “misleadingly suggested” that the drug was proven safe and effective for certain uses, when in fact it was not.²⁴ The letter clarified that the drug “is only indicated for the treatment of iron deficiency anemia in adult patients with chronic kidney disease.”²⁵

Avastin%20LTR1%20and. . .pdf (last visited Feb. 5, 2013). Reflecting the importance of the new information, the letter is dated the same day as the FDA’s announcement, before a revised prescribing label was available for circulation.

21. The letter was available at http://www.aranesp.com/pdf/aranesp_dhcp_letter-june2011.pdf (last visited September 30, 2012). It is no longer available at the online at link or from aranesp.com. The new prescribing information was based on the results from three randomized, controlled trials in which certain patients experienced greater risks for death, serious adverse cardiovascular reactions, and stroke. Among other things, the letter advised of different dosing requirements for patients on or off of dialysis.

22. 2010 Guidance for Industry, *supra* note 7, at 4.

23. FOOD & DRUG ADMIN., WARNING LETTER TO DR. BRIAN J.G. PEREIRA, MD, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMAG PHARMACEUTICALS, INC. (Oct. 18, 2010), available at <http://www.fda.gov/Drugs/GuidanceComplianceRegulatoryInformation/EnforcementActivitiesbyFDA/WarningLettersandNoticeofViolationLetterstoPharmaceuticalCompanies/ucm259186.htm>.

24. *Id.*

25. *Id.*

f. *“Important Information” Or Improper Advertising?*

Even with the FDA’s guidance on what constitutes “important information,” there is still room for disagreement on what is “important.” When it comes to positive product information, manufacturers sometimes use the imprecise “important information” standard to justify mailers sent principally for advertising purposes. Manufacturers have used the mailer to “alert” doctors about the advent of a new packaging size, a new indication, or a new and improved formula.

For example, a 2012 Dear Doctor letter announced “the availability” of a particular drug. The letter notified healthcare professionals that the drug was “available at most pharmacies, including chain pharmacies.” While we are not privy to the full background of the drug in question and its availability prior to June 2012, the Dear Doctor letter certainly appears to be more like advertising than a vehicle to convey “important drug information.”

Promotional Dear Doctor letters of that sort are tempting to send from the manufacturer’s standpoint. What else would a doctor more likely read than a letter that crosses his or her desk with the title “IMPORTANT DRUG INFORMATION”?²⁶ At a minimum, doctors are more likely to carefully read Dear Doctor letters than a “paid” advertisement in a medical or science journal. However, if reviewed by the FDA, these types of Dear Doctor letters may be frowned upon as including insufficiently “important” information and crossing the line into improper advertising. (In our experience, however, such letters have not drawn a warning letter from the FDA.)

Unfortunately, marketing-based Dear Doctor letters dilute the effectiveness of legitimate Dear Doctor letters. If a doctor’s mailbox is full of advertisements and “important” new drug information in the same format as a formal Dear Doctor letter, the doctor will be less likely to sift through all the letters and give due consideration to the genuinely “important” letters.

2. “Occasionally Are Required” Standard & “Encouraged”
Consultation With FDA

21 C.F.R. § 200.5 provides that drug manufacturers and distributors of

26. Of course, not all doctors routinely review Dear Doctor letters. See, e.g., *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31, 42, 58 (Miss. 2004) (one doctor “testified that he did not make it a practice to read ‘Dear Doctor’ letters or updated package inserts”; “[o]ther physicians testifying for the Plaintiffs admitted that they never bothered to read the updated labels or ‘Dear Doctor’ letters because their family practices kept them too busy to keep abreast of the changes in the drugs which they were prescribing.”).

drugs “occasionally are required” to mail important information about drugs.²⁷ What do “occasionally” and “required” mean? The clearest example is the “occasion” when the FDA tells the manufacturer or distributor they are so “required”; though in our experience, that is a very small subset of cases. Presumably, information that is “important” and “new” should always be sent out, not just “occasionally.” The “occasionally” language may simply suggest that “important information” is not a routine or daily occurrence, and should arise only on certain occasions, so as not to barrage doctors with too many not-so-important letters.

As for the “required” language, the regulation does not have a specific enforcement mechanism for not sending out a Dear Doctor letter, such as a civil or criminal fine or penalty.²⁸ Of course, the FDA has many tools at its disposal in addition to sending out the Dear Doctor letter itself, including sending out the information through a different medium, such as its MedWatch website. Moreover, because Dear Doctor letters are part of the broader drug labeling system,²⁹ the FDA may find regulatory violations based on the lack of disclosure of “important” new information in the manufacturer’s or distributor’s labeling.

When in doubt about the need to send a Dear Doctor letter, the FDA “encourages” manufacturers and distributors to contact the agency to determine together whether such a letter is the appropriate mechanism to convey the new information.³⁰ The FDA also suggests it can help to determine “[h]ow to present the new information in the letter” and “[t]he target audience for the information in the letter.”³¹ The FDA indicates that consulting with them before distributing the letter “could potentially avoid the need to send a corrective letter in the event that the FDA determines, after a [Dear Doctor letter] has been sent, that the content of the letter was somehow false or misleading,³² or “lacking in fair balance.”³³ A corrective

27. 21 C.F.R. § 200.5

28. 21 U.S.C. §§ 331 and 333 provide penalties for the misbranding of any “food, drug, device tobacco product or cosmetic in interstate commerce” or the sale, manufacture, or delivery of the same. These provisions, together, do provide an enforcement mechanism for the FDA for misbranding/mislabeling a drug. However, there is no enforcement provision specific to violations of the Dear Doctor letter regulation. Arguably, the FDA’s power to send a Dear Doctor letter on behalf of a manufacturer, or worse yet, require a drug recall, provide for sufficient enforcement.

29. See *infra* Section II (B).

30. See 2010 Guidance for Industry, *supra* note 7, at 2.

31. *Id.*

32. *Id.*

33. See NDAs: “Dear Healthcare Professional” Letters, *supra* note 6, at 7; see also *id.* at 4 (“When a [Dear Doctor] letter is disseminated without FDA input and the FDA disagrees with the letter’s content, [the Division of Drug Marketing, Advertising, and Communication

letter may be in the form of an FDA press release or public health advisory.³⁴ Or, the corrective action may be a request that the manufacturer “issue an appropriately revised letter and labeling/promotional materials (as applicable).”³⁵

3. The Sender: Manufacturer/Distributor or FDA

Once the decision has been made to send out a Dear Doctor letter, who should mail it? 21 C.F.R. § 200.5 states that both the FDA and manufacturer “will” send out “Dear Doctor” letters.³⁶ As a practical matter, however, the FDA rarely sends out such letters itself.³⁷ The FDA recognizes that “typically” they will not be the one to issue these letters.³⁸ For example, they may choose to post the manufacturer’s or distributor’s letter on its MedWatch website.

The FDA also recognizes that they will not always be consulted about a Dear Doctor letter before it is sent out.³⁹ However, since the letter may end up on the FDA’s MedWatch website, and even more importantly, since the letter is deemed part of the drug’s label,⁴⁰ a manufacturer or distributor that is seriously considering sending out a letter should consult with the FDA for review and approval of the letter. The Eleventh Circuit has noted that “FDA approval must be sought prior to issuing such a letter, as it is considered a change in package labeling.”⁴¹ As discussed above, the manufacturer or distributor who decides not to inform the FDA makes that decision at its own peril.

4. The Recipient: “Physicians And Others Responsible For Patient Care”

After the manufacturer or distributor decides that a Dear Doctor letter is needed (or “required”), who should the letter be mailed to? 21 C.F.R. § 200.5 provides that the mailer should be sent to “physicians and others

(DDMAC)] will initiate an enforcement action that may lead to corrective actions.”).

34. *Id.* at 7-8.

35. *Id.* at 8.

36. 21 C.F.R. § 200.5 (“The Food and Drug Administration will make such mailings in accordance with the specifications set forth in this section.”) (emphasis added).

37. See NDAs: “Dear Healthcare Professional” Letters, *supra* note 6, at 3.

38. See *id.*

39. *Id.* at 1 (“The FDA may or may not be involved in reviewing these DHCP letters before they are mailed.”); *id.* at 7 (“Occasionally, FDA does not learn about a [Dear Doctor] letter until after it has been distributed.”)

40. See *infra* Section II(b).

41. See, e.g., *Christopher v. Cutter Labs.*, 53 F.3d 1184, 1187 n.3 (11th Cir. 1995) (emphasis added).

responsible for patient care.”⁴² In the world of advanced medicine, with physicians divided into hundreds of specialty areas, the regulation says little about the scope of the mailer. Should the mailer be blasted to every physician and health care professional—including pharmacists, physician’s assistants, and nurses—in the United States?⁴³ That would be impractical.

While the FDA provides some guidance on who the “target audience” for a Dear Doctor letter should be, it is a wide-ranging audience: “all healthcare providers who are likely to prescribe, dispense, or administer the drug and others who would have a need to know the information being disseminated.”⁴⁴ Potential prescribers are usually the “most important audience,” so the “manufacturer should make certain to direct the letter to the full range of healthcare providers who would have occasion to prescribe the drug, including nurse practitioners and physician assistants who have prescribing authority.”⁴⁵ Examples of other important recipients include (1) emergency department or primary care doctors who may not prescribe the drug, but may provide care for patients with a drug-induced adverse reaction discussed in the letter, and (2) pharmacists who would be required to distribute a new Medication Guide announced in the letter.⁴⁶

Even with the FDA’s general guidance, the target audience may be difficult to define. For example, “important” side effect information about an arthritis drug likely should be sent not only to rheumatologists (and their assistants and nurse practitioners) that may prescribe or administer the drug, but also family medicine general practitioners, orthopedic specialists, and nurses who need to be cognizant of the side effect. But if the side effect relates to another medical specialty, such as cardiology, should the mailer also be sent to cardiologists and cardiac surgeons too? Probably yes. And for drugs that are prescribed by specialists to adults as well as children, should all pediatricians be included as part of the distribution list, even though they may not be the primary prescribers of the medication? Probably yes, but it is a judgment call. As discussed above, direct consultation with the FDA may help to properly define the target audience in each individual situation.

Once the pertinent subset of physicians and healthcare providers is

42. 21 C.F.R. § 200.5.

43. Of course, many drugs have worldwide distribution. However, the manufacturer’s and distributor’s international duties are presumably not covered by 21 C.F.R. § 200.5, and are thus not within the scope of this article.

44. See 2010 Guidance for Industry, *supra* note 7, at 5. FOOD & DRUG ADMIN., DRAFT GUIDANCE FOR INDUSTRY AND FDA STAFF, (Nov. 2010), <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/UCM233769.pdf>.

45. *Id.*

46. *Id.*

identified, there comes the not-so-simple issue of obtaining their mailing information. Typically, this is not public information and manufacturers and distributors must obtain (i.e., pay for) mailing lists from private consultants, which, in our experience, can be quite pricey. Consideration may be given to using contact lists from medical associations and specialty organizations, such as the American Medical Association or the American College of Cardiology. The problem, of course, is that such voluntary membership associations do not capture the full target audience.

Needless to say, the manufacturer sending out a Dear Doctor letter does not want to be in the position of sending out key drug information to fewer than all of the affected healthcare professionals, subjecting itself to failure-to-warn lawsuits by plaintiffs whose doctors prescribed the drug without the benefit of the Dear Doctor letter.

5. The Mechanism: First Class Mail Or Electronic Means

After reviewing 21 C.F.R. § 200.5, the manufacturer may wonder if it still has to use “first class mail and No. 10 white envelopes.” There is a clear answer to this question. E-mail or other electronic communications will suffice as long as they are equally efficient tools.⁴⁷ The FDA has additional guidelines on “Using Electronic Means to Distribute Certain Product Information” (March 2006).⁴⁸ These include:

- The subject line of the communication should include a signal of its importance, similar to the bold headers in mailings, together with the name of the drug product.
- The body of the communication should be concise, clear and identify the consequence if the information is not followed or used in the medical treatment of patients.
- The communications should not be promotional or contain links to promotional materials.⁴⁹

B. Dear Doctor Letters as Label Changes

Despite the myriad ambiguities that surround when, how, and to whom Dear Doctor letters should be sent, there is no doubt that courts and the FDA consider Dear Doctor letters to fall under the purview of “Drug

47. See 2010 Guidance for Industry, *supra* note 7, at 1 (“These recommendations are also intended to apply to [Dear Doctor] letters distributed by electronic means (e.g., email) to the extent practical for the type of electronic communication used.”).

48. See 2010 Guidance for Industry, *supra* note 7, at 6.

49. *Id.*

Labeling.”⁵⁰ This further complicates the already difficult decision facing manufacturers regarding whether to send a Dear Doctor letter, because with every Dear Doctor letter sent, a manufacturer is effectively changing its drug’s label. And, as all manufacturers know, making or failing to make label changes can have serious consequences if litigation ensues. When is a label change necessary? Under FDA regulations, a label change is required “as soon as there is reasonable evidence of an association of a serious hazard with a drug; a causal relationship need not have been proved.”⁵¹ Of course, obtaining FDA approval for a label change can be a time-consuming, drawn-out, and expensive proposition. When the drug label change is time-sensitive, a brand name drug manufacturer⁵² may, on its own accord, use the Changes Being Effected (“CBE”) process to change the label to add to or strengthen a warning or adverse event description while concurrently submitting a supplement to obtain formal approval for that change.⁵³ This permits a pharmaceutical manufacturer to rapidly distribute a new warning while meeting the formal requirement for FDA approval of all labeling changes.⁵⁴ The FDA may subsequently reject the change, at which time the label must be changed back. If the FDA approves the change, then the label can remain as is. The FDA reserves similar rights to reject or correct label changes suggested in Dear Doctor letters that are not approved in advance by the FDA.⁵⁵

III. DEAR DOCTOR LETTER CASE LAW: LESSONS IN PREEMPTION, FAILURE TO WARN, AND POST-REMEDIAL MEASURES

The ambiguity surrounding Dear Doctor letter regulation, combined with the fact that Dear Doctor letters constitute drug labeling, has created a minefield for drug manufacturers and plenty of fodder for failure-to-warn cases against them. This section will discuss the role of the Dear Doctor

50. Drug labeling is governed by a complicated scheme of federal regulations. In particular, Title 21, Part 200 of the Code of Federal Regulations details labeling requirements. Under the Regulations, “Dear Doctor” letters are considered part of a drug’s label. 21 C.F.R. § 321(m); *U.S. v. Guardian Chem. Corp.*, 410 F.2d 157, 160-61 (2nd Cir. 1969) (“In order to ‘accompany’ an article and thus constitute ‘labeling’ for it, printed pamphlets or brochures need not be shipped along with the article; they may be sent out either before or after the article and still ‘accompany it.’”).

51. 21 C.F.R. § 201.80(e) (2012); 21 C.F.R. § 201.57(e) (2005).

52. This option is not available to generic drug manufacturers. See *Pliva v. Mensing*, 131 S. Ct. 2567, 2576 (2011).

53. See 21 C.F.R. § 314.70(c)(6) (2012).

54. In fact, the FDA’s briefing in the *Mensing* case suggested that the CBE process is the only permissible means for adding to or strengthening a warning. See Brief for the United States as Amicus Curiae Supporting Respondent, *Pliva, Inc. v. Mensing*, Nos. 09-993, 09-1039, WL 4339894, at *6-7 (U.S. Nov. 2, 2010).

55. See 21 C.F.R. § 314.70(c)(6) (2012).

letter in litigation. When a Dear Doctor letter was not sent, plaintiffs fold this into their failure-to-warn claim, arguing that had their doctor only received such a letter, their injuries would have been avoided. This Dear Doctor letter argument presents interesting issues of proximate causation on summary judgment motions. And when a Dear Doctor letter has been sent after the alleged injury, plaintiffs have tried to admit the letter as evidence of the drug label's inadequacy at the time the drug was prescribed. This Dear Doctor letter argument raises admissibility issues for subsequent remedial measures.

But first, we discuss the role that Dear Doctor letters have played in federal preemption cases laying out the warning duties of generic and brand name manufacturers.

A. Preemption and Dear Doctor Letters, Pre- and Post-Mensing

1. Pre-Mensing: Using "Dear Doctor" Letters to Fight Preemption Defense by Generic and Brand Name Manufacturers

For years, plaintiffs successfully argued that federal law did not preempt failure-to-warn claims, in part because of the ability of manufacturers to send out Dear Doctor letters.⁵⁶ In *Perry v. Novartis Pharma. Corp.*, for example, the court noted that a plaintiff could maintain an action against a brand-name manufacturer if the plaintiff "claimed that a manufacturer was negligent in not sending a letter to prescribing physicians or other healthcare professionals[.]"⁵⁷ Similarly, in *Weiss v. Fujisawa Pharmaceutical Co.*, the court found "the regulations encourage [brand name] drug manufacturers to periodically send important information, including information regarding risks, to healthcare providers. Therefore, there are a number of ways a drug company can warn users of its product's risks[.]"⁵⁸

Even in cases involving generic drugs, courts routinely found that manufacturers could "ask the FDA to send 'Dear Doctor' warning letters to healthcare professionals," thus precluding a finding of preemption.⁵⁹ Just as

56. See, e.g., *Weiss v. Fujisawa Pharm. Co.*, 464 F. Supp. 2d 666 (E.D. Ky. 2006), *Perry v. Novartis Pharma. Corp.*, 456 F. Supp. 2d 678 (E.D. Pa. 2006); *Gaeta v. Perrigo Pharms. Co.*, 630 F.3d 1225, 1231 (9th Cir. 2011); see also *Demahy v. Actavis, Inc.*, 593 F.3d 428 (5th Cir. 2010); *Vitaoe v. Mylan Pharms., Inc.*, 696 F.Supp. 2d 599 (N.D.W. Va. 2010); *Schedin v. Ortho-McNeil-Janssen Pharms., Inc.*, 776 F.Supp. 2d 907, 911 (D. Minn. 2011) ("Ortho-McNeil still had various other options at its disposal to warn consumers, such as 'Dear Doctor' letters, or training by sales representatives with individual doctors. It could also have proposed an alteration to the label.").

57. *Perry*, 456 F. Supp. 2d at 686.

58. *Weiss*, 464 F. Supp. 2d at 675.

59. *Gaeta*, 630 F.3d. at 1235 (9th Cir. 2011) ("Perrigo could have suggested that the

these Dear Doctor letter preemption arguments seemed to be gaining traction, the Supreme Court reversed course in the landmark generic preemption case, *Pliva v. Mensing*.⁶⁰

2. Post-Mensing: Generic Manufacturers Cannot Independently Transmit “Dear Doctor” Letters

On June 23, 2011, after years of plaintiffs using Dear Doctor letters to defeat manufacturing defendants’ preemption arguments, the Supreme Court issued its decision in *Pliva v. Mensing*. That decision—for now—forecloses the argument that a manufacturer of a generic drug could have and should have sent a Dear Doctor letter to strengthen a drug’s warnings; the Supreme Court held that “federal law d[oes] not permit [generic] Manufacturers to issue additional warnings through Dear Doctor letters.”⁶¹

In *Mensing*, plaintiff respondents sued generic drug manufacturers alleging failure to warn of risks of developing tardive dyskinesia from taking metoclopramide (the generic form of Reglan®).⁶² They argued that the generic manufacturers should have strengthened their label through either the CBE process or through a Dear Doctor letter.⁶³ Specifically, they asserted that the generic manufacturers “could have used ‘Dear Doctor’ letters to send additional warnings to prescribing physicians and other healthcare professionals.”⁶⁴

After a review of the FDA’s position and its labeling regulations, the Supreme Court rejected plaintiffs’ position. The Court ruled “[a] Dear Doctor letter that contained substantial new warning information would not be consistent with the drug’s approved labeling.”⁶⁵ Accordingly, the Court found that “if generic drug manufacturers, but not the brand-name manufacturer, sent such letters, that would inaccurately imply a therapeutic difference between the brand and generic drugs and thus could be impermissibly ‘misleading.’”⁶⁶ The Court “conclude[d] that federal law did not permit the manufacturers to issue additional warnings through Dear Doctor letters.”⁶⁷ Unfortunately, *Mensing* gave no guidance on when brand

FDA send a ‘Dear Doctor’ letter to health care professional, warning them of the risks associated with using ibuprofen concurrently with other drugs known to be hepatotoxic); see also, *Demahy*, 593 F.3d at 444-45 (5th Cir. 2010); *Vitaoe*, 696 F. Supp. 2d at 615-16.

60. *Pliva v. Mensing*, 131 S. Ct. 2567, 2576 (2011).

61. *Id.* at 2576.

62. *Id.* at 2573.

63. *Id.* at 2575-76.

64. *Id.* at 2576.

65. *Id.*

66. *Id.*

67. *Id.*

name manufacturers should issue Dear Doctor letters.⁶⁸

Despite *Mensing*'s apparently clear ruling regarding generic manufacturers' lack of any duty to send Dear Doctor letters, some lower courts have already criticized the holding.⁶⁹ Others have found that there are still situations in which generic manufacturers are required to send Dear Doctor letters.⁷⁰ In *Fisher v. Pelstring*, for example, the Superior Court of Washington D.C. defied *Mensing*'s holding and ruled that the generic manufacturer should have "issue[d] a 'Dear Doctor' letter" alerting physicians of changes made in the branded drug's label."⁷¹ Similarly, in *Brasley-Thrash v. Teva Pharmaceuticals*, the District Court for the Southern District of Alabama held that the plaintiff's effort to amend her complaint was not futile where she planned to allege that the defendant generic drug manufacturers were liable for failing to send a Dear Doctor letter advising her treating physician of a change in the label for a brand name drug.⁷² Thus, despite *Mensing*'s seeming preemption protection, generic manufacturers still have to consider whether a Dear Doctor mailer should be sent, and if so, work with the FDA to encourage either the FDA or the brand name manufacturer to send them out.

Also looming over *Mensing*'s preemption holding is proposed legislation to overturn it. Introduced by Senator Patrick Leahy (D-Vt.) in April 2012, the bill would permit generic drug manufacturers to change their labels independent of the brand name drug.⁷³ Although the legislation has not yet passed in its current form, it is unlikely to be Congress's last word in response to *Mensing*. Other alternative bills may surface, which could

68. *Id.*

69. See e.g., *In re Budeprion Marketing & Sales Litig.*, Case Nos. 2107,09-md-2107, 2012 U.S. Dist. LEXIS 91176 at *46 (E.D. Pa. July 2, 2012) ("An individual's ability to sue for damages caused by prescription medication should not depend on whether the drug was name brand or generic. If drug manufacturers are legally responsible for their products (like every other maker of a good), generic drug makers should not be immune from liability. The Supreme Court decision renders generic drug makers parrots, free from liability provided they do a competent job copying the label of the name brand drug maker's label.")

70. See, e.g., *Bartlett v. Mut. Pharm. Co.*, 678 F.3d 30 (1st Cir. 2012); *Couick v. Wyeth, Inc.*, Civ. A. No. 09-210, 2012 WL 79670 (W.D.N.C. Feb. 16, 2012); *Brasley-Thrash v. Teva Pharms. USA, Inc.*, Civ. A. No. 10-31, 2011 U.S. Dist. LEXIS 102858, 2012 WL 4025734 (S.D. Ala. Sept. 12, 2011); *Hassett v. Dafoe*, No. 1551, 1997, 2012 WL 1512551 (C.C.P. Phila. Mar. 22, 2012).

71. *Fisher v. Pelstring*, 817 F. Supp. 2d 791, 834-35 (D.C.S.C. 2012).

72. *Brasley-Thrash v. Teva Pharms. USA, Inc.*, 2011 WL 4025734, at 4 (S.D. Ala. Sept. 12, 2011).

73. Patient Safety and Generic Labeling Improvement Act, S. 2295, 112th Cong. (2012); see generally James W. Huston, Erin M. Bosman & Julie Y. Park, Client Alert: Bill to Undo *Mensing* Decision and Allow Patients to Sue Generic Drug Makers for Failure to Warn, MORRISON & FOERSTER LLP (Apr. 19, 2012), available at <http://www.mofo.com/files/Uploads/Images/120419-Mensing-Decision.pdf>.

include requiring generics to alert physicians of changes to the brand label through Dear Doctor letters, or requiring generics to request the FDA send a Dear Doctor mailer on their behalf if they think a label change is necessary.

B. The Dear Doctor Letter Causation Argument

In failure-to-warn cases, brought under negligence or strict liability theories (and usually both), a key battleground is whether the plaintiff can prove that the allegedly inadequate warnings and instructions proximately caused the plaintiff's injuries. Under the learned intermediary rule, this usually requires showing that had plaintiff's physicians reviewed an adequate warning, they would not have prescribed or continued using the drug, or would have used a different dose or enhanced monitoring methods.⁷⁴

However, in our experience, in most cases, doctors do not read the drug label (particularly the label effective at the time of plaintiff's treatment) before administering the drug. And if the prescribing physician or other treating physicians never read the supposedly inadequate label, how could the manufacturer's warnings and instructions (or lack thereof) possibly have caused plaintiff's alleged injuries? Even with causation typically being a question of fact for the jury, there are legions of state and federal decisions granting summary judgment on the issue of causation when there is no evidence that a doctor has read the pertinent warning.⁷⁵

74. The "learned intermediary doctrine" is substantive state law. Generally, it requires that "only the physician who prescribes an inherently dangerous drug need be warned (and not his patient)[.]" See *Nix v. SmithKline Beecham, Corp.*, No. CIV06-43-PHX-SMM, 2007 WL 4219157, *2 (D. Ariz. Nov. 28, 2007); *Dyer v. Best Pharmacal*, 118 Ariz. 465, 468 (Ariz. App. Div. 1987) ("A drug manufacturer has discharged his duty to the public if he has properly warned the administering physician of the contraindications and possible side effects of the drug."). If there is no evidence that the prescribing physician would have changed his mind absent other additional warnings, there is no proximate cause. *Gebhardt v. Mentor Corp.*, 191 F.R.D. 180, 184-85 (D. Ariz. 1999) (granting summary judgment for defendant where there was no evidence that treating physician would have changed treatment if different warnings had been given).

75. See, e.g., *Gebhardt v. Mentor Corp.*, 191 F.R.D. 180, 184-85 & n.1 (D. Ariz. 1999) (granting summary judgment based on lack of causation where plaintiff's doctor did not review package insert, but relied on other information such as "prior experience, peer articles, and an interview" with the inventor of the medical device at issue), *aff'd* *Gebhardt v. Mentor Corp.*, 15 Fed. Appx. 540 (9th Cir. 2001); *Southwest Pet Prods., Inc. v. Koch Indus., Inc.*, 273 F. Supp. 2d 1041, 1062 (D. Ariz. 2003) (granting summary judgment on failure-to-warn claim where plaintiff "presented absolutely no evidence that a different warning would have changed its conduct"); *Owens v. Wyeth*, No. 185 EDA 2009, 2010 Pa. Super. LEXIS 2095, at *6 (Pa. Super. Ct. July 26, 2010) (dismissing failure-to-warn claim where plaintiff failed to show alternative warning would have changed prescribing doctor's decision); *Banker v. Hoehn*, 718 N.Y.S.2d 438, 441 (N.Y.A.D. 2000) ("in the absence of reviewing any operating manuals for the [device]" by the prescriber, summary judgment granted on lack of proximate cause).

Enter the Dear Doctor letter causation argument: if defendant manufacturer had just sent out a Dear Doctor letter including the information that plaintiff says the doctor should have been warned about, plaintiff's doctors would have surely read it, and plaintiff would never have been injured by the drug. This argument has been rejected by some courts as speculative and unwise, and accepted by others to allow plaintiff's causation claim to proceed to trial.⁷⁶

1. Courts Rejecting Dear Doctor Letter Argument

a. *Rodriguez v. Stryker Corp.*, 680 F.3d 568 (6th Cir. 2012)

Rodriguez v. Stryker Corp. is currently the only Federal Circuit-level case analyzing whether a plaintiff's argument that "defendants could have sent out a Dear Doctor letter" is sufficient to present a triable issue of fact on causation in a failure-to-warn case⁷⁷ While the Sixth Circuit firmly rejected the Dear Doctor letter arguments made by the instant plaintiff and affirmed the district court's grant of summary judgment to defendants, it left open avenues for other plaintiffs to make out successful Dear Doctor letter theories.

In *Rodriguez*, the plaintiff sued Stryker Corporation, the manufacturer of a pain pump, and Stryker's sales affiliate, alleging that the pump's delivery of a local anesthetic to his shoulder joint after arthroscopic surgery caused him to develop chondrolysis—a complete deterioration of the cartilage in his shoulder.⁷⁸ The district court found that at the time of plaintiff's surgery, defendants "could not have reasonably have known about the risk of chondrolysis" and "thus had no duty to warn of the risk."⁷⁹ The district court also held that even if defendants had a duty to warn, plaintiff "failed as a matter of law to prove causation."⁸⁰

We focus on the causation holding, which implicates plaintiff's Dear Doctor letter arguments. To prevail on his failure-to-warn claim, the plaintiff had to show that had defendants given additional warnings, he would not have sustained his injury.⁸¹ The only evidence he offered on this point was the deposition testimony of his surgeon, Dr. Kuhn.⁸² However,

76. See, e.g., *Rodriguez v. Stryker Corp.*, 680 F.3d 568 (6th Cir. 2012) (rejecting Dear Doctor letter argument); *Winter v. Novartis Pharms. Corp.*, No. 06-04049-CV-C-NKL, 2011 WL 5008008 (W.D. Mo. Oct. 20, 2011) (accepting Dear Doctor letter argument).

77. *Rodriguez*, 680 F.3d at 570.

78. *Id.*

79. *Id.*

80. *Id.* at 570, 575.

81. *Id.* at 575.

82. *Id.*

Dr. Kuhn testified that he did not recall ever reviewing Stryker's pump instructions or speaking with a Stryker sales representative.⁸³ A nurse would simply deliver the pump to Dr. Kuhn in the operating room, "without any packaging or the instructions for use."⁸⁴ Thus, plaintiff faced a "causation problem": he had "no evidence that, even if Stryker had placed the proposed warning in the instructions or given it through a sales representative, the warning would have reached Dr. Kuhn or would have prevented the injury."⁸⁵

As the Sixth Circuit put it, plaintiff tried to "sidestep" the causation problem by "add[ing]" that defendants should have warned physicians through a Dear Doctor letter or a label directly on the pain pump.⁸⁶ Both of these arguments suffered three main flaws.

First, plaintiff had not pled the Dear Doctor letter or direct label theories in his complaint—he only claimed that defendants should have provided "adequate" warnings.⁸⁷ "If these warnings were the only 'adequate' ones in this setting, it was Rodriguez's burden to argue that and provide evidence showing that."⁸⁸ Thus, future plaintiffs are now on notice that it would be wise to plead the Dear Doctor letter (or any other alternative warning) argument in their complaint, and likely present some expert testimony as to why only that kind of warning would be "adequate." Presumably, with respect to Dear Doctor letters, that would require some analysis of the 21 C.F.R. § 200.5 "important" information standard and FDA policies and practices with respect to Dear Doctor letters.

Second, the Sixth Circuit in Rodriguez criticized the plaintiff for raising the Dear Doctor letter and direct label options in connection with his "FDA arguments"—relating to the manufacturer's duty to warn—⁸⁹ rather than in the causation context. The plaintiff argued that "Stryker should have known that it needed to 'revise its instructions or at least circulate a Dear Doctor Letter' when the FDA rejected its requests to approve the pump specifically for use in a joint."⁹⁰ But, the court had already concluded that the FDA position in response to Stryker's 510(k) requests did not indicate in any way that using the pain pump in a joint was unsafe.⁹¹ Thus, if

83. Id.

84. Id.

85. Id. at 576.

86. Id.

87. Id.

88. Id.

89. Plaintiff argued that defendants should have known that the pain pump was not safe to use in a joint because the FDA had denied permission to market the pump for that use. Id. at 573-74.

90. Id. at 576 (citation omitted).

91. Id.; see also id. at 573-74 (analyzing 510(k) process).

plaintiffs plan on making a Dear Doctor letter causation argument, it needs to be made directly.

The Sixth Circuit in *Rodriguez* detailed a third and final impediment to plaintiff's Dear Doctor letter and direct label arguments: they were simply not supported by the evidence.⁹² With respect to Dear Doctor letters, plaintiff could only point to the following deposition testimony:

Q: A Dear Doctor letter is when a company . . . learn[s] . . . they are now getting adverse reports on a particular, either machine, or the drug, [and] they send out a letter called a Dear Doctor letter to warn the doctors or instruct the doctors of what's happened?

A: Yes

Q: You have had that over the years, have you not?

A: I have seen that for medications, yes.

This exchange conveys only the unsurprising reality that Dr. Kuhn knew what 'Dear Doctor' letters were, not that he received and reviewed them, and most importantly not what he would have done with a "Dear Doctor" letter in this case and not what such a letter would have looked like in this instance.⁹³

Plaintiff raised no genuine issue of fact for trial that a Dear Doctor letter would have caused Dr. Kuhn not to use the Stryker pain pump in plaintiff's joint.⁹⁴

In *Rodriguez*, the court implied that a claim for causation could survive a challenge if a plaintiff did the following to support the Dear Doctor letter causation argument: (1) obtain testimony that the treating doctor or doctors would have received and reviewed the proposed letter (and actually articulate what that letter would have said); and, (2) obtain testimony that the treating doctor would have heeded the proposed letter; and therefore, would not have used the product (or whatever other statement is necessary to show that plaintiff's injuries would have been prevented). Obtaining this testimony poses risks, of course, for the plaintiff. While, in our experience, most doctors who are asked in deposition are too embarrassed to say anything other than, "of course, I review all Dear Doctor letters that cross my desk" (even though that's likely not always true),⁹⁵ most plaintiffs are afraid to draft some concrete language for the Dear Doctor letter, lest that

92. *Id.* at 576.

93. *Id.*

94. *Id.*

95. See, e.g., *Janssen Pharmaceutica, Inc. v. Bailey*, 878 So.2d 31, 42, 58 (Miss. 2004).

box them in at trial. And, we have seen no plaintiffs dare to ask if the doctor would have done anything differently had he or she reviewed a specific Dear Doctor letter. After all, the answer could very well be, “no, I would have prescribed the same medicine all over again”—and out goes the plaintiff’s Dear Doctor letter argument, and the chance to survive summary judgment. Instead, plaintiff’s counsel will usually ask the more benign question: “Doctor, if you had received a Dear Doctor letter, would you have followed what it said?” Without any context for what the Dear Doctor letter would instruct, most doctors of course say yes—why would they not follow an FDA-approved letter with important drug information?

However, it is not only plaintiffs that shy away from asking the pointed question of whether a particular Dear Doctor letter would have made a difference. Defense counsel fears asking that question, too, as there is a chance that the doctor, accustomed to following instructions in Dear Doctor letters, will say “yes, I would have done things differently.” It is far safer for the defense to argue on summary judgment that there is “no evidence” that a Dear Doctor letter would have avoided plaintiff’s injury.

b. *Kapps v. Biosense Webster, Inc.*, 813 F. Supp. 2d 1128 (D. Minn. 2011)

Kapps v. Biosense Webster, Inc. is a district court case that, like *Rodriguez*, rejected the Dear Doctor letter causation argument because plaintiff could not show that his doctors would have done anything differently if defendant had sent out a Dear Doctor letter.⁹⁶ *Kapps* provides an interesting twist, because the plaintiff actually braved crafting the content of the proposed Dear Doctor letter and was criticized soundly for it.⁹⁷ Like *Rodriguez*, *Kapps* does not close the door to other plaintiffs making out successful Dear Doctor letter arguments on a different set of facts, but it does provide ample ammunition for defendants seeking to defeat Dear Doctor letter causation arguments.

In *Kapps*, plaintiff sought to recover for injuries he suffered when the tip of a catheter—made by defendant Biosense Webster (“Biosense”)—snapped off and became entangled in the mitral valve of his heart.⁹⁸ Plaintiff suffered pericardial bleeding and damage to his mitral valve, which required treatment with open-heart surgery.⁹⁹ The catheter at issue was sold by Biosense to the Mayo Clinic and used in a patient other than plaintiff. Then, contrary to Biosense’s instructions to use the catheter only once, the Mayo Clinic sent the used catheter to defendant Ascent Healthcare

96. *Kapps v. Biosense Webster, Inc.*, 813 F. Supp. 2d 1128, 1156 (D. Minn. 2011).

97. *Id.*

98. *Id.* at 1133.

99. *Id.*

Solutions (“Ascent”) for reprocessing, so that it could be used in another patient (ultimately, plaintiff).¹⁰⁰

We focus on the district court’s grant of full summary judgment to Biosense (Ascent was left in the case), and in particular on the analysis of plaintiff’s failure-to-warn claim. Plaintiff argued that Biosense’s catheter was defective because: (1) it lacked adequate warnings about the risk of mitral-valve entrapment, and (2) it lacked adequate instructions about how to extricate an entrapped catheter.¹⁰¹ Plaintiff’s warning-defect claim was not based on Biosense’s instructions for use—plaintiff’s expert admitted, “doctors don’t read [instructions for use] in great detail every time.”¹⁰² Rather, plaintiff’s expert opined that Biosense should have warned about mitral-valve entrapment in a Dear Doctor letter, which would say, “Dear Doctor, we have had a few reports of entrapment of this catheter in the mitral valve. Please be very careful with its use in the atrium, et cetera, et cetera.”¹⁰³

The district court gave a free pass to plaintiff on the issue of whether he could show that Biosense should have issued a Dear Doctor letter, as opposed to inserting the proposed warning in the catheter’s instructions for use.¹⁰⁴ Plaintiff’s warning expert testified that there are “probably some” Dear Doctor letter regulatory requirements, but didn’t “know them” and couldn’t “quote them.”¹⁰⁵ (As shocking as this may seem, many warning-defect experts are unfamiliar, not only with Dear Doctor letter regulations, but FDA labeling regulations more generally—a fruitful subject for a Daubert motion¹⁰⁶ to exclude a plaintiff’s warning-defect expert.) Because neither party briefed Dear Doctor Regulations, the district court did not make a ruling on the subject.

The District Court of Minnesota assumed, “for the sake of argument” that Biosense could have issued the warning advocated by the plaintiff.¹⁰⁷ Had Biosense analyzed the “important” information standard and categories

100. *Id.* at 1134.

101. *Id.* at 1155. Plaintiff also argued that Biosense failed to warn of the dangers associated with reprocessing. *Id.* However, the court easily dismissed this argument, in light of Biosense’s clear instruction to use the catheter only once. The court found it “fanciful” to suggest that Biosense has a further duty to tell doctors, in effect, “Our catheters are labeled for a single use. We really mean it. Some companies will offer to reprocess our catheters. Those companies will tell you that the reprocessed catheters are safe. Don’t believe them.” *Id.* at 1158-59.

102. *Id.* at 1155 (internal quotations and citation omitted).

103. *Id.*

104. *Id.* at 1156.

105. *Id.*

106. *Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579 (1993).

107. *Id.*

in 21 C.F.R. § 200.5, it could have made strong arguments, especially through an expert, that a proposed warning to be “very careful” does not meet the requirements of a Dear Doctor letter. The lesson here is that plaintiffs and defendants are both well-advised to have warning-defect experts who are savvy about Dear Doctor letter and other FDA regulatory requirements. If only one side or the other has such a knowledgeable expert, that imbalance can tip the scale for the court’s analysis of whether a Dear Doctor letter was feasible in the instant case.

The court also assumed, “for the sake of argument,” that plaintiff’s doctors would have paid closer attention to a Dear Doctor letter than to instructions included with the catheter.¹⁰⁸ Nevertheless, the Kapps court dismissed plaintiff’s failure-to-warn claim because he could not show that his doctors “would have done anything differently” if Biosense had sent out the proposed Dear Doctor letter.¹⁰⁹

The District Court of Minnesota first critiqued plaintiff’s proposed “[p]lease be very careful” warning as “content-free.”¹¹⁰ The court noted that plaintiff’s expert testified that an instruction for extricating the entrapped catheter “might” be: “if you get this thing entangled and it doesn’t disentangle with a little clockwise torque, you would call a surgeon.”¹¹¹ But this did not help plaintiff’s warning claim, as his expert said he was not going to render an opinion on what disentanglement instruction “should have been included.”¹¹² The court in Kapps further assessed that plaintiff’s “content-free” Dear Doctor “would not have changed *anyone*’s behavior.”¹¹³ After all, “[s]urely doctors know, based on their training and common sense, that they must be ‘very careful’ when manipulating an instrument inside a human heart.”¹¹⁴ The court in Kapps thus cautions future plaintiffs to put specific content in their proposed Dear Doctor letter that, at least on its face, sounds like it could make a difference in the product’s use. The court in Kapps also encourages defendants to pin down plaintiffs on their proposed Dear Doctor letter content, so they can deconstruct and decimate it.

The court in Kapps then analyzed another glaring flaw in plaintiff’s Dear Doctor letter argument: no one had deposed Dr. Wong, the doctor manipulating the catheter when it became entrapped.¹¹⁵ Thus, as to Dr.

108. Id.

109. Id.

110. Id.

111. Id. (internal quotations and citation omitted).

112. Id. at 1157 (internal quotations and citation omitted).

113. Id. at 1156, 1157 (emphasis added).

114. Id.

115. Id.

Wong, there was “not a shred of evidence in the record that” a Dear Doctor letter warning would have changed anything about how the heart procedure was done.¹¹⁶ The court rejected the argument that the heeding presumption—i.e., the presumption that if a product comes with a warning, it will be read—could establish the effect of the Dear Doctor letter on Dr. Wong.¹¹⁷ Minnesota, providing the applicable state law, had not adopted the heeding presumption.¹¹⁸ Even if it had, the presumption would not have helped Kapps: “What is presumed under the heeding presumption is that the omitted warning would have been heeded, not that the heeding of the omitted warning would have prevented the plaintiff’s injury.”¹¹⁹ In the instant case, however, there was no evidence that if Dr. Wong “had heeded the warning to be very careful, he would have done something differently,” and thus there was “no evidence that the absence of that warning caused Kapps’s injuries.”¹²⁰

We find it odd that neither plaintiff nor defendant chose to depose Dr. Wong; typically, it is in both parties’ best interests to depose all of the treating physicians to develop their case theories and defenses. While the court in Kapps suggests that in some cases there is a tactical advantage in favor of the defense to not depose a treating doctor, we would not recommend this as a general rule to either plaintiffs or defendants. For plaintiffs, this could be the issue keeping them from surviving summary judgment. Even in states with heeding presumptions, the presumptions may not be sufficient to create a triable issue of fact regarding whether the doctor would have done something differently based on the Dear Doctor letter. As for defendants, they are ill advised to forego deposing a treating doctor and thus have no indication of what that doctor will say at trial—including, theoretically, that plaintiff’s proposed warning would have made all the difference.

Finally, the court noted in Kapps that the deposition testimony of Dr. Packer, who supervised Dr. Wong and was in charge of extricating the catheter once it was entrapped, provided even further support that the proposed Dear Doctor letter would not have prevented plaintiff’s injuries.¹²¹ Dr. Packer testified that he “has not changed anything about how he uses” the catheter at issue despite what happened during plaintiff’s procedure.¹²² In fact, plaintiff’s procedure gave Dr. Packer “direct personal knowledge of

116. Id.

117. Id. at 1157 n.22.

118. Id.

119. Id.

120. Id.

121. Id. at 1158.

122. Id.

the very information” that allegedly should have been in the Dear Doctor letter.¹²³ The court reasoned that if that knowledge did not change Dr. Packer’s conduct after the procedure, receiving the proposed Dear Doctor letter (conveying that same knowledge) before the procedure would not have changed his conduct during the procedure.¹²⁴ The court then concluded that “a reasonable jury could not find a causal connection” between the alleged warning defect and plaintiff’s injuries.¹²⁵ This holding suggests that plaintiff’s counsel should try to elicit treating doctor testimony that his or her practice has changed after what happened to plaintiff, while defendants should try elicit testimony that the treating doctor continued to do all the things the same way, despite plaintiff’s injuries.

c. *Bartlett v. Mut. Pharm. Co., Inc.*, 731 F. Supp. 2d 135 (D.N.H. 2010)¹²⁶

Bartlett is a pre-Mensing case where the District Court of New Hampshire granted summary judgment on plaintiff’s failure-to-warn claim, though not on all claims, after finding no evidence that plaintiff’s treating doctor read the generic drug’s package insert.¹²⁷ While the court in *Bartlett* could have dismissed plaintiff’s failure-to-warn claim more summarily post-Mensing (because it involved a generic drug manufacturer), the case nonetheless provides noteworthy analysis and rejection of plaintiff’s “speculative” Dear Doctor letter causation arguments,¹²⁸ which are arguably still good law.

In *Bartlett*, the plaintiff sued generic drug manufacturer Mutual Pharmaceuticals (“Mutual”) after experiencing severe side effects from the drug sulindac—a non-steroidal anti-inflammatory drug (“NSAID”).¹²⁹ Within weeks of taking the drug, the plaintiff was diagnosed with Stevens-Johnson Syndrome (“SJS”), progressing to toxic epidermal necrolysis (“TEN”)—a potentially fatal condition involving necrosis, or death, of the skin and mucous membranes.¹³⁰ The plaintiff suffered from a two-month coma and permanent injuries, including blindness.¹³¹ The sulindac label expressly listed SJS/TEN as a potential adverse reaction in the “Adverse Reactions” section, and warned about “severe skin reactions” that could

123. *Id.*

124. *Id.*

125. *Id.*

126. A petition for writ of certiorari in the *Bartlett* case was filed by Mutual Pharmaceutical Company, Inc., on July 31, 2012 (Docket No. 12-142).

127. See *Bartlett v. Mut. Pharm. Co., Inc.*, 731 F.Supp.2d 135, 141 (D.N.H. 2010).

128. *Id.* at 149.

129. *Id.* at 142.

130. *Id.*

131. *Id.*

lead to fatalities, without mentioning SJS/TEN by name in the “Warnings” section.¹³²

Dr. Ergin, who prescribed Clinoril (the brand name version of sulindac) for the plaintiff, admitted that he never reviewed the sulindac label before treating plaintiff and that “nothing about it influenced [his] prescribing of the drug or what he told Bartlett about it.”¹³³ Dr. Ergin further testified that “without reading the warning label [he] knew from his medical background that Sulindac and other NSAIDs carried some risk of causing SJS/TEN.”¹³⁴ Nonetheless, he claimed that if there had been “strong warnings in place about what may well be a higher risk of severe reactions like SJS and TEN with [s]ulindac . . . he likely would have prescribed a different drug for Bartlett that carried less risk of SJS/TEN.”¹³⁵ Dr. Ergin admitted that he still prescribes sulindac “on rare occasions, even after learning of Bartlett’s ordeal.”¹³⁶

Mutual argued that causation was lacking because Dr. Ergin never reviewed the label.¹³⁷ The court agreed, holding that “even assuming arguendo that Mutual had a duty to strengthen the SJS/TEN warning on its [s]ulindac label, that stronger warning would not have affected Dr. Ergin’s decision or prevented Bartlett’s injuries” because he did not read the label.¹³⁸ Even if the heeding presumption applied under the applicable state law (New Hampshire), Dr. Ergin’s testimony rebutted that presumption by making clear he did not review the label; and thus, would not have heeded any changes to it.¹³⁹

Enter again the Dear Doctor letter causation argument, which in Bartlett was raised by the court sua sponte, among other non-label arguments, during the summary judgment oral argument.¹⁴⁰ Plaintiff “seized the opportunity” and argued that Dr. Ergin would have heeded a stronger warning sent out in a Dear Doctor letter.¹⁴¹ The court rejected the

132. Id. at 142-43.

133. Bartlett, 731 F.Supp.2d at 143 (internal quotations and citation omitted) (Dr. Ergin also did not review the Clinoril label “in detail” before treating plaintiff.).

134. Id.

135. Id. (internal quotations and citation omitted).

136. Id.

137. Id. at 146.

138. Id. (Plaintiff also argued that Dr. Ergin’s review of the identical label for the brand-name drug, Clinoril, could establish causation. Id. However, the court found that Dr. Ergin’s “cursory review” of that label, which did not include review of the SJS/TEN warning, showed that even if the warnings had been stronger, “they would not have reached Dr. Ergin’s attention.”).

139. Bartlett, 731 F.Supp.2d at 147.

140. Id. at 148.

141. Id.

argument, finding “no evidence about whether Dr. Ergin has a practice of reading such letters” and “little, if any, evidence about the process for distributing such letters.”¹⁴² Accordingly, the court found “any causation theory based on a ‘Dear Doctor’ letter . . . purely speculative.”¹⁴³ Of course, the finding in Bartlett that the Dear Doctor letter is “purely speculative” is easily distinguishable from cases with testimony from the treating doctor that he or she routinely reviewed and relied upon Dear Doctor letters, and that the proposed Dear Doctor letter in the instant case would have changed the plaintiff’s treatment.

What is not-so-distinguishable is the finding in Bartlett that Dear Doctor letter arguments (and other non-label theories)

[r]est upon a dubious proposition: that even if [defendant] had strengthened the [subject] warning on its [drug] label . . . that still would have been a legally inadequate warning unless [defendant] took additional steps beyond the label to disseminate such information. [Plaintiff] has not identified any authority or evidence for that proposition.¹⁴⁴

In other words, like in Rodriguez, plaintiff should have the burden of showing that a change to the label would not have been an “adequate” warning, and that only a Dear Doctor letter would have provided an “adequate” one.¹⁴⁵

2. Cases (Indirectly) Supporting the Dear Doctor Letter Causation Argument

As with many areas in products liability, there are cases that oppose Rodriguez, Kapps, and Bartlett’s rejection of Dear Doctor letter causation arguments. We suspect that as the case law develops, there will be more cases giving credence to the Dear Doctor letter causation argument—particularly as plaintiffs succeed in establishing stronger evidentiary bases for the argument.

- a. Winter v. Novartis Pharms. Corp., No. 06-04049-CV-C-NKL, 2011 WL 5008008 (W.D. Mo. Oct. 20, 2011).

Winter v. Novartis is a paradigm case where the plaintiff’s doctor did not review the subject drug’s package insert, the defendant moved for summary judgment on lack of causation for the failure-to-warn claim, and nevertheless, the district court allowed the plaintiff to proceed to trial.¹⁴⁶

142. Id. at 149.

143. Id.

144. Id.

145. See supra Section III(B)(1)(a) (citing Rodriguez, 680 F.3d at 576).

146. See Winter v. Novartis Pharms. Corp., No. 06-04049-CV-C-NKL, 2011 WL

While the court's reasoning is cursory (apparently because an MDL transferee court had already denied a similar summary judgment motion and the court was "hesitant to disturb the MDL court's ruling"), it provides some support to plaintiffs seeking to validate Dear Doctor—or other non-label-based—causation arguments on a scarce evidentiary record.¹⁴⁷

In Winter, Ruth Baldwin¹⁴⁸ was prescribed cancer drugs Aredia and Zometa after being diagnosed with breast cancer with metastases to her spine and liver.¹⁴⁹ The prescribing oncologist testified that he could not recall a patient with metastases to whom he did not prescribe one of these drugs prior to when he stopped using them on Ms. Baldwin.¹⁵⁰ Beginning in September 2003, Novartis made a series of changes in its package insert to alert physicians to the potential side effect of osteonecrosis of the jaw (ONJ)¹⁵¹—a serious bone disease that exposes the jaw bones through lesions in the gums. Novartis also "highlighted" the latest label changes regarding ONJ in a September 24, 2004 Dear Doctor letter.¹⁵²

There was no dispute that plaintiff's oncologist "never read the package inserts for Aredia and Zometa," apparently because he believed "Novartis produced them in a way that made them useless to a practitioner."¹⁵³ The parties disputed whether the oncologist received the September 24, 2004 Dear Doctor letter.¹⁵⁴ The parties did not dispute, however, that Ms. Baldwin's dentist (who had not prescribed the subject drugs) had received no warnings about the risks of ONJ in patients on Aredia and Zometa, including the warning that tooth extractions—like those done on plaintiff on November 6, 2003 and September 9, 2004 (twenty days before the date of the Dear Doctor letter)—may exacerbate ONJ.¹⁵⁵

Novartis argued that the fact that Ms. Baldwin's oncologist testified that he did not read the relevant package inserts—i.e. "made himself ignorant" of their content—precluded a finding of causation on her failure-to-warn claim.¹⁵⁶ The district court disagreed on two grounds.

First, the court found a triable issue of fact in the oncologist's unsupported allegation that the package insert was "useless"¹⁵⁷—even

5008008 (W.D. Mo. Oct. 20, 2011).

147. Id. at *2.

148. Plaintiff Christine Winter was suing on behalf of Ms. Baldwin's estate. Id. at *1.

149. Id.

150. Id.

151. Id.

152. Id.

153. Id.

154. Id.

155. Id. at *1-*3.

156. Id. at *2.

157. Id. at *3.

though it was approved in form and content by the FDA. Indeed, some of the ONJ warnings were made at the FDA's own request.¹⁵⁸

Second, setting an exceedingly low evidentiary bar for non-label arguments akin to Dear Doctor letter arguments, the court gave weight to plaintiff's argument that "Novartis had a duty to reflect the known side effects of its medication in articles and communications through sales representatives, both of which could have reached [the oncologist] and changed the course of events despite his not reading package inserts."¹⁵⁹ The district court required no evidence to support that the oncologist "would have" received a non-label warning or that this hypothetical warning "would have" changed whether Ms. Baldwin was prescribed these drugs and whether she would have had her tooth extractions. Had there not been a Dear Doctor letter sent by Novartis, this court likely would have accepted that a theoretical Dear Doctor letter "could have changed the course of events" without any evidence that the oncologist made it a practice to review these letters, or that such a letter would have made any difference in his treatment decisions.

Putting aside its lenient causation standard on summary judgment, the court in *Winter* provided a few useful lessons on Dear Doctor letters for pharmaceutical manufacturers, such as a lesson on hard-copy versus electronic mailers. The parties in *Winter* disputed whether the oncologist had received the Dear Doctor letter.¹⁶⁰ Proving the receipt of hard copy Dear Doctor letters by a specific doctor may be difficult or impossible, especially if the doctor's recollection is hazy. Thus, even if a pharmaceutical manufacturer sends out a snail-mail mailer—following 21 C.F.R. 200.5 by providing a detailed warning of the precise risk at issue at just the right time so as to be able to avoid a plaintiff's injuries—that still may not be enough to prove that the warning was provided. Accordingly, manufacturers should consider e-mailing Dear Doctor letters, with electronic tracking to provide a definite answer as to who received the information and when.

Another lesson highlighted in *Winter* is the importance of carefully thinking through to whom Dear Doctor letters should be sent. Given that the Dear Doctor letter at issue dealt specifically with ONJ in relation to dental surgery, it likely should have been sent out to dentists and oral surgeons. Because there was no dispute that these categories of health care providers were not included in the recipient list, the district court left the decision of whether Novartis had a duty to warn plaintiff's dentist about

158. *Id.* at *1.

159. *Id.* at *3 (emphasis added).

160. *Id.* at *1.

Zometa and Aredia to the jury.¹⁶¹ Based on FDA guidance issued after Ms. Baldwin suffered her injuries, the answer is almost certainly yes.¹⁶² Indeed, in April 2012 a jury awarded Ms. Baldwin \$225,000 in compensatory damages for her injuries.

b. Tucker v. SmithKline Beecham, Corp.,
701 F.Supp. 2d 1040 (S.D. Ind. 2010)

Tucker, like Winter, does not provide direct support for the Dear Doctor letter causation argument, but provides some helpful language for plaintiffs trying to use that argument to avoid summary judgment. Tucker also raises additional considerations that drug manufacturers should keep in mind before issuing Dear Doctor letters. These considerations will be discussed at the end of this section.

Tucker is distinguishable from Winter from the get go. In Tucker, the treating doctor actually read the package insert for the drug at issue, but complained it did not warn clearly enough about the attendant risk of suicide.¹⁶³ The causation argument balanced on whether an additional “adequate” warning—be it in the label or through other means (such as a Dear Doctor letter)—would have changed the doctor’s treatment decisions.

Tucker concerned the warnings associated with the drug Paxil, an antidepressant classified as a selective serotonin re-uptake inhibitor or “SSRI.”¹⁶⁴ In 2002, the year Father Tucker (yes, the plaintiff was a priest) was prescribed Paxil, the label warned that the “possibility of a suicide attempt is inherent in major depressive disorder and may persist until significant remission occurs.”¹⁶⁵ Father Tucker committed suicide a few weeks after he began taking Paxil.¹⁶⁶

Before prescribing Paxil to Father Tucker, Dr. Bright reviewed the package insert.¹⁶⁷ He did not recall any “specific warnings in 2002 regarding an association between Paxil and suicide in adults,” nor did he have any “independent knowledge” of such an association at that time.¹⁶⁸ Dr. Bright testified that “[i]f he had been provided with a warning that Paxil was associated with suicide, he would have considered that warning in

161. Id. at *3.

162. See supra Section II(A)(4).

163. Tucker v. Smithkline Beecham, Corp., 701 F.Supp. 2d 1040, 1067 (S.D. Ind. 2010).

164. Id. at 1043.

165. Id. at 1044.

166. Id. at 1042.

167. Id. at 1044.

168. Id. at 1044-45.

making his decision to prescribe Paxil to Father Tucker.¹⁶⁹ Notably, in 2006, SmithKline issued a Dear Doctor letter advising of such an association: a “statistically significant” increase in suicidal behavior in adults with major depressive disorder who were on Paxil (as opposed to a placebo).¹⁷⁰

SmithKline moved for summary judgment based on lack of causation because Dr. Bright knew that patients on Paxil were at risk for suicide before prescribing it to Father Tucker.¹⁷¹ The court found there was triable issue of fact on causation based on Dr. Bright’s comment that he “would have considered” information in a more “explicit warning.”¹⁷² The court was not bothered that there was no evidence that an additional suicide warning—whether via a revised package insert or a Dear Doctor letter (the court didn’t specify)—would have changed his decision to prescribe Paxil.¹⁷³ Because “Dr. Bright’s statement [was] not definitive either way,” the court reasoned, “it must be construed in favor of the plaintiff.”¹⁷⁴ Thus, like Winter, Tucker provides a very loose standard to survive a causation summary judgment motion in a failure-to-warn case.

Tucker provides additional considerations for drug manufacturers to keep in mind before issuing Dear Doctor letters, as such letters very well may be used against manufacturers.¹⁷⁵ The court used the 2006 Dear Doctor letter in rejecting SmithKline’s Daubert motions to exclude plaintiff’s experts.¹⁷⁶ Not surprisingly, the court found admissible the plaintiff’s expert’s controversial opinion that there was an increased risk of suicidality in adult patients taking Paxil, when SmithKline’s Dear Doctor letter essentially stated as much.¹⁷⁷ Similarly, the court found that another plaintiff’s expert’s opinion regarding general causation was reliable, as it “appropriately relied on [SmithKline’s] voluntary issuance of a ‘Dear Doctor’ letter.”¹⁷⁸ Thus, manufacturers should be certain they are comfortable with each word of a Dear Doctor letter, as plaintiff’s counsel may readily use each word as a defense concession or admission.

Plaintiff also used SmithKline’s 2006 Dear Doctor letter to oppose the

169. Id. at 1045.

170. Id. at 1046.

171. Id. at 1067.

172. Id. at 1068.

173. Id. at 1068 (“He did not opine as to what his ultimate decision would have been.”).

174. Id.

175. See also Section III(C) regarding whether Dear Doctor letters may be excluded under Federal Rule of Civil Procedure 407 as subsequent remedial measures.

176. Tucker, 701 F. Supp. 2d at 1061-63.

177. Id. at 1062.

178. Id. at 1063.

argument that the 2002 Paxil label was adequate as a matter of law.¹⁷⁹ While the court in Tucker held that a reasonable jury could find the 2002 label inadequate “[e]ven without comparing Paxil’s 2002 label with [SmithKline’s] revisions,” it is difficult to imagine that the court did not consider such a comparison, or that the jury would not consider it either, if presented with the juxtaposition. This leads into the discussion of whether post-injury Dear Doctor letters constitute subsequent remedial measures and are therefore inadmissible under Federal Rule of Evidence 407.

C. Dear Doctor Letters as Post-Remedial Measures: Courts Divided

The Dear Doctor letter causation argument shows how not sending a Dear Doctor letter may subject a manufacturer to a failure-to-warn claim. When a Dear Doctor letter has been sent out after a plaintiff’s alleged injury from the drug or medical device at issue, a plaintiff may want to offer it as evidence of the package insert’s inadequacy or the manufacturer’s negligence, as we saw in Tucker.

The question then becomes, can a manufacturer exclude an issued Dear Doctor letter from evidence at trial? It all depends on the jurisdiction. Some courts have held that post-event label changes constitute subsequent remedial measures and are thus inadmissible under Federal Rule of Evidence 407.¹⁸⁰ For example, in *Chlopek v. Federal Insurance Co.*,¹⁸¹ the Seventh Circuit held that the defendant’s “motive for making the [label] change is irrelevant. All the rule requires is that the measure ‘would have made the injury or harm less likely to occur.’”¹⁸² Several other courts have agreed, at least with respect to “true” label changes (these decisions do not necessarily discuss Dear Doctor letters specifically).¹⁸³

At least one recent decision has come out the other way, however, finding that Rule 407 does not apply. In 2011, *Schedin v. Ortho-McNeil-Nanssen Pharmaceuticals*,¹⁸⁴ the District Court of Minnesota held, over the manufacturer’s Rule 407 objection, that evidence of labeling and label changes (including Dear Doctor letters) that occurred after the plaintiff ingested the drug at issue—Levaquin—were admissible.¹⁸⁵ The court held

179. *Id.* at 1067.

180. Fed. R. Evid. 407.

181. *Chlopek v. Fed. Ins. Co.*, 499 F.3d 692, 700 (7th Cir. 2007).

182. *Id.*

183. *Janssen Pharm., Inc. v. Armond*, 866 So. 2d 1092, 1100-01 (Miss. 2004); *Stahl v. Novartis Pharm. Corp.*, 283 F.3d 254, 270 n.10 (5th Cir. 2002); *Martinkovic v. Bangash*, No. 84 C 9568, 1987 WL 28400, at *1 (N.D. Ill. Dec. 18, 1987); *DeLuryea v. Winthrop Laboratories*, 697 F.2d 222, 227-29 (8th Cir. 1983).

184. 808 F. Supp.2d 1125 (D. Minn. 2011).

185. *Id.* at 1137-38.

that because the FDA mandates label changes, the evidence fell within the “superior governmental authority” exception to Rule 407.¹⁸⁶

Even more recently, in *Tietz v. Abbott Laboratories, Inc., et al.*, a Dear Doctor letter not only wound up in front of an Illinois state court jury, but also became “Exhibit A” in the plaintiff’s failure to warn case.¹⁸⁷ Plaintiff Tietz accused Abbott Laboratories, Inc. and AbbVie, Inc. (together, “Abbott”) of failing to adequately warn doctors about the risks of developing unrecognized histoplasmosis when taking the arthritis drug, Humira.¹⁸⁸ Tietz alleged that, as a result of taking Humira, his wife was hospitalized and nearly died from a widespread histoplasmosis infection that doctors struggled to diagnose in early May 2010. If Abbott had adequately warned of the risk of developing a histoplasmosis infection through a quickly distributed Dear Doctor letter, argued Tietz, doctors could have diagnosed his wife’s condition sooner.

Abbott sent a Dear Doctor letter warning of this exact risk on May 17, 2010 (this letter ultimately ended up in front of the jury).¹⁸⁹ The letter provided that “Abbott would like to inform you . . . [of] the risk of developing unrecognized histoplasmosis.”¹⁹⁰ Tietz argued that Abbott knew of the risk at least 20 months earlier (as evidenced by a FDA-mandated Risk Evaluation and Mitigation Strategy (“REMS”) concerning Humira).¹⁹¹ According to Abbott, however, it could not be liable for failure to send the Dear Doctor letter sooner because it met all FDA-imposed deadlines concerning the REMS for Humira, including timely providing a Dear Doctor letter to the FDA for its approval.¹⁹²

Abbott’s Senior Director of Regulatory Affairs, Raymond Votzmeyer, testified that Abbott could not have sent out the Dear Doctor letter before it did because the letter needed FDA approval, which it did not have until

186. The “superior governmental authority” exception to Rule 407 provides that when remedial measures are mandated by a governmental agency, they are not voluntary and Rule 407 is accordingly inapplicable. *In re Levaquin Prods. Liab. Litig.*, No. 08-1943, 08-5743, 2010 U.S. Dist. LEXIS 124647 (D. Minn. Nov. 24, 2010).

187. *Tietz v. Abbott Labs., Inc.*, No 12-L-002715 (jury verdict May 9, 2013).

188. *Id.*; see also James W. Huston, Ellen N. Adler & Joanna L. Simon, Client Alert: Jury Buys Plaintiff’s Argument That Drug Manufacturer Should Have Distributed Dear Doctor Letter Soon, Without Prior FDA Approval, MORRISON & FOERSTER LLP (May 15, 2013), available at <http://www.mofo.com/files/Uploads/Images/130515-Dear-Doctor-Letters.pdf> [hereinafter Client Alert].

189. Robert Hoff, M.D., Senior Medical Director, Abbott Laboratories, to Healthcare Providers (May 17, 2010), available at http://www.humirajustice.com/pdf/fda/11-Doctor_Letter_PDF.pdf.

190. *Id.*

191. See *supra* note 188, Client Alert.

192. *Id.*

April 2010.¹⁹³ Votzmeyer admitted, however, that providing full information concerning Humira's risks was ultimately Abbott's responsibility—not the FDA's.¹⁹⁴

In closing, Tietz argued that Abbott's delay in sending the Dear Doctor letter was unreasonable and contributed to his wife's injuries. He asked for \$5.8 million in damages; the jury returned a verdict in his favor for \$2.2 million.¹⁹⁵

That Tietz was able to argue that Abbott should have sent the Dear Doctor letter sooner despite FDA-imposed guidelines serves as a reminder that not all courts view Dear Doctor letters as inadmissible subsequent remedial measures.¹⁹⁶ Additionally, it indicates that manufacturers are not permitted to sit on information that may affect physician prescribing decisions, and that compliance with FDA-imposed deadlines is not sufficient to avoid liability, even when such compliance is arguably the industry standard.¹⁹⁷

Despite Schedin and Tietz, manufacturers should continue to try to exclude post-event Dear Doctor letters and label changes in limine under Rule 407 or the parallel state rule of evidence. Not all jurisdictions recognize the superior governmental authority exception. Moreover, even in those jurisdictions that do, there are strong policy arguments to be made that Rule 407 encourages cooperation with government agencies, such as the FDA. By admitting evidence of post-event Dear Doctor letters and label changes, the courts are discouraging manufacturers from being proactive and working with the FDA to make drugs safer by providing physicians with additional warnings and information. Nonetheless, manufacturers should take care in crafting and sending Dear Doctor letters because they may very well be seen—and relied upon—by a jury in the future.

IV. CONCLUSION

The decision whether to send a Dear Doctor letter is multifaceted. Pharmaceutical manufacturers and their counsel must consider the form,

193. *Id.*

194. *Id.*

195. *Id.*

196. The Illinois law on subsequent remedial measures is not clear. The authors of the Illinois Rules of Evidence "reserved" on the issue of whether to adopt the federal Rule 407 standard due to a conflict among the Illinois courts of appeal.

197. Compliance with an industry standard, although evidence of non-negligence, is not alone sufficient to avoid liability. *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932) ("Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.").

content, timing, and distribution list for such a letter in order to ensure compliance with 21 C.F.R. § 200.5. Manufacturers should also seek the approval of the FDA before distributing a Dear Doctor letter. Because Dear Doctor letters constitute drug labeling, seeking prior FDA approval may prevent a host of problems for manufacturers down the line, including having to recall the letter and re-label the drug, and/or potential monetary penalties.

Manufacturers—especially branded manufacturers—should also consider the litigation impact of sending (or not sending) a Dear Doctor letter. Both options can lead to a host of litigation issues. Failure to send a Dear Doctor letter to alert the appropriate healthcare professionals can factor into failure-to-warn claims and may create stumbling blocks for summary judgment, especially when a healthcare professional testifies that he would have read a Dear Doctor letter if sent. On the other hand, distribution of a Dear Doctor letter may lead to additional claims that a manufacturer knew its drug label was inadequate as evidenced by the later-sent Dear Doctor letter. Whether these later-sent Dear Doctor letters are “subsequent remedial measures” is jurisdiction dependent. Accordingly, manufacturers should be aware of the possibility that a jury deciding the adequacy of a drug’s previous warning label might someday view Dear Doctor letters.

Along these same lines, manufacturers should implement standard operating procedures with regards to drafting and sending Dear Doctor letters. Part of that standard protocol should be including outside counsel as the lead for the discussion. Otherwise, e-mail and other memorandum discussing a possible Dear Doctor letter might be admitted into evidence as an admission by a party opponent, or to show notice, even if a Dear Doctor letter was not ultimately issued.

Despite the uncertainties that surround Dear Doctor letters, one thing is clear: their use—both by manufacturers as a tool to convey drug information and by lawyers as a tool in litigation—is only increasing. This will require vigilance on the part of all players in the pharmaceutical industry to keep up-to-date on the actions of Congress, the FDA, and the courts concerning Dear Doctor letters.

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