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COURTS GIVE MIXED REVIEWS TO PREEMPTION POLICY IN 2006 FDA LABELING RULE

by
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TABLE OF CONTENTS

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INTRODUCTION

The Food and Drug Administration's (FDA) publication of the Final Rule "Requirements on the Content & Format of Labeling for Human Prescription Drug and Biological Products" is by now well known to those representing manufacturers of prescription productions in personal injury litigation. While the primary purpose of the Final Rule is to improve the format and content of drug labels, making them easier to be read and understood,[1] its preamble may have as great a impact on policy as has any other part of the Rule. Indeed, in less than a year the preamble has been the subject of no less than eight decisions discussing its intended effect on product liability litigation.[2]

These cases concern themselves with the effect, if any, of FDA's expression that approval of prescription drug labeling preempts conflicting or contrary state law,

[1] 71 Fed. Reg. 3921, 3922 (Jan. 24, 2006).

[2] *Desiano v. Warner-Lambert & Co.*, 467 F. 3d 85 (2d Cir. 2006); *Weiss v. Fujisawa Pharmaceutical Co.*, 2006 WL 3422688 (E.D. Ky. 2006); *Jackson v. Pfizer*, 432 F. Supp. 2d 964 (D. Neb. 2006); *Colaccio v. Apotex, Inc.*, 432 F. Supp. 2d 514 (E.D. Pa. 2006); *Perry v. Novartis Pharma. Corp.*, 2006 WL 2979388 (E.D. Pa. 2006); *Ackermann v. Wyeth Pharmaceuticals*, 2006 WL 2591078 (E.D. Tex. 2006); *Levine v. Wyeth*, 2006 WL 3041078 (Vt. 2006); *Conte v. Wyeth*, 2006 WL 2692469 (Cal. Super. Ct. 2006).

including most failure-to-warn claims. Because a large majority of pharmaceutical product liability litigation arises from a failure-to-warn theory based upon the content of FDA-approved prescription drug labeling, the preamble potentially has the effect of significantly reducing the number of these claims.[3] The responses of the courts since the release of the preamble, though, have been inconsistent, with rulings both for and against preemption in cases with very similar factual situations. These conflicts are taking inevitable path to the U.S. Supreme Court; it bears noting too that a recent decision by Judge Charles R. Breyer of the Northern District of California provides a considered roadmap by which prescription drug manufacturers can continue to challenge these claims and squarely sets up the issue for the appellate courts.

I. BACKGROUND AND SUMMARY OF FDA FINAL RULE

The agency's position in the Final Rule regarding the preemptive effect of approved labeling echoes earlier FDA *amicus curiae* briefs arguing for preemption of failure-to-warn claims. These too provide insight into FDA's reasoning behind the preamble and for that reason have value in appreciating the intent of the preamble.[4] In two of these earlier cases, plaintiffs claimed the manufacturer of Zoloft failed to warn of an increased risk of suicide associated with use of the anti-depressant. FDA urged in its briefs that it had previously considered requiring the manufacturer to include a warning about this exact risk, but ultimately found that there was insufficient scientific evidence to support the

[3]Michael D. Green, *Safety as an Element of Pharmaceutical Quality: the Respective Roles of Regulation and Tort Law*, 42 ST. LOUIS L.J. 163, 169 (1998).

[4]*See* for example *Amicus Curiae* Letter Brief for the United States, *Motus v. Pfizer, Inc. (Roerig Div.)*, 358 F. 3d 659 (9th Cir. (Cal.) 2004) (Nos. 02-55372, 02-55498); *Amicus Curiae* Letter Brief for the United States, *Kallas v. Pfizer*, 2005 U.S. Dist. Ct. Briefs LEXIS 310 (C.D. Utah Sept 15, 2005) (No. 2:04-cv-0998). Mark C. Levy and Gregory J. Wartman, *Amicus Curiae Efforts to Reform Product Liability at the*

addition of the warning. FDA argued in these briefs that to recognize a claim FDA had previously found to be scientifically unsubstantiated would violate for a warning that FDA's prohibition against misbranding. It also objected on the grounds that such a theory would frustrate the FDA's purpose of ensuring accurate labeling.[5]

Since the filing of those briefs, prescription product defendants have relied on their arguments to support motions for summary judgment against failure to warn claims with some success.[6] Other courts in denying these motions have held that drug manufacturers are free to strengthen their warning labels without FDA approval and that FDA regulations set only "minimum standards."[7] Thus, the response of FDA in the preamble to the final labeling rule.

In the preamble, FDA identifies several grounds for a preemption defense based on drug labeling as well as a counter punch to several arguments plaintiffs' counsel and some courts have used in attempts to negate this strategy. According to FDA, preemption extends to most failure-to-warn claims involving a prescription medicine, including liability for failure to include warnings "not supported by evidence" meeting FDA standards, failure to include warnings prohibited by the FDA, and failure to include warnings proposed to the FDA but not yet required by the agency.[8] The agency's position

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Food and Drug Administration: FDA's Influence on Federal Preemption of Class III Medical Devices and Pharmaceuticals, 60 FOOD & DRUG L.J. 495 (2005).

[5]United States Brief at 15, *Motus* (Nos. 02-55372, 02-55498); United States Brief at 23, *Kallas* (No. 2:04-cv-0998).

[6]*E.g.*, *Dusek v. Pfizer*, 2004 WL 2191804 (S.D. Tex., 2004) (finding preemption where defendant would be "liable for not including a warning that the FDA explicitly decided was not scientifically warranted"); *Needleman v. Pfizer, Inc.*, 2004 WL 1773697 (N.D. Tex. 2004) (finding failure-to-warn claim preempted because in "direct, actual conflict with federal law").

[7]*E.g., Witczak v. Pfizer, Inc.*, 377 F. Supp. 2d 726 (D. Minn. 2005).

[8]*Id.* at 3936.

also includes preemption for a tort arising from a challenge to language the FDA has approved for inclusion in labeling.[9]

Not only does the preamble lay out the bases for a preemption defense it also counters the earlier findings of courts that there can be no preemption because manufacturers are free to change the label and that FDA's regulation sets only a minimum standard.

First, while FDA concedes in the preamble that manufacturers can implement changes before FDA approval, the agency correctly states that manufacturers generally consult FDA first to avoid the risk of a later enforcement action.[10] Even with this latitude, FDA argues its right of final approval makes the agency the final arbiter of changes to prescription drug labeling in *every* case.[11]

FDA also addresses the opposition to a preemption defense which theorizes that FDA regulation of labeling establishes only a floor of minimal standards. In short, the agency urged, "under existing preemption principles, FDA approved labeling preempts conflicting or contrary State law."[12]

Underlying the goals of the preamble is the core thesis that to allow civil juries to set standards for the content of labels has the potential to cause manufacturers to over-warn to the detriment of patients. State law liability would have, and has had, the effect of compelling manufacturers to include "speculative risks," minimizing doctors'

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[9]*Id*. Most of these preemptions exclude cases where the manufacturer withheld material information from the FDA.

[10]*Id*.

[11]*Id*.

"appreciation of potentially far more significant contraindications and side effects."[13] The consequences to FDA are clear: such overwarnings would ultimately discourage patients from taking beneficial drugs.[14]

In one *amicus curiae* brief FDA has submitted since the release of the Final Rule, it reiterated the arguments from prior briefs where it argued that the court should give weight to the agency's formalized position on preemption as stated in the preamble.[15] Yet, to date, the few courts that have discussed the impact of the preamble on failure-to-warn claims have disagreed over both the legitimacy and the legal effect of the FDA's position.[16] Before discussing the responses of the courts to the preamble, an overview of preemption is provided.

II. STATEMENT OF THE LAW OF PREEMPTION

Prescription product companies frequently urge that FDA regulation of their therapies preempts state efforts, in whatever form, to directly or indirectly regulate their products.

As a very limited primer on the defense of preemptions, a state law that conflicts with a federal law or "the exercise of an enumerated federal power" is preempted under

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[12] *Id*. at 3934.
[13] *Id*.

[14] *Id*.

[15] *Amicus Curiae* Letter Brief for the United States, *Colaccico v. Apotex, Inc.*, 2006 WL 1443357, at 2 (E.D. Pa.) (No. 05-05500).

[16] *E.g.*, *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514 (E.D. Pa. 2006) (giving deference to the FDA's stated policy); *Laisure-Radke v. Par Pharmaceutical, Inc.*, 2006 WL 901657 (W.D. Wash. 2006) (finding no conflict preemption because FDA supplies only minimum standards); *Coutu v. Tracy*, 2006 WL 1314261 (R.I. Super. 2006) (finding that deference for the new FDA policy unwarranted because of the agency's change in stated position over time).

the Supremacy Clause[17] of the United States Constitution.[18] Courts recognize two types of preemption – express, where Congress has explicitly preempted state law[19], and implied, where Congress has fully occupied a field or where state law actually conflicts federal law.[20] A state law is in conflict with federal law where it "make[s] it 'impossible' for private parties to comply with both state and federal law "or where it "prevent[s] or frustrate[s] the accomplishment of a federal objective."[21] Courts agree that implied conflict preemption should be cautiously applied, and then "only if the need for it is clear."[22] The "basic assumption [is] that Congress did not intend to displace state law."[23]

Federal law may have the effect of preempting failure-to-warn claims arising from the use of medicines under both types of implied conflict preemption. First, State tort claims may result in a jury finding that a warning should have been provided that conflicts with FDA prohibitions on false and misleading labeling, making it impossible for drug manufacturers to comply with both state and federal law. Second, such a verdict would also frustrate FDA's purpose of ensuring the safety and availability of prescription drugs,

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[17]U.S. Const. art. VI, cl. 2. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992).

[18]This section freely borrows from *Colacicco supra* fn 19, 432 F. Supp. 2d at 514.

[19]The Medical Device Amendments of 1976, 90 Stat. 539, 21 U.S.C. § 301 (1994 ed. & Supp. V) created a form of express preemption. *Brooks v. Howmedica, Inc.*, 273 F.3d 785, 796 (8th Cir. (Minn.) 2001).

[20]*Id. Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (U.S. Cal., 1977).

[21]*Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 873, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (U.S. Dist. Col., 2000).

[22]*Colacicco*, 432 F. Supp. 2d at

[23]*Id.* quoting *Building & Constr. Trades Council of Metropolitan Dist. v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc.*, 507 U.S. 218, 224 (1993).

including the scientific accuracy of drug labels by undermining the expertise and authority of FDA drug labeling determinations. These points are next developed in the context of the 2006 Final Rule.

A. State Failure-To-Warn Claims Make it Impossible for Drug Manufacturers to Comply with Both Federal and State Law

Liability based upon failure-to-warn claims result in conflicting requirements as to what should be included in a label. On one hand FDA has approved the warnings content of a label and in some instances has told a manufacturer not to include a specific warning. On the other hand a jury may hold that same manufacturer liable for failing to include the same warning. FDA states in the preamble that it has final approval over all prescription drug labeling and that its requirements set both a floor and a ceiling for the content of labels. Because manufacturers cannot change a label without FDA approval and because FDA controls both what is included and what is excluded from a label, state tort liability for failure-to-warn may make it impossible for a drug manufacturers to comply with both state and federal law.

1. Two Common Misconceptions – Manufacturer Latitude to Change Warning Labels without FDA Approval and FDA Regulations as Minimum Standards

Many courts have recently held that state-based failure-to-warn claims are not preempted.[24] Before the publication of the Final Rule courts concluded that state law

[24]". . . a number of district courts have very recently ruled that state court tort claims for failure to warn in drug cases are not pre-empted. *See Laisure-Radke v. Par Pharmaceutical, Inc.*, 426 F. Supp. 2d 1163, 1169 (W.D. Wash. 2006) and 2006 WL 901657 * 2-6 (Mar. 29, 2006) (plaintiff could bring state law claim for failure to warn of increased risk of suicidality of antidepressant drug fluoxetine as state law not preempted, statement would not be false and misleading, and no frustration of Congressional purpose existed); *Peters v. Astrazeneca, LP*, 417 F. Supp. 2d 1051,1055 (W.D. Wis. 2006) (no preemption over state law where FDA did not require a warning on the product); *McNellis v. Pfizer*, 2005 WL 3752269 *10 (D.N.J.

failure-to-warn claims do not conflict with FDA regulations because the labeling requirements allow manufacturers to augment labeling without FDA approval.[25] After the final rule courts have come to the complete opposite conclusion. For example, in *Laisure-Radke v. Par Pharm.*, the court in the Western District of Washington found that FDA regulation of labeling did not negate a generic drug manufacturer's duty to inform patients of the increased risk of suicide associated with its generic form of Prozac.[26] The court disagreed with FDA that its federal law regulations prevented the manufacturer

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Dec. 29, 2005) (common law failure to warn claim not preempted by federal law in Zoloft suicide case, and product not considered mislabeled because the label is strengthened, but burden on plaintiff to prove defendant's knowledge of suicide); *Zikis v. Pfizer, Inc.*, No. 04C8104, 2005 WL 1126909 (N.D. Ill. May 9, 2005) (Ex. 5) (finding state court claims not preempted, and manufacturer can add additional warnings and that manufacturer can comply with both FDA and state requirements); *Witczak v. Pfizer, Inc.*, 377 F. Supp. 2d 726, 728-30 (D. Minn. 2005) (manufacturer can unilaterally strengthen a warning; requirement by FDA to use label verbatim did not preempt state law failure to warn claim; and prohibition against false and misleading labels did not preempt failure to warn claims); *Cartwright v. Pfizer, Inc.*, 369 F. Supp. 2d 876, 881 (E.D. Tex. 2005) (FDA warning label requirement is a minimum standard of conduct); *but see Dusek v. Pfizer, Inc.*, No. H-02-3559, 2004 WL 2191804 (S.D. Tex. Feb. 20, 2004) (finding preemption by FDA of state law warning requirements), and *Needleman v. Pfizer, Inc.*, No. 3:03CV3074N, 2004 WL 1773697 (N.D. Tex. Aug. 6, 2004) (Ex. 4) (same); *Jackson v. Pfizer, Inc.*, 432 F. Supp. 2d 964, 967 (D. Neb. 2006). As stated by Chief Judge James Rosenbaum in *Witczak*:

> Defendant's preemption argument has a surface appeal: Should it face state law liability for a failure to warn even though its label fully complied with federal law? But the argument fails upon scrutiny. Federal labeling laws are minimum standards; they do not necessarily shield manufacturers from state law liability. The primary purpose of both the FDCA and the FDA's regulatory scheme is to protect the public. State-law protections reinforce and enhance this objective. Defendant's preemption argument ultimately fails because Congress has not expressed a specific intent to preempt state consumer-protection laws in the area of prescription-drug labeling. In the absence of Congress's express statement, defendant must overcome the presumption against implying Congressional preemptive intent. It has not done so. As a result, plaintiffs' state law claims remain viable.

Witczak, 377 F. Supp. 2d at 732. *Jackson v. Pfizer, Inc.*, 432 F. Supp. 2d 964, 967 (D. Neb., 2006).

[25]*See, e.g., Laisure-Radke v. Par Pharmaceutical, Inc.*, 426 F. Supp. 2d 1163 (W. Wash. 2006) (finding a manufacturer may make labeling changes without prior FDA approval); *Witczak v. Pfizer*, 377 F. Supp. 726 (Minn. 2005) (concluding FDA regulations allow unilateral strengthening of a warning label at any time without approval); *Zikis v. Pfizer, Inc.*, 2005 WL 1126909 3 (N.D. Ill. May 9, 2005); *Eve v. Sandoz Pharmaceutical Corp.*, 2002 WL 181972 3 (S.D. Ind. June 28, 2002); *Motus v. Pfizer, Inc.*, 127 F. Supp. 2d 1085 (C.D. Cal. 2000); *but see, e.g., Needleman v. Pfizer*, 2004 WL 1773697 (N.D. Tex.) (finding manufacturer added warnings are always subject to later FDA approval); *In re Bextra and Celebrex Marketing Sales and Product Liability Litigation*, 2006 WL 2374742 (N.D. Cal. Aug. 16, 2006). *Cartwright v. Pfizer, Inc.*, 369 F. Supp. 876 (E.D. Tex., 2005) (FDA's regulations "merely set minimum standards").

[26]*Laisure-Radke*, 426 F. Supp. 2d at 3.

from making unapproved changes to its labeling and that the warning in dispute would have been false and misleading.[27]

Two months later, a court in the Eastern District of Pennsylvania came to the opposite conclusion in *Colacicco v. Apotex, Inc.,* holding that "generic drug makers *can not* unilaterally strengthen their drug."[28] The plaintiff in *Colacicco* filed a claim for failure-to-warn of an increased risk of suicide while taking Paxil. The trial court in *Colacicco* emphasized the importance of FDA's stated position in the preamble and its submitted *amicus curiae* brief that FDA must ultimately approve all label changes.[29] The court declined to "question the FDA's interpretation of its own regulations."[30]

Colacicco seems to have taken the correct route in its analysis. Absent the deference given by the *Colacicco* court to the ultimate authority of FDA, the agency's regulations clearly establish that it has complete approval control over all additions to prescription drug labeling. 21 C.F.R. 314.70(c) (6)(iii)(A) allows a drug manufacturer to

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[27]*Laisure-Radke*, 426 F. Supp. 2d at 6. "While defendants are certainly correct that a generic drug manufacturer submitting an ANDA must propose and utilize the same label as the reference listed drug, that requirement does not mandate that the manufacturer cannot change its label once the ANDA has been approved. Furthermore, it is obvious from the materials cited by defendants that any state law requiring something different for generic drug labeling prior to, or during, the approval process would directly conflict with the regulations, and is clearly preempted. However, as persuasively stated by the Fourth Circuit Court of Appeals: . . . Although generic manufacturers must include the same labeling information as the equivalent brand name drug, they are also permitted to add or strengthen warnings and delete misleading statements on labels, even without prior FDA approval. The statutory scheme governing premarketing approval for drugs simply does not evidence Congressional intent to insulate generic drug manufacturers from liability for misrepresentations made regarding their products, or to otherwise alter state products liability law. Manufacturers of generic drugs, like all other manufacturers, are responsible for the representations they make regarding their products. *Foster*, 29 F.3d at 169-70 (citations omitted)."

[28]*Colacicco*, 432 F. Supp. 2d at 523 (citing 21 C.F.R. § 314.150).

[29]*Id*.

[30]*Id*.

add or strengthen risk warnings to its label.[31] This provision is part of a larger section requiring a supplemental submission to FDA for approval if a change to the label is made. Although FDA allows the company to begin distribution of the drug with the new labeling immediately upon FDA receipt of the supplement, FDA retains the authority to reject the new label and to enjoin the company from its further use if it seems that the label amounts to a misbranding. To avoid FDA rejection after implementing a new label, manufacturers "typically consult with the FDA" prior to making changes,[32] making the provision even less significant.

While FDA is certainly responsible for determining what must be included in a specific drug's labeling, it is also charged by law to determine what information should, for reasons of public health, be omitted as false and misleading. Just as FDA requires warnings that it determines are necessary for patient protection, it also strikes warnings which are insufficiently substantiated by scientific evidence. FDA, unlike state judges and lay juries, has the required expertise to determine which warnings are and which are not scientifically substantiated and to assess the adverse impact inadequately supported additional warnings may have on nationwide public use. Indeed, District Judge Charles R. Breyer has held, as discussed below, that because of this expertise "FDA's interpretation of the preemption effect is entitled to deference."[33]

2. State Failure-To-Warn Claims Directly Conflict with FDA Regulations

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[31]This provision applies to name brand prescription drugs only. Generic drug manufacturers are never allowed to make changes to their labeling without prior FDA approval. 21 C.F.R. 314.150(b)(10).

[32]71 Fed. Reg. 3922, 3934.

[33]2006 WL 2374742 *6 citing to *Geier v. American Honda Motor Corp.*, 529 U.S. 861, 873 (2000).

State failure-to-warn litigation has the potential to conflict with federal law where a state jury verdict would have the effect of requiring the addition or omission of warnings that differ from FDA requirements, including warnings FDA has approved, warnings FDA has denied, and warnings unsupported by scientific evidence as required by FDA regulations. The cornerstone to this addition of any type of false and misleading warnings is a violation of federal law even where FDA has not yet spoken to the validity of the warning.[34] There is no requirement of "a specific, formal agency statement identifying conflict in order to conclude that such a conflict in fact exists."[35]

In any of these three instances, preemption should always apply. But even where FDA has not issued an official statement as to a warning's acceptability,[36] preemption should also apply where the warning does not meet FDA standards and would be rejected by the agency if formally submitted and reviewed. Because of its regulatory basis as well as recognized expertise, FDA is best situated to determine if a specific warning is scientifically substantiated. Some courts have therefore agreed that states should defer to FDA as to the suitability of any warning, even where FDA has not addressed the specific label.[37]

B. State Failure-to-Warn Claims Stand as an Obstacle to the Achievement of the Full Objectives and Purposes of the FDA

[34]United States Brief at 10, *Motus* (Nos. 02-55372, 02-55498).

[35]*Greier*, 529 U.S. at 884.

[36]71 Fed. Reg. 3922, 3936 ("warnings that are not supported by evidence that meets the standards set forth in this rule" conflict with federal law and are preempted).

[37]*See Colacicco*, 432 F. Supp. 2d at 528 ("no where does the statute declare that the FDA must bring a prosecution to state an *opinion* as to whether a particular drug would have been misbranded if a certain warning had been attached").

A second argument in support of implied preemption (and one also supported by the Final Rule) is that a jury verdict against a manufacturer would frustrate FDA's purpose in regulating drugs. Again, until the Final Rule, courts had split on the effect of the state jury verdicts. For example, in *Coutu v. Tracy*, a failure-to-warn case involving a coma-inducing drug, the court was not convinced that state tort claims "encouraging more stringent warning standards, frustrate the purpose of the FDA."[38] In contrast, the court in *Colaccico*, reviewing a failure-to-warn claim against the background of the Final Rule, found persuasive FDA's position that "ensuring that warnings be scientifically substantiated is an important public policy."[39] (A similar finding was made in *Jackson v. Pfizer*, a case involving the death by suicide of plaintiffs who were taking defendant's antidepressant.[40]) Unlike *Coutu*, the court in *Colacicco* recognized that the addition of a warning not supported by scientific evidence can unnecessarily discourage use, "depriving patients of efficacious treatment."[41] The ability to prevent dissemination of inadequately supported warnings is as important to the FDA's goal of promoting public health as is its ability to require substantiated warnings.

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[38] *Coutu*, 2006 WL 1314261, at 4. (unpublished).

[39] *Colacicco*, 432 F. Supp. at 536.

[40] 432 F. Supp. 2d 964 (D. Neb. 2006).

[41] *Id*.

Because individual State tort claims focus on the consequences of a prescription drug on one patient, in contrast to FDA's consideration of its effect on overall public health, state verdicts have the effect of obstructing FDA's ability to ensure the safety and availability of prescription drugs to all who might benefit from them. The potential for contradictory verdicts on the same failure-to-warn claim in different state courts (as evidenced by the *Laisure-Radke* and *Colacicco* decisions) further undermines FDA policy by creating competing standards at the state level.[42]

Thus, many courts correctly see that FDA is in the unique position, unlike state court juries, to appropriately balance the public benefits and risks of a specific drug. The rigorous requirements of the agency's New Drug Application (NDA) process allow FDA to fully and scientifically assess a drug to implement adequate labeling requirements.[43] Determining whether a particular warning is supported by sufficient scientific evidence is part of the process. FDA, in comparison to a state court jury, has the expertise to consider a drug's potential beneficial impact on the general public health and to act to maximize this impact and minimize any risks. State failure-to-warn claims interfere with the flexibility the agency requires to achieve its goals.[44]

Preventing misbranding through false or misleading labeling is also fundamental

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[42]The Supreme Court recognized in *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 350, that "[a]s a practical matter, complying with FDA's detailed regulatory regime in the shadow of 50 States' tort regimes will dramatically increase the burdens facing potential applicants . . . not contemplated by Congress in enacting the FDCA."

[43]The NDA process is similar to the requirements for Class III medical devices under the MDA. State claims against Class III devices have been found to be preempted by a majority of courts. *See*, *e.g.*, *Horn v. Thoratec Corp.*, 376 F.3d 165, (3rd Cir. 2004). Although unlike the FDCA, the MDA contains an express preemption clause, in "the absence of a clear congressional command as to preemption, courts may infer that the relevant administrative agency possesses a degree of leeway to determine which rules, regulations, or other administrative actions will have preemptive effect." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 505 (1996) (Breyer, J. concurring).

to FDA's role in protecting the public health. Misbranding can occur not only through the omission of relevant side effects from a label, but also through the inclusion of risks unsupported by scientific evidence. To avoid liability in state court, drug companies may begin to label defensively, effectively allowing state courts to usurp the FDA's role of regulating labeling.

The type of defensive labeling also interferes with FDA's goals by providing potentially misleading information to the public. In an effort to avoid state liability, drug companies may voluntarily include warnings that lack appropriate scientific basis. The effect of this is to detract attention from more significant and harmful risks and may lead to under-utilization by patients reacting to the defensive warnings. Patients need to be able to differentiate scientifically substantiated warnings from defensive labeling to accurately assess a drugs potential risks and benefits. If patients place too much weight on unsubstantiated defensive warnings, they may unnecessarily forgo beneficial or even lifesaving treatments.

A Harris Poll conducted for the U.S. Chamber of Commerce supports the position that state failure-to-warn claims frustrate the FDA's purposes by complicating labels and discouraging use of beneficial drugs.[45] The poll found three-quarters of doctors feel that labeling information is too complicated for patients.[46] Almost all doctors (91%) attribute this over-complication to product liability litigation.[47] Product liability litigation also

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[44] *Buckman*, 531 U.S. at 349 ("[F]lexibility is a critical component of the statutory and regulatory framework under which the FDA pursues difficult (and often competing) objectives.").

[45] Harris Interactive, *Pharmaceutical Liability Study: Report on Findings*, July 15, 2003 available at http://www.uschamber.com/publications/reports/030715_ilr_pharma.htm (last visited 6/30/06).

[46] *Id.* at 8.

[47] *Id.*

discourages patients from taking drugs properly prescribed by their doctors.[48] Finally, one-fifth of patients surveyed have chosen not to take a prescribed drug after reading the product insert warning of possible serious side effects.[49]

Litigation, in short, can be dangerous to your health. Against this reality the Final Rule urges that its regulation of warning labels be given, in limited circumstances, a preemptive effect. Nevertheless, the inconsistent rulings discussed above continue despite the preamble's clear statements about the role of FDA in regulating regulations, labeling and the adverse effect that state tort failure-to-warn claims have on the public health.

C. Courts Should Defer to FDA's Position on Preemption

The few courts to consider the issue of deterring FDA's position on preemption as posited in the preamble have disagreed. The court in *Coutu*, for example, argued against giving any deference because FDA's position in the preamble conflicts with past positions taken by FDA regarding preemption.[50] Since the court had relied on those prior statements that did not support preemption, it argued the change in position implicated stare decisis.[51] In contrast, the court in *Colacicco* considered FDA's position "critical to [its] analysis because Supreme Court precedent dictates that an agency's interpretation of

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[48] *Id.* 38% of doctors reported that patients have stopped taking a drug when they learned it was the subject of litigation. 30% report patients refusing to take newly prescribed drugs if the drugs are involved in litigation.

[49] *Id.* at 13.

[50] *Coutu*, 2006 WL 1314261, at 4.

[51] *Id.* citing *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 356 (2000) rejecting the government's argument because it "contradicts the agency's own previous construction that this Court adopted as authoritative."

the statute and regulations it administers is entitled to deference."[52] While acknowledging that the consistency of FDA's position should be considered, the *Colacicco* court determined that "in the absence of clearly expressed Congressional intent . . . FDA's position on the preemptive scope of its regulatory authority 'is dispositive.'"[53] As noted by District Judge Breyer:

> The Court cannot conclude that the FDA is wrong: the FDA is the agency charged with administering the FCDA and striking a 'somewhat delicate balance' among its statutory objectives. *Buckman Co. v. Plaintiffs' Legal Committee*, 531 U.S. 341, 348 (2001). The FDA is in a better position than the Court to determine whether state laws that encourage manufacturers to propose defensive labels upset the FDA's careful balance of statutory objectives.

Significant Supreme Court precedent exists to support giving full weight to FDA's position in the Final Rule on preemption regardless of earlier positioning.[54] The Court has acknowledged that federal agencies can "speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments"[55] and *amicus* briefs.[56] Under 21 C.F.R. 10.85(d)(1), preamble policy statements are considered

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[52]*Colacicco*, 432 F. Supp. 2d at 525 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)).

[53]*Id*. (citing *Hillsborough County v. Automated Med. Labs., Inc.*, 471 U.S. 707, 714 (1985)). *See Bextra and Celebrex*, *supra*.

[54]*Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984) (recognizing that "considerable weight should be accorded" to an agency's interpretation of its statutory scheme); *Hillsborough County v. Automated Med. Labs., Inc*., 471 U.S. 707, 714 (1985) ("the FDA's statement is dispositive on the question of implicit intent to pre-empt. . .").

[55]*Hillsborough*, 471 U.S. at 718.

[56]*Greier*, 529 U.S. at 883 (placing weight on the government's interpretation of its statutory objectives as stated in its *amicus curiae* brief).

advisory, representing the formal position of the FDA.[57] The Court has also recognized that FDA is "uniquely qualified to determine whether a particular state law . . . should be preempted."[58]

Deference to the FDA's position is further supported by the Supreme Court's statement in *Chevron v. U.S.A. Inc. v. National Resources Defense Council* that "[an] agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."[59] A change in position is not fatal if the agency "can justify [the] change with reasoned analysis."[60] The FDA's preamble statements reflect "existing preemption principles,"[61] principles reinforced by the agency's *amicus curiae* briefs since *Motus*, and do not represent an unreasonable shift in policy.

Among the conflicting positions the courts have taken on defense to FDA, perhaps the clearest and most concise meaning of the Final Rule is that detailed by Judge Breyer in the Bextra and Celebrex litigation.

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[57]21 C.F.R. 10.85(e). Advisory opinions "may be used in . . . court to illustrate acceptable and unacceptable procedures or standards, but not as a legal requirement." 21 C.F.R. 10.85(j). This is consistent with FDA's contention in its *Colacicco Amicus Curiae* Brief that "the basis for federal preemption is not the preamble itself." United States Brief at 2, *Colacicco* (No. 05-05500).

[58]*Medtronic, Inc.*, 518 U.S. at 496.

[59]*Chevron*, 467 U.S. at 863-64.

[60]*Colacicco*, 432 F. Supp. 2d at 526 (citing *Horn v. Thoratec Corp.*, 376 F.3d 163, 179 (3d Cir. 2004)).

[61]71 Fed. Reg. 3922, 3934.

III. *BEXTRA* AND *CELEBREX* LITIGATION: ONE COURT'S VIEW OF THE FINAL RULE

In the *Bextra and Celebrex* litigation,[62] plaintiffs argued that the preamble in the labeling rule did not have a preemption effect on failure to warn claims. Coordinated before District Judge Charles R. Breyer in the Northern District of California, plaintiffs brought a number of class actions seeking damages from Pfizer based upon harm claimed to have resulted from the non-steroidal anti-inflammatory drug Celebrex. Their claims were based on the claimed inadequacy of its approved labeling as well as the content of various promotional items. Judge Breyer's decision is the most comprehensive analysis of the effect of the Final Rule to date.

Plaintiffs first argued that because the statement about preemption was in a preamble, the court could ignore the rule. But the Supreme Court, as noted by Judge Breyer, disagrees. In *Hillsborough*, the Court found that certain state law claims were not preempted because, among other things, the FDA had never indicated its belief that its regulations preempted state law:

> . . . because agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, *preambles*, interpretative statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. [471 U.S. at 718 (emphasis added).] *See also de la Cuesta*, 458 U.S. at 158 n.13 (giving deference to an agency's preamble statement on the preemptive effect of its regulations).

[62] *In re Bextra and Celebrex Marketing Sales Practices and Product Liability Litigation*, 2006 WL 2374742 (N.D. Cal., 2006).

Plaintiffs next urged that because Congress had not delegated to FDA the ability to determine the preemptive effect of its regulations, it had no power to do so. Judge Breyer held:

> Congress has delegated the responsibility for administering the FDCA to the FDA; such responsibility implies the authority and expertise to determine which state laws conflict with its regulations. *See Geier*, 529 U.S. at 883; *Hillsborough County*, 471 U.S. at 721; *see also Medtronic, Inc.*, 518 U.S. at 505 (Breyer, J., concurring) (noting that the Supreme Court 'has previously suggested that, in the absence of clear congressional command as to pre-emption, courts may infer that the relevant administrative agency possesses a degree of leeway to determine which rules, regulations or other administrative actions will have pre-emptive effect'). Congress's omission of a federal damages remedy in the FDCA is not a clear congressional command' of no preemption.

Plaintiffs also argued that FDA had changed its position on preemptive effect of labeling and that this in and of itself should negate its interpretation of preemption. Judge Breyer handily rejected this:

> But while the FDA's current view of the preemptive effect of its labeling regulations is a 180-degree reversal of its prior position, the Supreme Court has recognized that an agency's view of the preemptive effect of its regulations may change over time as the agency gains more experience with the interrelationship between its regulations and state laws. *See Hillsborough*, 471 U.S. at 714-15 (noting that an agency's statement of no preemption is dispositive "unless subsequent developments reveal a change in that position"); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863-64 (1984) (holding that the fact that the agency had from time to time changed its interpretation of a term does not mean no deference is accorded the agency's view: "On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis"). Moreover, the Supreme Court has never held that a court may not give weight to an agency's view of the preemptive effect of its own regulations simply because that agency's view changed contemporaneously with a change in administration. And, as

> the *Colacicco* court notes, the FDA's view has been consistent since 2000.[63]

Plaintiffs urged that if a prescription product manufacturer failed to disclose information about an adverse effect, it should not be given preemptive effect. Judge Breyer rejected this as being determined adversely against the plaintiff in *Buckman Co. v. Plaintiff's Legal Committee*.[64] Lastly, Plaintiffs contended that preemption should apply as to claims FDA has found that if given would be false and misleading, but:

> FDA believes that State laws conflict with and stand as an obstacle to achievement of the full objectives and purposes of Federal law when they purport to compel a firm to include in labeling or advertising a statement that FDA has considered and found scientifically unsubstantiated. [71 Fed. Reg. 3935.] *See also id* at 3936 (stating that "claims that a sponsor breached an obligation to warn by failing to include contraindications or warnings that are not supported by evidence" are preempted). Thus the FDA's view is that a claim is preempted if the FDA determined that the warning the plaintiff seeks to impose is not supported by the evidence before the FDA; the FDA does not also have to expressly determine that the warning would be false and misleading, although the FDA has suggested that an unsubstantiated statement is "false or misleading." *See* 71 Fed. Reg. 3935 (stating that additional disclosures of risk information can expose a manufacturer to liability under the act if the additional statement *is unsubstantiated or otherwise false or misleading*") (emphasis added).

Judge Breyer's ruling is a roadmap to preemption based upon failure-to-warn claims for prescription products.

CONCLUSION

[63] 432 F. Supp. 2d at 531-32.

[64] 531 U.S. 341, 348 (2001).

Labeling plays an important role in providing the public with accurate and meaningful information about the benefits and risks of prescription drugs. FDA's determinations, one way or the other, about the content of a drug label balances the need to inform the public about potential adverse side effects with the need to prevent underutilization of prescription drugs based on scientifically unsubstantiated warnings. FDA has the expertise civil juries lack in evaluating appropriate labeling based on complex scientific standards that consider the benefits of each drug to the nation as a whole. Preemption of tort failure-to-warn claims, as reflected in the Final Rule and its presence, protects the public's interest by ensuring that FDA alone sets the standards for the content of warnings.