DuVal CLIENT ALERT

Passing on Tribal Knowledge of FDA Law

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COMBINATION PRODUCTS

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Combination Products-Genus Medical Technologies v. FDA

FDA's regulation of drug, device and combination products has an extensive legislative, judicial and experiential history that would lead one to expect that the regulatory pathway for a given product type, especially one that has been in the U.S. market for decades, should be well-established. ***In Genus Medical Technologies v. FDA[1], the decision of the United States Court of Appeals for the District of Columbia serves to reinforce that this has not been the case and illustrates the need for greater clarity in this regard.***

Although the Food, Drug & Cosmetic Act (FD&C Act) sets forth distinctly different regulatory schemes for drugs and devices based on their respective statutory definitions (21 U.S.C. § 321(g) defining "drug" and (h) defining "device"), these definitions overlap in that both are "intended for use in the diagnosis of disease or other conditions," in the "cure, mitigation, treatment, or prevention of disease," or "to affect the structure or function of the body of man or other animals." The FD&C Act, however, also provides an exclusionary clause distinction based on a product's mode of action clearly differentiating that a device "does not achieve its primary intended purposes through chemical action within or on the body of man or other animals" and "is not dependent upon being metabolized for the achievement of its primary intended purposes."

Despite the exclusionary distinction, FDA has held a long-standing position that the overlap in the definitions of "drug" and "device" in the FD&C Act provides the agency the administrative discretion to determine which regulatory pathway to apply to a product. In the case of the Genus' Vanilla SilQ barium sulfate imaging agent, FDA chose to regulate the product as a

[1] Genus Medical Technologies, LLC v. United States Food and Drug Administration, _____ F.3d_____, 2021 WL 1437211 (D.C. Cir. 2021)

drug with the expressed intent to ensure consistent regulation of imaging agents rather than as a device aligned with the product's mode of action. Due to the significant impact to the costs and timelines required to bring a new product to (and maintain it in) the market in the U.S. under the drug regulatory framework, Genus sought a declaration requiring FDA to regulate Genus's Vanilla SilQ product as a device.

Not surprising, in the Genus decision the D.C. Circuit concluded that "Congress established separate regulatory tracks for drugs and devices" that "Drugs and devices are subject to distinct regulatory regimes" and that ***"[i]t would make little sense, then, for the Congress to have constructed such elaborate regulatory regimes— carefully calibrated to products' relative risk levels—only for the FDA to possess the authority to upend the statutory scheme by reclassifying any device as a drug, no matter its relative risk level."*** _____ F.3d_____, 2021 WL 1437211 at 19 (emphasis added). The Court ruled that if a product meets the exclusionary "mode of action" clause criteria it is a device—it cannot and must not be regulated as a drug. ***The Court stated that interpreting the language any differently would read out the exclusionary clauses entirely and nullify Congress' intent to create two separate regulatory tracks for devices and drugs.***

In reaching this decision, the Court specifically excepted combination products. For a combination product the definition determination must consider the FD&C Act, Section 201(h) "device" definition, and how that statutory definition aligns with the definition of Primary Mode of Action (PMOA) under the combination product statute, regulation and FDA guidance. *See* 21 U.S.C. § 321(h). Primary Mode of Action is very similar in phraseology and concept to achievement of its primary intended purpose, especially when one considers FDA's regulations further refine that meaning of PMOA, as follows:

"[T]he single mode of action of a combination product that provides the most important therapeutic action of the combination product. The most important therapeutic action is the mode of action expected to make the

greatest contribution to the overall intended therapeutic effects of the combination product." 21 C.F.R. § 3.2(m).

"In determining the primary mode of action of a combination product, the Secretary shall not determine that the primary mode of action is that of a drug or biological product solely because the combination product has any chemical action within or on the human body." 21 U.S.C. §353(g)

The concepts are very similar under both statutes. The lowest common denominator of the combination products regulation is that its focus is on the single mode of action that provides the most important therapeutic action to make the greatest contribution to the overall intended therapeutic effects. This PMOA definition is akin to the "achievement its primary intended purpose" under Section 201(h), albeit using a lot more words. ***This has made the determination of which statute to apply to any given product confusing.***

The current FDA focus from Genus is "to bring previously classified products into line with the Genus decision" focusing on products that meet the device definition but have been historically regulated as drugs (such as barium sulfate imaging agents). It will be of interest to see what impact the Genus decision will have in regard to the regulation of combination products in 2022.

DuVal & Associates
Drug, Device and Food Law

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