

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA**

MONROE DIVISION

JERRILENE WASHINGTON	*	CIVIL NO. 3:09-CV-01343
VERSUS	*	JUDGE ROBERT G. JAMES
WYETH, INC. ET AL.	*	MAGISTRATE JUDGE KAREN L. HAYES

REPORT AND RECOMMENDATION

Before the undersigned magistrate judge, on reference from the district court, is a motion to dismiss filed by defendant Actavis, Inc. (“Actavis”). Doc. #7. For reasons stated below, it is recommended that the motion be **DENIED**.

Plaintiff, Jerrilene Washington, individually and on behalf of the estate of Adell Washington, filed the instant suit in diversity, 28 U.S.C. § 1332, to recover damages for Adell Washington’s ingestion of the drug Reglan/metoclopramide. Doc. #3 at ¶ 10. In her complaint, plaintiff asserted state law tort claims against Actavis, a manufacturer of generic pharmaceuticals, alleging that it was liable for failing to provide warnings in addition to the warnings the FDA approved for the corresponding name brand drug. *Id.* at ¶¶ 65-69. In its motion to dismiss, Actavis argues that plaintiff’s claims “are preempted as a matter of law because they directly conflict with the statutory and regulatory labeling requirements applicable to generics.” Doc. # 7 at p. 1.

The Fifth Circuit Court of Appeals recently held that failure-to-warn claims brought against generic manufacturers are not conflict-preempted by federal law. *Demahy v. Actavis, Inc.*, 2010 U.S. App. LEXIS 430 (5th Cir. Jan. 8, 2010); *see also Mensing v. Wyeth, Inc.*, 588

F.3d 603 (8th Cir. 2009). Accordingly, it is recommended that the motion to dismiss (Doc. # 7) be **DENIED**.

Under the provisions of 28 U.S.C. §636(b)(1)(C) and FRCP Rule 72(b), the parties have **fourteen (14) days** from service of this Report and Recommendation to file specific, written objections with the Clerk of Court. A party may respond to another party's objections within **fourteen (14) days** after being served with a copy thereof. A courtesy copy of any objection or response or request for extension of time shall be furnished to the District Judge at the time of filing. Timely objections will be considered by the District Judge before he makes a final ruling.

A PARTY'S FAILURE TO FILE WRITTEN OBJECTIONS TO THE PROPOSED FINDINGS, CONCLUSIONS AND RECOMMENDATIONS CONTAINED IN THIS REPORT WITHIN FOURTEEN (14) DAYS FROM THE DATE OF ITS SERVICE SHALL BAR AN AGGRIEVED PARTY, EXCEPT ON GROUNDS OF PLAIN ERROR, FROM ATTACKING ON APPEAL THE UNOBJECTED-TO PROPOSED FACTUAL FINDINGS AND LEGAL CONCLUSIONS ACCEPTED BY THE DISTRICT JUDGE.

THUS DONE AND SIGNED at Monroe, Louisiana, this 13th day of January, 2010.



KAREN L. HAYES
U. S. MAGISTRATE JUDGE