FOR IPO PHARMA AND BIOTECH ISSUES COMMITTEE

THE TEVA PETITION FOR CERTIORARI IN *GSK V. TEVA*, THE COREG® CASE

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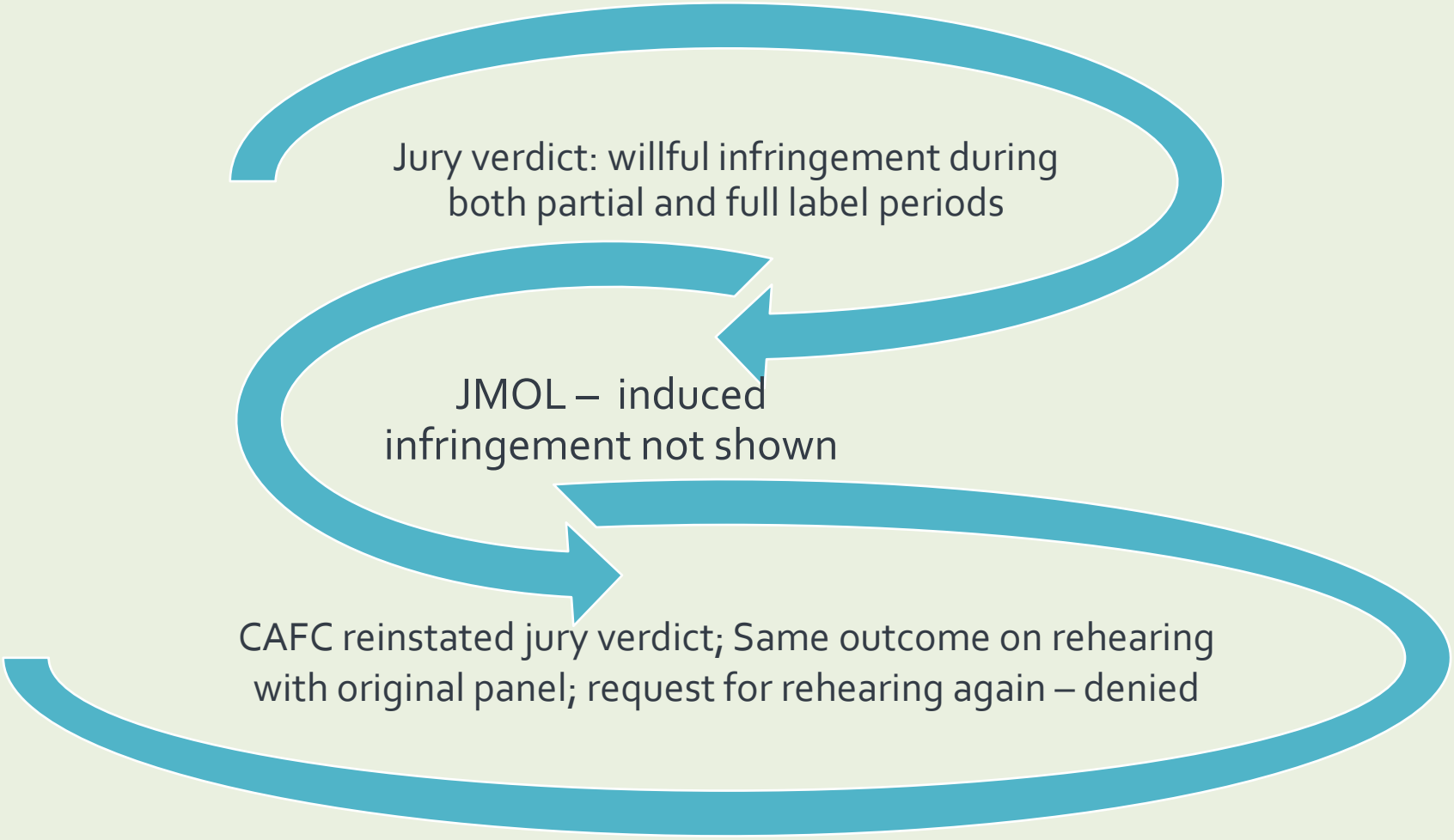
GSK V. TEVA


Jury verdict: willful infringement during both partial and full label periods
JMOL – induced infringement not shown
CAFC reinstated jury verdict; Same outcome on rehearing with original panel; request for rehearing again – denied

GSK'S CLAIM

- RE40,000 Claim 1: A method of decreasing mortality caused by congestive heart failure in a patient in need thereof which comprises[:]
  - administering a therapeutically acceptable amount of carvedilol in conjunction with one or more other therapeutic agents, said agents being selected from the group consisting of an angiotensin converting enzyme inhibitor (ACE), a diuretic, and digoxin,
  - *wherein the administering comprises administering to said patient daily maintenance dosages for a maintenance period to decrease a risk of mortality caused by congestive heart failure, and said maintenance period is greater than six months*.

TEVA'S LABEL/ACTIVITY

- Teva's 2007 skinny label included post-MI LVD indication and hypertension indication (NOT CHF indication):

> Carvedilol is indicated to reduce cardiovascular mortality in clinically stable patients who have survived the acute phase of a myocardial infarction and have a left ventricular ejection fraction of ≤ 40% (with or without symptomatic heart failure) *(see CLINICAL STUDIES [14.1])*.

- Teva's press releases and marketing materials: generic carvedilol "indicated for treatment of heart failure and hypertension," as the "Generic version of [GSK's] cardiovascular agent Coreg®," and as an "AB-rated generic equivalent of [GSK's] Coreg® Tablets."

- Teva's 2011 full label added an indication for treating CHF.

1ST CAFC OPINION

- Vacate grant of JMOL and reinstate jury verdict and damages award.
  - Substantial evidence, including label, promotional materials, catalogues, and press releases, supported the verdict
  - Judge Prost filed a lengthy dissent
- Teva petitioned for rehearing *en banc*
- Panel rehearing granted, decision vacated

2ND CAFC OPINION

- *GSK v. Teva Pharms. USA, Inc.*, 7 F.4th 1320 (Fed. Cir. Aug. 5, 2021) (per curiam) (Judge Prost dissented)
  - Vacate grant of JMOL and reinstate jury verdict and damages award.
  - "Teva argued our October 2, 2020 decision could be broadly read to impose liability on ANDA filers that carve out patented uses under section viii when seeking approval to market generic drug products, in direct contravention of the Hatch-Waxman Act."
    - ***BUT this is post-launch infringement litigation, not Hatch-Waxman!***
  - "This is a case in which **substantial evidence supports a jury finding** that the patented use was on the generic label at all relevant times and that, therefore, Teva failed to carve out all patented indications."
    - Teva's partial label and full label both included post-MI LVD indication;
    - Expert testimony as to how Teva's label met the limitations of claim 1 and conveyed to doctors that the treatment decreased mortality caused by CHF; and
    - Expert testimony that post-MI LVD indication falls within the definition of CHF.

2ND CAFC OPINION (CON'T)

- "Whether treating post-MI LVD patients with symptomatic heart failure with carvedilol was within the scope of the claims was **a fact question. It was for the jury, not this court or the district court, to resolve**."

- The court noted that "the record was not devoid of contrary or equivocal evidence":
  - Patent certification, 4.2(a): "treatment of mild-to-severe heart failure of ischemic or cardiomyopathic origin, usually in addition to diuretics, ACE inhibitor, and digitalis, to increase survival."
  - Patent certification, 4.2(b): "Decreasing Mortality Caused By Congestive Heart Failure."

- The issues before us are the issues that were **tried to the jury** and decided in the district court." (not equitable estoppel based on GSK's FDA submissions)

2ND CAFC OPINION (CON'T)

- Evidence supporting **jury verdict** of inducement:
  - "record evidence that Teva intended its label to affect physician's prescribing practices";
  - "extensive expert testimony along with Teva's marketing efforts, catalogs, press releases, and testimony from Teva's own witnesses, showing that Teva encouraged carvedilol sales for CHF despite its attempted carveout."
  - Teva "said its product is a generic equivalent of GSK's cardiovascular agent Coreg®. It was **reasonable for the jury to conclude**, especially in light of the prior press release that expressly mentioned heart failure, that Teva was again encouraging the substitution of its product for all of Coreg's® cardiovascular indications, including as claimed in the '000 patent."
  - "sufficient circumstantial evidence, in the form of labels, marketing materials, catalogs, press releases, and expert testimony, **for [the jury]** to conclude that Teva succeeded in influencing doctors to prescribe carvedilol for the infringing use."

AMARIN PHARMA V. HIKMA PHARMS. USA INC., NO. 20-1630 (D. DEL.)

AMARIN
Vascepa
(icosapent ethyl)

Initial Approval in 2012:

VASCEPA is an ethyl ester of eicosapentaenoic acid (EPA) indicated as an adjunct to diet to reduce triglyceride (TG) levels in adult patients with severe (≥ 500 mg/dL) hypertriglyceridemia. (1)

Limitations of Use:
•The effect of VASCEPA on the risk for pancreatitis in patients with severe hypertriglyceridemia has not been determined. (1)

•The effect of VASCEPA on cardiovascular mortality and morbidity in patients with severe hypertriglyceridemia has not been determined. (1)

Updated Label in 2019:

VASCEPA is an ethyl ester of eicosapentaenoic acid (EPA) indicated:

- as an adjunct to maximally tolerated statin therapy to reduce the risk of myocardial infarction, stroke, coronary revascularization, and unstable angina requiring hospitalization in adult patients with elevated triglyceride (TG) levels (≥ 150 mg/dL) and
  - established cardiovascular disease or
  - diabetes mellitus and 2 or more additional risk factors for cardiovascular disease. (1)
- as an adjunct to diet to reduce TG levels in adult patients with severe (≥ 500 mg/dL) hypertriglyceridemia. (1)

Limitations of Use:

- The effect of VASCEPA on the risk for pancreatitis in patients with severe hypertriglyceridemia has not been determined. (1)

Orange Book Patents:

- Amarin listed several patents directed to treating severe hypertriglyceridemia;
- With updated label, lists 3 new patents:
  - '537 patent: reducing occurrence of CV event in hypercholesterolemia patient
  - '007 patent: reducing triglycerides and Hs-CRP in patient with mixed dyslipidemia
  - '861 patent: reducing risk of CV death in subject with CV disease

THE PRE-LAUNCH, HATCH-WAXMAN LAWSUIT

- Hikma's ANDA filed Sep. 2016.
  - Consistent w/Amarin's label at the time:
    - Only indication was "severe hypercholesterolemia"
    - Contained the CV limitation.
  - Hikma submitted pIV certifications to patents on methods of treating severe hypertriglyceridemia.
- Ensuing litigation in Nevada, followed by appeal.
  - Hikma induces infringement.
  - Amarin's patents invalid as obvious.
- Hikma's ANDA approved May 2020.
- Hikma launches in November 2020.

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THE POST-LAUNCH, NON-HATCH WAXMAN LAWSUIT

- November 2020: Amarin files non-HW suit.
- On information and belief…
  - When Amarin obtained the new patents and CV indication, Hikma submitted ***section viii statements*** and ***removed the CV limitation.***
  - "Hikma removed the CV Limitation of Use ***so that healthcare providers and patients would believe*** that Hikma's [ANDA product] could be and should be used ***just like*** VASCEPA®, including to reduce the risk of CV events per the CV Indication awarded to VASCEPA®."
  - "Hikma ***has always intended*** for its [ANDA product] to be used in the place of VASCEPA® for ***all of VASCEPA®'s uses***."

MOTION TO DISMISS GRANTED (JAN. 4, 2022)

- "Here, **Hikma stated that its product was 'AB Rated'** in a category that includes both patented and non-patented uses….
- "Unlike Teva's press release in *GSK*, **Hikma has not pointed to Vascepa's patented uses in describing itself as Vascepa's generic equivalent**….
- "Since I find that **Amarin's complaint has failed to plead inducement** based on Hikma's label or public statements, I will **grant Hikma's motion to dismiss**."
  - *Amarin Pharma v. Hikma Pharm.*, No. 20-1630-RGA-JLH, 2022 U.S. Dist. LEXIS 1937, at *12-13 (D. Del. Jan. 4, 2022)

MOTION TO DISMISS GRANTED (CON'T)

- Label mentioning side effects is not inducement; nor is silence as to CV limitation.

- Press releases may go to intent but are not an inducing act where the broader category simply includes both infringing and non-infringing uses, without "specifically encourage[ing]" the use of the generic for the non-infringing uses.

- *Note:* ***never got to jury*** *against the drug companies* ***and*** *case continuing against insurer.* Health Net's placement of generic icosapent ethyl on a preferred tier encourages the substitution of the generic for the branded drug, including for the patented indication. That was enough to plead specific intent to induce against the insurer.

BUT CASE CONTINUES AGAINST INSURER

- From Amended Complaint:

69. On information and belief, Health Net, which is a health insurance provider, learned that FDA approved VASCEPA® for the CV Indication on or around December 13, 2019 because, on information and belief, Health Net regularly monitors the approved indications for drugs that it covers for its health insurance plans and on its formulary lists and for which it directs or provides payment.

81. On information and belief, Health Net monitors FDA approval of generic versions of drugs that are listed on its formularies, on which VASCEPA® was and still is listed. … As such, Health Net would have been aware of the FDA-approved indication for the Hikma Defendants' generic version of VASCEPA®.

87. On December 11, 2020, Amarin sent a letter to the payer community, including Envolve, the Pharmacy Benefit Manager ("PBM") that Health Net, on information and belief, uses to manage its pharmacy benefits, concerning the launch of the Hikma Defendants' generic version of VASCEPA[explaining] that the Hikma Defendants' generic version of VASCEPA® is not FDAapproved for the CV Indication.

89. Thus, Health Net was or should have been aware that actions that encourage the sale or use of Hikma's generic version of VASCEPA® for the CV Indication would induce infringement of the patents-in-suit.

90. Further, on November 16, 2020, even before filing this lawsuit against Hikma, Amarin held a clinical review meeting with Envolve…. At that meeting, Amarin discussed the clinical data to support VASCEPA®'s CV Indication, as well as detailed how the approved indications on the labels for VASCEPA® and Hikma's generic version of VASCEPA® differed.

BUT CASE CONTINUES AGAINST INSURER

140. After the launch of the Hikma Defendants' generic version of VASCEPA®, Health Net added the generic product to formularies, meaning that it would provide insurance coverage and/or payment for Hikma's generic version of VASCEPA®.
...
142. Indeed, the Health Net 2021 Classic Formulary and the Health Net 2021 Prime Formulary encourage the prescription and use of Hikma's generic version of VASCEPA®.

143. VASCEPA® is on these formularies as a tier 3 drug. .... By contrast, Hikma's generic version of VASCEPA®, referred to as "icosapent ethyl caps" (in lower case italics), is on the Health Net 2021 Classic Formulary and the Health Net 2021 Prime Formulary as a tier 1 drug. Id.

144. Health Net makes no distinction on its formulary listing for Hikma's generic version of VASCEPA® with respect to the CV Indication versus the Severe Hypertriglyceridemia Indication, even though Hikma's generic version of VASCEPA® is not approved for the former. ....

145. On information and belief, the placement of a drug on a lower tier leads to a lower patient copayment than placement of a drug on a higher tier. ...

146. Health Net's inclusion of the Hikma Defendants' generic version of VASCEPA® at tier 1 on the Health Net 2021 Classic Formulary and the Health Net 2021 Prime Formulary encourages pharmacists to dispense it and patients to use it instead of VASCEPA® given VASCEPA®'s placement on tier 3, for both the Severe Hypertriglyceridemia Indication and the patented CV Indication, even though Hikma's generic version of VASCEPA® is not approved by the FDA for the patented CV Indication.

TEVA PETITION FOR CERTIORARI

- Filed July 11, 2022
- No. 22-37

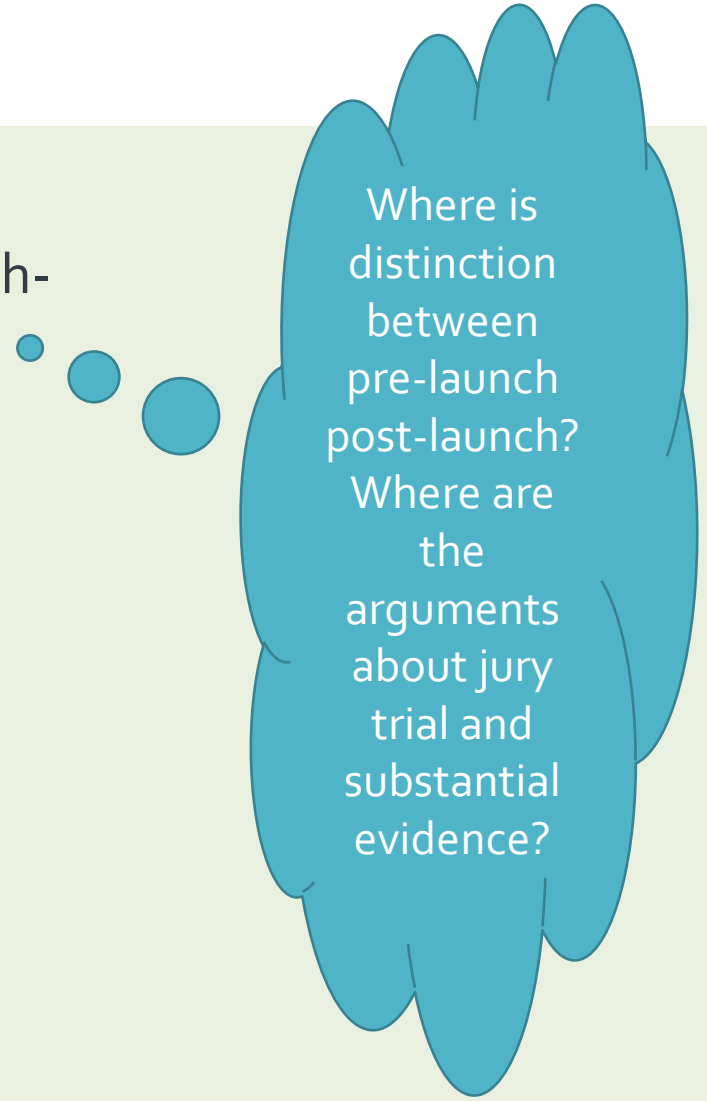
- Question presented:

  - If a generic drug's FDA-approved label carves out all of the language that the brand manufacturer has identified as covering its patented uses, can the generic manufacturer be held liable on a theory that its label still intentionally encourages infringement of those carved-out uses?

TEVA PETITION FOR CERTIORARI

- Teva petition arguments:
  - Federal Circuit distorted the inducement doctrine and nullified Hatch-Waxman's carve-out provision;
  - Skinny-label statute and 271(b)'s active inducement element speed generic launch by providing predictability and security to generic manufacturers;
  - Federal Circuit decision fundamentally undermines Congress' objectives and defies settled principles of inducement law; and
  - Federal Circuit decision has far-reaching consequences warranting this Court's attention.

- GSK response due Sept. 12, 2022.



THANK YOU!

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