

NOTE

**GENERIC PREEMPTION:
APPLYING CONFLICT PREEMPTION
AFTER WYETH V. LEVINE**

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INTRODUCTION

In a much-awaited decision, the Supreme Court determined that federal preemption did not apply to a state failure-to-warn claim for a prescription drug.¹ The *Wyeth v. Levine* decision addressed a question that has caused much commotion and consternation in courts and among legal professionals and scholars² and understandably so—preemption issues are the “fiercest battle in products liability litigation today.”³ Just a few days after issuing the *Levine* decision, the Supreme Court also vacated and remanded a similar Third Circuit decision, *Colacicco v. Apotex*.⁴ Like *Levine*, *Colacicco* addressed preemption for prescription drugs. *Colacicco* included both branded and generic pharmaceutical companies as defendants, whereas the sole defendant, Wyeth, in *Levine* was a pharmaceutical company that manufactures and sells branded drugs.⁵

While it is clear that state failure-to-warn claims can no longer be preempted by federal approval of a branded prescription drug label, the *Levine* and *Colacicco* holdings do not clearly prevent generic manufacturers from claiming preemption. The Food and Drug Administration (FDA) regulates both branded and generic drugs, but does so under separate statutory and regulatory provisions. Originally, the FDA evaluated generic drugs just as they did branded products.

Uniform evaluation stopped as a result of Congress’ concern over high pharmaceutical costs. In an effort to increase the availability of lower cost, generic drugs in the marketplace, Congress enacted the Hatch-Waxman Act.⁶ As anticipated, the Act increased the market pres-

1. *Wyeth v. Levine*, 129 S. Ct. 1187 (2009).

2. *E.g.*, Posting of Jim Beck to Drug and Device Law, <http://druganddevicelaw.blogspot.com/2007/12/supreme-courts-preemption-trilogy.html> (Dec. 8, 2007, 13:32 EST) (recognizing that *Wyeth v. Levine* would solve an issue that federal appellate and state courts wrestle with frequently). *But see, e.g.*, Lars Noah, *Platitudes About “Product Stewardship” in Torts: Continuing Drug Research and Education*, 15 MICH. TELECOMM. TECH. L. REV. 359, 361 n.3 (2009) (explaining that *Wyeth v. Levine* “fail[s] to foreclose altogether the possibility that such a tort claim might conflict with a more clearly expressed FDA labeling requirement”).

3. Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 450 (2009).

4. *Colacicco v. Apotex, Inc.*, 129 S. Ct. 1578 (2009).

5. Wyeth currently sells some generic drugs, but the *Levine* case dealt only with its branded, non-generic product, Phenergan. *Levine*, 129 S. Ct. at 1191.

6. Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (1984) (codified as amended at 21 U.S.C. 355 (2009) and 35 U.S.C. 271(d)-(h) (2009)) [hereinafter Hatch-Waxman Act].

ence of generic drugs.⁷ Recent summaries show that “10,072 of the 12,751 drugs listed in the FDA’s Orange Book have generic counterparts.”⁸ In order to achieve this goal, the Act permits generic drug manufacturers to submit a smaller collection of information prior to receiving the FDA’s permission to market a new generic drug. For example, generic manufacturers need not submit clinical safety and efficacy data. Rather, the FDA requires generic manufactures to make showings of similarity between its generic drug and the branded drug it seeks to supplement.⁹ This requirement also dictates generic manufacturers to duplicate the labeling of the branded drug. By relying on the branded drug’s clinical data, the generic manufacturer forfeits all control over the safety and efficacy warnings.

If a generic manufacturer does not have control over its safety warnings, can it comply with the obligations posed by state tort liability? State failure-to-warn actions evaluate whether a product manufacturer has met its obligation to warn consumers about known dangers associated with its product. In essence, if a manufacturer knows about a potentially dangerous outcome, it has a duty to warn its consumers. If the generic manufacturer can comply with a state duty to warn only by changing a label that the FDA will not allow it to change, it becomes impossible for the corporation to meet both requirements. This impossibility indicates that conflict preemption applies and the generic manufacturer ought not to be liable for claims arising under state tort law.¹⁰ This situation is distinct from branded pharmaceutical manufacturers who do have the ability to control and modify their safety labels.

Part I begins by examining the doctrine of preemption, considering state tort liability and federal preemption theories. Part II reviews recent Supreme Court jurisprudence relevant to pharmaceutical preemption. Part III then looks at how generic drugs fit into the preemption landscape and concludes that preemption applies to generic drugs. Finally, Part IV evaluates the implications of preemption within the generic drug context.

7. Douglas A. Robinson, Note, *Recent Administrative Reforms of the Hatch-Waxman Act: Lower Prices Now in Exchange for Less Pharmaceutical Innovation Later?*, 81 WASH. U. L.Q. 829, 831 (2003).

8. Generic Pharmaceutical Organization, *Facts at a Glance*, <http://www.gphaonline.org/about-gpha/about-generics/facts> (last visited May 4, 2009). The FDA’s Orange Book lists drug products that are approved on the basis of safety and effectiveness under Section 505 of the Food Drug and Cosmetic Act. FDA, Center for Food and Drug Administration, *Drug Information*, <http://www.fda.gov/cder/orange/default.htm> (last visited May 4, 2009).

9. 21 U.S.C. § 355(j) (2009) (requiring, among other things, a showing of identical active ingredients, bioequivalence, and labeling).

10. For general information on conflict preemption, see generally 16 AM. JUR. 2D *Constitutional Law* § 55 (2009); 16A AM. JUR. 2D *Constitutional Law* § 234 (2009).

I. FEDERAL PREEMPTION

Identifying the reach of federal regulations is difficult in products liability where strong arguments exist both for national uniform standards and, alternately, for more localized, state-based approaches.¹¹ This difficulty is compounded when state common-law and federal regulatory systems address similar problems.¹² State tort law plays a role in drug regulation, if not by promoting drug safety, at least by serving “a compensatory function distinct from federal regulation.”¹³ This section outlines state failure-to-warn claims and then considers these claims in the context of federal preemption.

A. State Failure-to-Warn Claims

Liability can arise for a manufacturer when one of its products causes injury. Products liability exists “to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”¹⁴ Although having its origins in common law, products liability is now, in many states, supplemented or replaced by statutes.¹⁵

Failure-to-warn claims, a type of products liability, look to whether a manufacturer adequately warned of dangers associated with its product. To determine what dangers must be included in a warning to consumers, a manufacturer must consider a number of issues, including the “extent of the risk, the likelihood that it will arise, the user’s likely understanding about the danger, the means available to convey a warning, the likelihood that too many warnings will decrease the effectiveness of each, and other factors”¹⁶ As evinced by the range of factors that must be considered, the duty to warn is predicated on the superior knowledge of the manufacturer.¹⁷ Liability arises when, despite its superior knowledge, the manufacturer abdicates its responsibility to provide

11. Sharkey, *supra* note 3, at 452–53.

12. *Id.* at 452.

13. *Wyeth v. Levine*, 129 S. Ct. 1187, 1193 (2009) (referencing the state trial court opinion).

14. *Greenman v. Yuba Prods., Inc.*, 377 P.2d 897,901 (Cal. 1963). *Greenman* is considered the seminal case on strict liability for product defects. JOSEPH W. GLANNON, *THE LAW OF TORTS* 288 (3d ed. 2005).

15. GLANNON, *supra* note 14, at 297.

16. GLANNON, *supra* note 14, at 295.

17. 1–6 PRODUCTS LIABILITY GUIDE § 6.03(4)(c)(MB)(2009).

adequate warnings and thereby causes harm through having made its product unreasonably dangerous.¹⁸

The rationale supporting products liability—to insure manufacturers bear the costs of injurious products—logically applies to pharmaceutical manufacturers just as it does to manufacturers in other industries. A branded drug is manufactured by a pharmaceutical company only after extensive research and thorough testing. This comprehensive process leads directly to the superior knowledge on which the duty to warn is predicated. Generic manufacturers, on the other hand, undertake limited research and development efforts.¹⁹ If the duty to warn is based on the existence of superior knowledge, it is possible that this limited knowledge base creates an asymmetrical duty to consumers when compared to their branded competition. To the extent that duty is premised on knowledge, the potential for disparity of knowledge between the branded and the generic manufacturer creates a potential for disparity in the ability to protect the consumer. Yet, the pharmaceutical manufacturer—whether producing branded or generic drugs—is far more knowledgeable than the consumer. Thus, the purposes of state law can fairly be accomplished by holding either type of manufacturer liable for harm to the consumer.

*B. State Failure-to-Warn Claims, Federal Preemption,
and Pharmaceuticals*

In recent years, the courts have debated whether and when state tort failure-to-warn claims by drug manufacturers are preempted by FDA regulation. In so doing, many courts have reviewed the conceptual foundations of preemption and have considered the Supreme Court's preemption jurisprudence.

The foundation of preemption comes from the Constitution. "It is a familiar and well-established principle that the Supremacy Clause of the U.S. Constitution invalidates state laws that 'interfere with, or are contrary to,' federal law."²⁰ There are three recognized types of federal preemption of state law under the Supremacy Clause.²¹ The first and more defined type of preemption is known as express preemption. Congress can enact legislation that explicitly reserves the area in question for

18. GLANNON, *supra* note 14, at 295 (evaluating THE RESTATEMENT (SECOND) OF TORTS § 402A cmt. j and THE RESTATEMENT (THIRD) OF TORTS: PRODUCT LIABILITY § 2, cmt. i).

19. Generic manufacturers must demonstrate bioequivalence between the generic product and the targeted branded drug product. 21 U.S.C. § 355 (j)(2)(A)(iv) (2009). The generic manufacturer is not privy to the efficacy and safety data submitted to the FDA as a part of the branded drug's New Drug Application (NDA).

20. Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 712–13 (1985) (quoting Gibbons v. Ogden, 22 U.S. 1 (1824)).

21. Gaeta v. Perrigo Pharms. Co., 562 F. Supp. 2d 1091, 1095 (N.D. Cal. 2008).

federal law or regulation.²² Perhaps predictably, Congress does not frequently expressly preempt state law.²³ Thus, parties who seek a preemption determination typically depend on implied preemption.

Implied preemption can occur in two ways—either through field preemption or conflict preemption. Field preemption occurs when Congress legislates so comprehensively in a field that there is no need or “no room” for state law.²⁴ Conflict preemption arises when there is room for state law in a field, but a specific state law conflicts with federal legislation or regulation in such a way that it is impossible to comply with both.²⁵ Preemption jurisprudence acknowledges that, where applicable, federal regulations, in addition to federal statutes, can preempt state laws.²⁶ When facing failure-to-warn claims under state law, generic manufacturers routinely argue that conflict preemption applies, often conceding that express and field preemption are not at issue with respect to the FDA’s regulations of generic drugs.²⁷

When the Supreme Court considers preemption, the touchstone of the analysis is congressional intent.²⁸ Express preemption then theoretically entails a standard statutory interpretation. For implied preemption, “a textualist approach almost by definition fails.”²⁹ The Court routinely appears to reject this failure, instead striving to discern congressional intent in this context through an interpretive canon known as the presumption against preemption.³⁰ Implied preemption often arises in an area traditionally occupied by states. Under the presumption against preemption, the Court assumes “that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”³¹ When considering congressional intent in an implied preemption analysis specific to a federal regulation, the Court relies on the “substance of state and federal law” to evaluate whether conflict exists.³² The Court has further elaborated on this evalua-

22. For a recent example of the Court recognizing and upholding express preemption, see *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

23. Sharkey, *supra* note 3, at 450 (observing that, despite the clear constitutionality of Congress’ express preemption regulation, Congress often “punts” on the issue).

24. *Hillsborough County*, 471 U.S. at 713.

25. *Id.* (citing *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963)).

26. *Id.*

27. See *Mensing v. Wyeth, Inc.*, 562 F. Supp. 2d 1056 (D. Minn. 2008), *rev’d*, 588 F.3d 603 (8th Cir. 2009); *Gaeta v. Perrigo Pharms. Co.*, 562 F. Supp. 2d 1091 (N.D. Cal. 2008); *Morris v. Wyeth, Inc.*, 582 F. Supp. 2d 861 (W.D. Ky. 2008).

28. Sharkey, *supra* note 3, at 455.

29. *Id.* at 456.

30. *Id.*

31. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

32. *Wyeth v. Levine*, 129 S. Ct. 1187, 1200 (2009).

tion, stating that conflict preemption applies when the state law “stands as an obstacle to the accomplishment and execution” of the purposes of Congress.³³

C. Supreme Court: Preemption and Pharmaceuticals

In 2009 the Court addressed conflict preemption for pharmaceutical companies facing state tort failure-to-warn claims. The Court concluded that preemption did not apply to the facts presented in *Wyeth v. Levine* and remanded the *Colacicco* case for further consideration in light of *Levine*.

1. *Wyeth v. Levine*

In *Levine*,³⁴ the Court considered “whether the FDA’s drug labeling judgments ‘preempt state law products liability claims premised on the theory that different labeling judgments were necessary to make drugs reasonably safe for use.’”³⁵ The Court granted certiorari to review the Vermont Supreme Court’s decision, which concluded that federal preemption did not apply to bar state claims based on Wyeth’s prescription drug label.³⁶ The United States Supreme Court affirmed, finding that no federal preemption applies for drugs like Phenergan, Wyeth’s branded prescription drug.³⁷

The Court began its inquiry by considering two cornerstones of a preemption analysis—Congressional purpose and the presumption against preemption. The Food, Drug, and Cosmetic Act (FDCA) sets forth the requirements for prescription drug labeling. In order “to bolster consumer protection against harmful products,”³⁸ the FDCA requires the FDA to review and approve new drugs and the proposed labeling.³⁹ However, the Court found that “Congress took care to preserve state law,”⁴⁰ indicating that preemption would only arise for “‘direct and positive conflict[s]’” with federal law.⁴¹ The FDCA lacks any applicable express language preempting state law,⁴² so the Court delved into the “substance” of the applicable statutory and regulatory provisions to evaluate whether conflict preemption applied.

33. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

34. *Wyeth v. Levine*, 129 S. Ct. 1187 (2009).

35. *Id.* at 1193 (quoting Wyeth’s petition for certiorari).

36. *Wyeth v. Levine*, 944 A.2d 179 (Vt. Sup. Ct. 2006).

37. *Levine*, 129 S. Ct. at 1191.

38. *Id.* at 1199.

39. *Id.* at 1194–95.

40. *Id.* at 1196.

41. *Id.* (quoting the Federal Food, Drug and Cosmetic Act, 21 U.S.C. § 202 (1962)).

42. *Id.* at 1200.

In response to Wyeth's claims of impossibility, the Court first emphasized that federal law allows pharmaceutical manufacturers to change drug labels to add or strengthen safety warnings.⁴³ Changing the label in this manner does expose the manufacturer to violations of the misbranding provisions within the FDCA and FDA regulations.⁴⁴ Ultimately, the Court reasoned, the manufacturer was responsible for its label, "charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market."⁴⁵ Further, there was no clear evidence in the record that the FDA would have denied a stronger label.⁴⁶ Therefore, the Court determined that Wyeth could comply with both the FDA regulations and the requirements imposed by a state law duty.

In response to Wyeth's alternate argument that the state law duty stood as an obstacle to the purposes and objectives of Congress, the Court theorized that Congress would have expressly preempted state law if a real barrier to its objectives existed.⁴⁷ Moreover, the controlling federal law leaves room for state-law judgments to impact the contents of the label because the FDCA imposes no ceiling on what manufacturers may include.⁴⁸ The FDA's statements to the contrary are accorded little merit by the Court, primarily because they represent a recent shift in the FDA's opinion⁴⁹ and are not detailed in any formal notice-and-comment rulemaking provisions.⁵⁰ Justice Breyer's concurrence also emphasized the lack of any specific regulation serving as a regulatory ceiling on labeling requirements.⁵¹ Until the statutory or regulatory scheme changes, the *Levine* decision establishes that conflict preemption does not apply for branded drugs like Phenergan in state law failure-to-warn claims, or at least not without some additional record to bolster its preemption claim.⁵²

43. *Id.* at 1196 (referencing the changes being effected (CBE) regulation). For a discussion of CBE regulations *see infra* Part II.

44. *Id.* at 1197.

45. *Id.* at 1198 (referencing 21 C.F.R. § 201.80(e) (2009)).

46. *Id.* at 1198.

47. *Id.* at 1200.

48. *Id.*

49. *Id.* at 1202–03.

50. *Id.* at 1203. The Court recognized that an actual regulation can preempt conflicting state requirements. *Id.* at 1200.

51. *Id.* at 1204 (Breyer, J., concurring).

52. *Id.* at 1198 (discussing the absence of any evidence that the FDA would prohibit a modified warning).

2. *Colacicco v. Apotex*

The Supreme Court granted certiorari in *Colacicco v. Apotex* and vacated and remanded the Third Circuit's decision for reconsideration in light of the *Levine* opinion.⁵³ The Third Circuit's decision broadly considered whether conflict preemption applied to a prescription drug⁵⁴ and concluded that it did.⁵⁵ The Third Circuit conducted a standard preemption analysis, considering both the presumption against preemption and the Congressional purpose. The court then concluded that state law, rather than creating an impossible compliance scheme, stood as an obstacle to the objectives of Congress.⁵⁶ To reach this conclusion, the Third Circuit compared the liability facing the pharmaceutical companies for misbranded drug products⁵⁷ with the FDA's repeated rejection of a more specific warning label.⁵⁸ Additionally, the court afforded deference to the FDA's position that preemption applied. The opinion noted the policy implications underlying the FDA's position, namely that "[u]nder-use of a drug based on dissemination of unsubstantiated warnings may deprive patients of efficacious and possibly lifesaving treatment [and] unsubstantiated warnings would likely reduce the impact of valid warnings."⁵⁹

The Third Circuit identified that the facts presented in *Colacicco* diverged from those presented in *Levine*, primarily because *Colacicco* contained strong evidence that the FDA would not allow the label changes required under state law. Additionally, *Colacicco* involved a defendant generic pharmaceutical manufacturer. Neither the *Levine* decision nor the Third Circuit's *Colacicco* opinion addressed the unique regulatory constraints faced by a generic manufacturer.

II. GENERIC PREEMPTION

Today, the federal government oversees food and drug regulation under the FDCA. In 1984, the Hatch-Waxman Act amended the FDCA, setting forth specific requirements for the regulation of generic drugs.

53. *Colacicco v. Apotex Inc.*, 129 S. Ct. 1578 (2009).

54. *Colacicco v. Apotex Inc.*, 521 F.3d 253, 257 (3d Cir. 2008) [hereinafter *Colacicco*]. *Colacicco* is the consolidation of two Third Circuit District Court cases, *McNellis v. Pfizer, Inc.*, 2006 U.S. Dist. LEXIS 70844 (D. N.J. Sept. 29, 2006), and *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514 (E.D. Pa. 2006). *McNellis* dealt only with a branded pharmaceutical product. Therefore, the analysis herein of the Third Circuit's opinion focuses primarily on the *Colacicco v. Apotex* portion of the case as it includes a defendant generic manufacturer.

55. *Colacicco*, 521 F.3d at 276.

56. *Id.* at 265–75.

57. *Id.* at 268 (referencing 21 U.S.C. § 355(d)(7) (2009)).

58. *Id.* at 269, 271.

59. *Id.* at 275 (quoting the FDA's amicus brief, Brief for the United States as Amicus Curiae at 16–17).

This section outlines the pharmaceutical regulatory framework and evaluates the requirements for generic drugs in the context of preemption.

A. Regulatory Framework

1. The Approval Process

The FDA is charged with ensuring that drugs reaching the marketplace are safe and effective.⁶⁰ In light of this responsibility, the FDA maintains an application approval process for new drugs. Drug manufacturers must receive application approval prior to introducing or delivering into commerce any new drug.⁶¹

Drug companies seeking to introduce new or patented branded drugs must file a New Drug Application (NDA).⁶² The NDA must include “full reports of investigations which have been made to show whether or not such drug is safe for use and whether such drug is effective in use.”⁶³ The NDA also must include the proposed label.⁶⁴ While the FDA sets forth requirements about the form and subject matter of the label,⁶⁵ the manufacturer develops the label warning language based on in-house expertise and clinical information. The statute emphasizes that the manufacturer’s labeling submission is merely “proposed” labeling,⁶⁶ implying that there may be further edits and revisions between the manufacturer and the FDA over the final, approved label.

Manufacturers of generic drugs receive approval under a separate statutory provision,⁶⁷ which requires submission of an Abbreviated New Drug Application (ANDA).⁶⁸ The ANDA sets forth less demanding requirements in response to Congress’ recognition that the “NDA process is costly and timeconsuming [sic]. . . .”⁶⁹ Generic manufacturers need only establish bioequivalence between the generic and branded drug identified in the ANDA, allowing them to forego all safety and efficacy clinical work.⁷⁰ Additionally, generic manufacturers must submit the ge-

60. 21 U.S.C. § 393 (2009).

61. 21 U.S.C. § 355(a) (2009).

62. 21 U.S.C. § 355(b) (2009).

63. 21 U.S.C. § 355(b)(1)(A) (2009).

64. 21 U.S.C. § 355(b)(1)(F) (2009).

65. Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3, 922 (Jan. 24, 2006).

66. 21 U.S.C. § 355(b)(1)(F) (2009).

67. 21 U.S.C. § 355(j) (2009).

68. Presumably, the potential ANDA applicant could file a NDA under 21 U.S.C. § 355(b) if it was willing to conduct independent preclinical and clinical testing.

69. *Serono Laboratories, Inc. v. Shalala*, 158 F.3d 1313, 1316 (D.C. Cir. 1998).

70. Sarah E. Eurek, iBrief, *Hatch-Waxman Reform and Accelerated Market Entry of Generic Drugs: Is Faster Necessarily Better?*, 2003 DUKE L. & TECH. REV. 0018, at ¶ 4 (2003).

neric product's labeling.⁷¹ The label must duplicate the branded drug's label; to ensure compliance, the FDA requires the generic manufacturer to submit the branded drug's packaging along with its own.⁷² Dissimilar labeling will result in the FDA's refusal to approve a submitted ANDA.⁷³

Limited exceptions exist to the strict uniformity requirement. Substitutions are allowed to identify a difference in producer.⁷⁴ In addition, the generic manufacturer may petition the FDA for label changes that relate to differences in "route of administration, dosage form, or strength."⁷⁵ Specific indications may also be omitted from the label in response to patent or exclusivity rights of the branded drug.⁷⁶ Neither the relevant statute nor regulations allow for labeling changes for manufacturers to incorporate stronger warnings.

2. Post-Approval

Following approval, the labeling requirements for branded and generic drugs continue to remain distinct. The branded drug manufacturer must revise a label "to include a warning about a clinically significant hazard as soon as there is reasonable evidence of a casual association with a drug. . . ."⁷⁷ Under this regulation, known as the Changes Being Effected (CBE) regulation, the branded manufacturers have some autonomy to modify labels for their drugs prior to FDA approval.⁷⁸ They may "add or strengthen a contraindication [or] warning" without prior agency approval.⁷⁹

Unlike their branded drug counterparts, generic manufacturers have no authority to make independent labeling changes under the CBE regulation. If the branded drug referenced in the manufacturer's ANDA changes its warning for any reason, including strengthening its warning, the generic manufacturer must follow suit.⁸⁰ Absent this single permitted modification, "there is no statutory or regulatory provision permitting a

71. 21 U.S.C. § 355(j)(2)(A)(v) (2009).

72. 21 C.F.R. § 314.94(a)(8) (2009).

73. 21 C.F.R. § 314.127(a)(7) (2009).

74. 21 U.S.C. § 355(j)(2)(A)(v) (2009).

75. 21 U.S.C. § 355(j)(2)(C) (2009); 21 C.F.R. § 314.93(b) (2009).

76. 21 C.F.R. § 314.94(a)(8)(iv) (2009).

77. 21 C.F.R. § 201.57(c)(6)(i) (2009).

78. 21 C.F.R. § 314.70(c) (2009); *see also* discussion of *Wyeth v. Levine*, *supra* Part I.

79. 21 C.F.R. § 314.70(c)(6)(iii) (2009). The manufacturer must notify the agency of the change but need not receive approval prior to distribution.

80. FDA, GUIDANCE FOR INDUSTRY: REVISING ANDA LABELING FOLLOWING REVISION OF THE RLD LABELING (2000), <http://www.fda.gov/downloads/Drugs/GuidanceComplianceRegulatoryInformation/Guidances/ucm072891.pdf> [hereinafter GUIDANCE FOR INDUSTRY].

labeling change to be made without prior FDA approval.”⁸¹ The CBE regulation, allowing changes that strengthen or add to a branded drug’s warning label, applies only to drugs approved under a NDA.⁸² It does not apply to ANDA holders.⁸³ The FDA confirmed the inapplicability to generic drugs during the promulgation of the regulations, stating that the CBE regulation does “not authorize [generic] drug manufacturers to add new warnings” to the label approved for the branded drug.⁸⁴

3. Withdrawal

The FDA reserves the right to withdraw a drug’s approval for a range of reasons.⁸⁵ Immediate withdrawal is appropriate in situations posing imminent hazard to the public health. Several other provisions identifying circumstances for withdrawal also stress reasons related to safety and efficacy concerns. In addition, deficient labeling may be grounds for withdrawal if “there is a lack of substantial evidence that the drug will have the effect it purports . . . in the labeling”⁸⁶ All these possible withdrawal scenarios apply equally to NDA and ANDA holders.⁸⁷ Generic manufacturers face an additional threat of withdrawal. ANDA approval may be withdrawn at any point if the generic drug label fails to maintain consistency with the branded drug listed in the ANDA, including failing to update its label when the branded drug’s label is modified.⁸⁸

81. Brief for the United States as Amicus Curiae at 6, *Colacicco v. Apotex, Inc.*, 521 F.3d 253 (3d Cir. 2008) (No. 06-3107).

82. See *Mensing v. Wyeth, Inc.*, 562 F. Supp. 2d 1056, 1064 (D. Minn. 2008), *rev’d*, 588 F.3d 603(8th Cir. 2009). Even though Subpart C (ANDA) regulations reference 21 CFR § 314.70, which contains the CBE regulation, the FDA maintains, “that provision does not modify the requirement that the drug label for a generic drug must be the same as the label for the approved innovator drug” *Mensing*, 562 F. Supp. 2d at 1064. On the eve of publication of this Note, *Mensing* was reversed by the Eighth Circuit, which concluded that generic manufacturers must comply with the CBE regulations given the lack of an express preemption provision in the Hatch-Waxman Act. *Mensing v. Wyeth, Inc.*, 588 F.3d 603, 607 (8th Cir. 2009). I find the lower court’s reasoning to be more persuasive and anticipate other courts to follow it. Admittedly though, the recent reversal by the Eighth Circuit indicates an increasing divide over the application of CD regulation to generic manufacturers.

83. *Mensing*, 562 F. Supp. 2d at 1064.

84. *Id.* (quoting the FDA on the applicability of CBE regulations to generic drugs); see also Abbreviated New Drug Application Regulations, Final Rule, 57 Fed. Reg. 17,950, at 17,961, 17,953, 17,955 (April 28, 1992) [hereinafter ANDA Final Rule].

85. 21 U.S.C. § 355(e) (2009).

86. 21 U.S.C. § 355(e)(3) (2009).

87. See ANDA Final Rule, *supra* note 84, at cmt. 39.

88. 21 C.F.R. § 314.150 (2009). The regulation states that withdrawal is appropriate if the generic drug label “is no longer consistent” with the listed drug in the ANDA, implicitly acknowledging the regulation’s applicability following approval. 21 C.F.R. § 314.150(b)(10) (2009). See also ANDA Final Rule, *supra* note 84, at cmt. 39.

During the rulemaking notice and comment period, the FDA faced criticism over this apparent lack of flexibility regarding the generic label.⁸⁹ The FDA responded decidedly, confirming that generics may not modify the label to “add contraindications, warnings, precautions, adverse reactions, and other safety-related information.”⁹⁰ In light of safety concerns, the FDA suggested that when an ANDA holder believes a warning label should be changed or strengthened, it may submit the information to the FDA, and the FDA “will determine whether the labeling for the generic and [branded] drugs should be revised.”⁹¹ The FDA then made it exceedingly clear that under no circumstances may the generic manufacturer modify the label autonomously.⁹²

B. A Generic’s Fate—Does Preemption Apply?

Due to the differences between the branded and generic regulatory requirements, a branded drug preemption analysis is thus not an appropriate approach for generic drugs. Using the same framework for evaluation, however, it is possible to assess how a failure-to-warm claim against a generic manufacturer might fare under a preemption analysis.

1. Preemption Cornerstones

In enacting the Hatch-Waxman Act, Congress’ purpose was to “make . . . innovative medicines cheaper and more affordable to the public” by encouraging generic competition.⁹³ The Hatch-Waxman Act changed the pharmaceutical regulatory paradigm by introducing an application and oversight process specifically for generic products. Among the changes, Congress shifted testing responsibility away from the generic manufacturers, requiring only a demonstration of bioequivalence.⁹⁴ Permitting ANDA applicants to use the clinical and safety data of the NDA holder significantly reduced generic drug development costs, thereby allowing for lower retail prices.⁹⁵

Given the presumption against preemption, it is critical that Congress chose not to preempt expressly state law when drafting and enacting the Hatch-Waxman Act. Yet, the provision’s absence need not be conclusive of Congressional intent. Surely, Congress could have

89. ANDA Final Rule, *supra* note 84, at cmt. 40.

90. *Id.*

91. *Id.*

92. *Id.*

93. Wansheng Jerry Liu, *Balancing Accessibility and Sustainability: How to Achieve the Dual Objectives of the Hatch-Waxman Act While Resolving Antitrust Issues in Pharmaceutical Patent Settlement Cases*, 18 ALB. L.J. SCI. & TECH. 441, 443 (2008).

94. 21 U.S.C. § 335(j) (2009).

95. *See* Liu, *supra* note 93, at 448.

resolved generic preemption explicitly in the Act, but doing so might have been a politically divisive decision. Often with respect to express products liability preemption, Congress seeks to “placate both industry and consumers,”⁹⁶ choosing to “punt” the issue to courts and federal agencies.⁹⁷ Without an express preemption provision, generic state tort liability may only be preempted if it falls within the confines of implied preemption.

2. Implied Conflict Preemption

Conflict preemption applies if the “substance of state and federal law” presents an impossible regulatory scheme, or if the state law stands as an obstacle to congressional purpose.⁹⁸ Impossibility emerges when the duties arising from state law obligations make compliance with federal labeling requirements unachievable.⁹⁹ State law failure-to-warn claims are premised on the idea that a manufacturer failed to include a warning that should have otherwise been included. A manufacturer thus has an obligation to modify their labels accordingly. The federal statute establishes a no-more (ceiling) and no-less (floor) framework for generic labels and dictates the contents of the label, requiring the “same” label as the branded drug the generic seeks to imitate.¹⁰⁰ The ANDA requires submission of the “same” label for approval. Even post approval, no modifications are permitted by the manufacturer for the generic drug.¹⁰¹ A generic manufacturer facing obligatory label modifications under state law would necessarily violate this federal “same” label requirement. The obligations for the manufacturer to add or modify labels accordingly to avoid liability in State law tort claims make federal compliance impossible, and thus directly conflict with the federal law.

State law stands as an obstacle when it conflicts, is contrary to, is inconsistent with, curtails, or interferes with, among other things, the purposes and objectives of Congress.¹⁰² As discussed previously, Congress enacted the Hatch-Waxman Act to ensure consumer accessibility to cheaper drugs by promoting the introduction of generic substitutes in the marketplace. Because many of these are prescription drugs, accessibility

96. Sharkey, *supra* note 3, at 450 n.4 (quoting JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 424 (5th ed. 2004)).

97. *Id.*

98. *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009).

99. *Mensing v. Wyeth, Inc.*, 562 F. Supp. 2d 1056, 1058–59 (D. Minn. 2008), *rev'd*, 588 F.3d 603 (8th Cir. 2009).

100. 21 U.S.C. § 355(j)(2)(v) (2009). Permissible exceptions to the “same” requirement do not include safety and warning modifications. *See supra* Part II.A.

101. The CBE regulation allowing branded manufacturers leeway to change labels to strengthen safety warnings does not apply to generic products. *See supra* Part II.A.

102. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000).

turns in part on physicians' willingness to prescribe these drugs. The FDA maintains that allowing separate labeling would serve as a deterrent to doctors, stating that "consistent labeling will assure physicians, health professionals, and consumers that a generic drug is as safe and effective as its brand-name counterpart."¹⁰³ If the FDA's concern about allowing generic labeling deviations is legitimate, physicians may be less likely to prescribe generic alternatives. Such deterrence impacts actual availability because consumers typically have no other means to purchase many generic drugs without a physician's prescription. State law obligations to change labeling present the possibility that a generic manufacturer might be compelled to depart from its branded counterpart's label language. Should that deviation result in physicians opting to prescribe the branded, higher-cost product, the purposes of Congress would be impeded.

Additionally, allowing generic labeling changes that add contraindications and/or strengthen warnings potentially imposes a de facto requirement on generic manufacturers to conduct or support clinical testing. Once subject to generic competition, branded manufacturers may face diminished incentives to remain in the marketplace. Most plainly, their profit margins shift because generic competition prevents monopolist pricing. Branded manufacturers will also face continued state tort liability for potentially faulty labels following the decision in *Levine*. This liability, coupled with reduced revenue, could drive branded manufacturers to leave the marketplace if it opens them to direct generic competition. Even if the branded manufacturer decides to stay in the marketplace at this juncture, it has significantly reduced incentives to continue clinical testing.¹⁰⁴

Either way, it is possible that the market for a particular drug could become devoid of any continued clinical work. Generic manufacturers facing state obligations to modify warning labels may then be forced to conduct clinical testing to evaluate drug safety. Costs associated with this testing will be reflected in the market price, potentially driving up the selling price of generic products. State law provisions that potentially force generic clinical testing certainly contravene Congress' purpose of reducing the clinical burden in order to promote low cost pharmaceuticals.

To receive FDA approval for a generic drug, the manufacturer must use a label identical to its branded counterpart. Duties arising under state

103. ANDA Final Rule, *supra* note 84, at cmt. 40.

104. Many incentives that encourage branded pharmaceutical manufacturers to continue clinical work after approval are tied to additional grants of market exclusivity. *Levine* may change this or it may exacerbate it; manufacturers may avoid all unnecessary research in order to ensure they acquire no knowledge that might need to be disclosed to consumers.

law that would alter the identical nature of the label make it impossible for a generic manufacturer to comply with federal law. This paradigm also creates scenarios that may be directly contrary to achieving the objectives of Congress. As a result, conflict preemption must apply for generic manufacturers facing state tort failure-to-warn claims.

C. The FDA's Interpretation

The *Levine* Court acknowledged that some weight may be given to an agency's perspective on "the impact of tort law on federal objectives"¹⁰⁵ The FDA has long asserted that generic manufacturers may not modify their drug warning labels. Since codifying the Hatch-Waxman Act, the FDA has opposed generic modifications of the branded drug label.¹⁰⁶ At that time, the FDA made clear that even *additional* warnings were not acceptable under the Act.¹⁰⁷ The FDA affirmed this position in 2000, stating that it is the responsibility of the ANDA holder to ensure that the label for the generic drug remains the same as the label for its branded counterpart over the entire marketing lifespan of the branded drug.¹⁰⁸ In 2008, the FDA filed an amicus brief in *Colacicco*, further confirming that the generic manufacturer must at all times conform to the approved labeling of the branded drug.¹⁰⁹ As *Levine* cautioned, the FDA's position is instructive, not conclusive. The FDA's long-standing view, evinced through repeated proclamations, clearly indicates that generic manufacturers may not add contraindications or strengthen warnings. This position makes sure that generic manufacturers seeking to meet additional labeling requirements imposed by state law will violate federal requirements, further demonstrating that preemption should apply.

105. *Wyeth v. Levine*, 129 S. Ct. 1187, 1201 (2009).

106. ANDA Final Rule, *supra* note 84, at cmt. 40.

107. *Id.* at 17,953 (discussing the requirement for the same labeling as the referenced listed drug even when the requested change entails an additional warning).

108. GUIDANCE FOR INDUSTRY, *supra* note 80, at 5. The FDA also encourages the ANDA holder to make the change at the "very earliest time possible." *Id.*

109. *Mensing v. Wyeth, Inc.*, 562 F. Supp. 2d 1056, 1064 (D. Minn. 2008), *rev'd*, 588 F.3d 603 (8th Cir. 2009) (citing FDA amicus brief, Brief for the United States as Amicus Curiae). The FDA withdrew the *Colacicco* amicus brief on April 28, 2009, stating that in light of the *Levine* decision, it had not conducted the reexamination of preemption necessary to participate in the case. Letter from the Solicitor General to the United States Court of Appeals for the Third Circuit (April 28, 2009), *available at* <http://druganddevicelaw.blogspot.com/2009/04/solicitor-generals-letter-in-colacicco.html>. Withdrawing the amicus brief does not necessarily speak to a reversal of the FDA's position on generic preemption since *Levine* did not address generic drug products.

D. Revisited: Supreme Court Preemption and Pharmaceuticals

As discussed in Part II, the Supreme Court directly addressed preemption for pharmaceuticals this term, concluding that conflict preemption did not apply in a state failure-to-warn claim against a branded drug. This Note concludes that under the current regulatory scheme, preemption should apply for generic products. This section revisits the Supreme Court decisions for this term to consider their implications for this issue.

1. *Wyeth v. Levine* Revisited

Factually, the *Levine* premise is distinguishable from the question of generic preemption. *Levine* did not involve a generic drug manufacturer, and as a result, the unique regulatory requirements facing a generic manufacturer were not considered by the Court.

The Supreme Court began its analysis with an examination of congressional purpose. Given that the *Levine* Court was addressing a branded drug, it only examined congressional intent as it related to branded products. Although the FDA regulates both branded drugs and generic drugs, it does so under separate provisions. As discussed extensively above, Congress expressed a discrete purpose regarding generic pharmaceuticals by amending the FDCA with the Hatch-Waxman Act. The *Levine* discussion of congressional purpose, while generally informative, cannot be dispositive of Congress' purpose relevant to generic drugs because it did not—and had no reason to—consider the Hatch-Waxman Act.

The Court then undertook a detailed look at conflict preemption and pharmaceutical products. Regarding impossibility, the Court looked directly to the feasibility of label changes under the CBE regulation. Generic manufacturers, without access to the CBE or similar regulation, lack the ability to modify labels without FDA approval. Likewise, the “responsibility” reasoning of the Court does not apply for generic manufacturers. Branded manufacturers are “charged with crafting an adequate label and . . . ensuring that [the] warning remain[s] adequate,”¹¹⁰ whereas generic manufacturers are charged with demonstrating that their labeling is the “same” as that of the listed drug¹¹¹ and ensuring that it remains the same throughout the marketing life of the branded product.¹¹² Unlike the Court's attention to the absence of “clear evidence that the FDA would not have approved a [label] change,”¹¹³ the FDA has been explicit that

110. *Wyeth v. Levine*, 129 S. Ct. 1187, 1198 (2009).

111. 21 U.S.C. § 355(j)(2)(v) (2009).

112. GUIDANCE FOR INDUSTRY, *supra* note 80, at 5.

113. *Levine*, 129 S. Ct. at 1198.

generic manufacturers may not modify or strengthen contraindications and safety warnings.¹¹⁴ Finally, the Court noted the lack of an affirmative regulation setting a ceiling on warning labels for branded drugs. Generic drug regulations establish both a floor and a ceiling for warning labels by dictating the exact permissible language.¹¹⁵

Clearly, the *Levine* holding neither addresses nor abrogates generic label conflict preemption.

2. *Colacicco v. Apotex* Revisited

The Third Circuit remanded the *Colacicco* case to the district court for decision. It is worth noting that the Third Circuit's *Colacicco* opinion did not directly address generic drug failure-to-warn claims. The court of appeals did not distinguish between the requirements for branded and generic drugs and, instead, focused exclusively on the provisions that applied to the branded defendant drug company. Without predicting how the district court will rule on remand, the original district court opinion may serve as a marker that the court foresaw the complexity involved with generic drug regulations. The district court directly addressed the issue of generic preemption relative to failure-to-warn claims, finding that "assigning a duty to include a warning different from [the branded drug's] approved label inherently conflicts with the FDCA."¹¹⁶

As the record currently stands, the question of generic preemption has not been resolved. The Supreme Court's ruling, vacating and remanding the *Colacicco* decision, and the subsequent remand by the Third Circuit are not dispositive on generic preemption because the Third Circuit holding primarily addressed preemption as it applied to branded pharmaceuticals.

3. Post-*Levine* Holdings

Following the *Levine* decision, a few federal district courts have considered the generic preemption issue with mixed results. The Western District of Kentucky held that preemption applied in several generic failure-to-warn cases.¹¹⁷ In these cases, the court conducted a thorough analysis of generic preemption for failure-to-warn state tort claims. It concluded that "federal regulation of brand and generic drug labeling

114. ANDA Final Rule, *supra* note 84, at cmt. 40.

115. There are both statutory and regulatory provisions requiring the "same" label. *See* 21 U.S.C. § 355(e) (2009); 21 C.F.R. § 314.94(a)(8) (2009).

116. *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514, 537 (E.D. Pa. 2006).

117. *See Morris v. Wyeth, Inc.*, No. 1:07-CV-176-R, 2009 WL 424590 (W.D. Ky. Feb. 20, 2009); *Smith v. Wyeth, Inc.*, No. 5:07-CV-18-R, 2009 WL 425032 (W.D. Ky. Feb. 20, 2009); *Wilson v. Pliva, Inc.*, No. 3:07-CV-378-R, 2009 WL 425027 (W.D. Ky. Feb. 20, 2009).

differs significantly.”¹¹⁸ The court focused on the permissibility of generic modifications, stating that while the ANDA holder should notify the FDA when safety concerns dictate a label change, it is the FDA that determines when generic labels are revised.¹¹⁹ The court then further distinguished this notification requirement by contrasting the generic drug’s “should” notify standard with the branded drug’s “must” notify duty.¹²⁰ Even in the face of this “should” notify standard, the court notes that the “‘agency will not accept [ANDAs] for products with significant changes in labeling (such as new warnings or precautions) intended to address newly introduced safety or effectiveness problems not presented by the listed drug. . . .’”¹²¹ The court defers to the FDA’s explicit position that “CBE [label] changes are not available for generic drugs approved under an abbreviated new drug application To the contrary, a generic drug manufacturer is required to conform to the approved labeling for the listed drug.”¹²²

The court concluded by considering the public policy rationale behind the Hatch-Waxman Act and affirming that generic preemption exists.¹²³ While acknowledging that a majority of district courts that have considered this issue have found preemption,¹²⁴ the court recognized an emerging split among lower courts over this issue.¹²⁵ The district court then found that the Supreme Court’s decision in *Levine* did not alter the generic preemption reasoning.¹²⁶ Given the difficulty of the decision, however, the court recommended review by the Sixth Circuit.¹²⁷

Other district courts considering generic preemption in a post-*Levine* context have come to the opposite conclusion. The Western District of Oklahoma rejected preemption for generic drugs, reasoning that the defendant’s arguments for preemption were “similar, if not identical” to the defenses unsuccessfully used in *Levine*.¹²⁸ The Northern District

118. *Smith*, 2009 WL 425032, at *3.

119. *Id.* at *4 (referring to the FDA’s stated position in ANDA Final Rule, *supra* note 84, at 17,961).

120. *Id.*

121. *Id.* at *5 (quoting Abbreviated New Drug Application Regulations, 54 Fed. Reg. 28,872, 28,884 (proposed July 10, 1989)).

122. *Id.* at *6 (quoting Supplemental Applications Proposing Labeling Changes for Approved Drugs, Biologics, and Medical Devices, 73 Fed. Reg. 2848, 2849 (proposed January 16, 2008)).

123. *Id.* at *10.

124. *Smith v. Wyeth, Inc.*, No. 5:07-CV-18-R, 2008 WL 4697002, at *5 (W.D. Ky. Oct. 24, 2008) (listing federal district court decisions that consider generic failure-to-warn-preemption).

125. *Smith*, 2009 WL 425032 at *2.

126. *Smith v. Wyeth, Inc.*, No. 5:07-CV-18-R, 2009 WL 736208, at *1 (W.D. Ky. Mar. 4, 2009).

127. *Id.*

128. *Schrock v. Wyeth, Inc.*, 601 F. Supp. 2d 1262, 1265 (W.D. Okla. 2009).

of Illinois acknowledged that *Wyeth v. Levine* is not controlling on generic preemption.¹²⁹ Yet, in light of the “sweeping” language in *Levine* and the conclusion that the CBE regulations do apply to generic drugs, the district court declined to recognize generic preemption as a matter of law.¹³⁰ The Vermont District Court, in considering generic preemption, focused on the broad applicability of *Levine*¹³¹ and the lack of express preemption in the Hatch-Waxman Act¹³² before concluding that conflict preemption is not applicable.

The lower court decisions lack uniformity on the issue of generic preemption. The majority of decisions do indicate, however, that *Wyeth v. Levine* is not directly controlling on this issue.

III. IMPLICATIONS OF GENERIC PREEMPTION AND ALTERNATIVE LIABILITY SCHEMES

State failure-to-warn claims serve to compensate injured consumers and incentivize industries to produce safe products.¹³³ Preemption prevents this compensation function for injuries related to generic drugs but may help keep prices low for consumers. This section considers the implications of generic preemption and briefly identifies two options that might afford some of the benefits of state tort liability without compromising the goal of cheaper, generic pharmaceuticals.

A. Implications

Because conflict preemption bars liability under state failure-to-warn claims, generic consumers are left without recourse unless they have a cause of action against the manufacturer that developed the original label. Whether liability sounds in negligence or strict liability, the liable party must be the supplier of the injurious good.¹³⁴ Correspondingly, courts have declined to extend a branded drug manufacturer’s duty to warn to consumers of its generic counterpart.¹³⁵ A California state appellate court departed from this principle, holding a branded manufacturer

129. *Stacel v. Teva Pharms.*, 620 F. Supp. 2d 899, 904 (N.D. Ill. 2009).

130. *Id.* at 906.

131. *Kellogg v. Wyeth*, 612 F. Supp. 2d 437, 439 (D. Vt. 2009) (concluding that the Supreme Court did not “merely narrowly pars[e] the terms and applicability of the CBE provision to brand name manufacturers”).

132. *Id.* at 440–41.

133. *Wyeth v. Levine*, 129 S. Ct. 1187, 1200–01 (2009).

134. VICTOR E. SCHWARTZ, KATHRYN KELLY, & DAVID F. PARTLETT, PROSSER, WADE AND SCHWARTZ’S TORTS: CASES AND MATERIALS 718 (11th ed. 2005).

135. *See Foster v. Am. Home Prods. Corp.*, 29 F.3d 165, 171 (4th Cir. 1994); *Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514, 538–39 (E.D. Pa. 2006).

liable for a generic warning label on the premise that it was foreseeable that generic consumers would rely on the branded drug's label.¹³⁶ However, a subsequent federal court decision lambasted the California court's analysis, stating that the decision and foreseeability analysis is contrary to law and stands in contrast to every other court that has considered this issue.¹³⁷ Given product liability principles and the vast majority of judicial precedent, save a singular and heavily criticized California state court opinion, it is clear that consumers have no recourse for injurious generic drugs under a failure-to-warn theory.

State tort claims also serve to motivate manufacturers to keep warning labels current. Because the existing regulatory scheme preempts state tort claims for generic drug manufacturers, this incentive is lacking for generic drugs manufacturers. Additionally, the FDA does not require generic manufacturers to notify the agency when a safety concern arises. The FDA advises that the manufacturer should contact the agency regarding safety related label changes, but there is no formalized process to ensure the company reports the pertinent information.¹³⁸

The *Levine* holding will also likely augment an ANDA holder's interest in maintaining updated safety warnings. Because ANDA holders are responsible for ensuring that their labels remain identical to the branded drug referenced in the ANDA,¹³⁹ the incentive created by *Levine* will also help keep generic labels up-to-date. Without the motivation provided by potential state tort liability, this responsibility will serve as the primary mechanism to ensure that generic labels adequately warn about safety risks.

B. Possible Alternative Liability Schemes

Congress passed the Hatch-Waxman Act to make innovative pharmaceuticals more affordable for consumers by promoting the market introduction of generic drugs.¹⁴⁰ They did so by establishing different requirements for generic products. The "same" label requirement prevents the generic manufacturer from making any changes to the warning label, thus setting the stage for implied conflict preemption. The

136. Conte v. Wyeth, Inc., 168 Cal. App. 4th 89 (Cal. Ct. App. 2008).

137. Moretti v. Wyeth, Inc., No. 2:08-cv-00396-JCM-(GWF), 2009 U.S. Dist. Lexis 29550, at *10 (D. Nev. Mar. 20, 2009). The Eighth Circuit recently adopted the Fourth Circuit's position that "holding name brand manufacturers liable for harm cause by generic manufacturers 'stretch[es] the concept of foreseeability too far.'" Mensing v. Wyeth, 588 F.3d 603, 613 (8th Cir. 2009) (citing Foster v. Am. Home Prods. Corp., 29 F.3d 165, 171 (4th Cir. 1994)).

138. ANDA Final Rule, *supra* note 84, at cmts. 20, 40 (noting the FDA is willing to consider petitions to change both the listed and generic labels).

139. Guidance for Industry, *supra* note 80, at 5.

140. Liu, *supra* note 93, at 443.

rationale behind the “same” label requirement—generic manufacturers rely on the safety related clinical testing of the branded drug and thus should use the warning label based on that testing data—helps drive cheaper drugs into the marketplace. Generic manufacturers must invest only in the much more limited bioequivalence testing, substantially reducing costs. Preemption also reduces litigation-related costs.

It appears that the current statutory paradigm allows for either a system focused on promoting cheap drugs or a system that welcomes the safety and compensatory influences of state law. An alternative approach might be to allow the benefits of state tort claims without opening generic manufacturers up to liability so extensive that they are unable to offer low cost drugs. Professor Catherine M. Sharkey posits an option granting preemption under certain circumstances. She suggests that when the FDA makes a determination about a specific risk, during or subsequent to the label’s approval, state failure-to-warn claims should be preempted.¹⁴¹ Essentially, if the FDA rejects a proposed warning modification or reviews evidence under a mandatory petition but “declines to require a change, then potential grounds for preemption exist.”¹⁴² Practically, this may be the equivalent of the clear evidence of agency refusal standard suggested in *Levine*. Implementing this model would seem to entail a regulatory modification requiring generic manufacturers to notify the FDA about known risks.

The general debate about state law preemption for pharmaceuticals may be instructive for policymakers as they grapple with deciding whether generics should receive preemptory protection, especially when branded drugs do not. Jason C. Miller, in considering a state regulatory compliance defense that has the same effect as preemption, concluded that the FDA-approved labels should not be considered defective but acknowledged that preemption leaves injured consumers without any form of compensation.¹⁴³ Miller proposes a preemption scheme that blocks private actions for FDA-approved labels, but allows a state Attorney General to bring suits on behalf of the consumers under certain circumstances.¹⁴⁴ Implementing this scheme for prescription drugs generally, or for generic drugs specifically, could strike a better balance between promoting the introduction of low cost drugs in the marketplace and providing consumer protection from improperly labeled, injurious drugs. Because conflict preemption does not apply for branded drugs, states can

141. Sharkey, *supra* note 3, at 513.

142. *Id.* at 514.

143. Jason C. Miller, Note, *When and How to Defer to the FDA: Learning from Michigan’s Regulatory Compliance Defense*, 15 MICH. TELECOMM. TECH. L. REV. 565, 570 (2009).

144. *Id.* at 171.

choose whether to adopt a preemption provision.¹⁴⁵ Since conflict preemption does apply for generic manufacturers, Congress would need to act before a state could adopt an alternative like the state Attorneys General model.

CONCLUSION

Despite the much-awaited Supreme Court decision in *Wyeth v. Levine*, preemption for generic pharmaceuticals still exists. *Levine* addressed conflict preemption of state failure-to-warn claims. After reviewing the federal law governing pharmaceutical warning labels, the Court found that pharmaceutical companies could modify their branded drug warning labels to meet obligations presented by state law. Consequently, conflict preemption does not apply.

In contrast, generic drugs must adopt the identical label employed by their branded counterparts. The FDA does not allow the generic drug label to deviate from the branded competitor's at any point during the approval process or thereafter. As a result, the generic manufacturer is not at liberty to make changes to its product's warning label. State tort failure-to-warn claims pose an impossible situation—the generic manufacturer cannot comply with both the federal requirements to mirror the branded drug's label and a state obligation to enhance or modify the label. Further, Congress eliminated much of the clinical testing requirements for generic drugs as a measure to ensure that they remain low cost options for consumers.

Exposing generic drugs to tort liability under state law might push cautious generic manufacturers to conduct or support safety and efficacy testing. Conducting this type of research would certainly increase costs and drug prices, frustrating the purpose of Congress to promote generic drugs. Conflict preemption applies when it is impossible to comply with the duties arising out of state and federal law, or when state law stands as an obstacle to accomplishing the purposes of Congress.¹⁴⁶ Conflict preemption applies to generic manufacturers sued under state failure-to-warn claims, but a change in the law is needed to ensure generic warning labels are adequate and that consumers injured by generic drugs are not left without any compensation for their pain, suffering, and heavy medical expenses.

145. Michigan is the only state that treats a regulatory compliance defense as an irrebuttable presumption, which operates as absolute immunity for drug manufacturers. *Id.* at 566–567.

146. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–43 (1963).