

CASENOTES

PLIVA, INC. V. MENSING: HOW GENERIC- DRUG MANUFACTURERS AVOIDED LIABILITY FOR “FAILURE TO WARN” TORT CLAIMS

I. INTRODUCTION

Traditionally, state tort law has provided an avenue through which injured plaintiffs can seek compensation from pharmaceutical manufacturers.¹ Under state law, when a drug does not contain a label adequately warning consumers of potential side effects, an individual that ingests that drug and then suffers adverse side effects may bring a “failure to warn” claim against the pharmaceutical company that manufactured and marketed the drug.² In this way, state law acts as an additional layer of consumer protection and complements the Food and Drug Administration (FDA) regulation process.³ This extra layer of protection pressures pharmaceutical manufacturers to ensure that the labels on their drugs adequately warn prospective consumers of a drug’s potential side effects and also helps expose risks that were not discovered during a drug’s FDA approval process.⁴

The United States Supreme Court’s recent decision in

1. See David A. Kessler & David C. Vladeck, *A Critical Examination of the FDA’s Efforts to Preempt Failure-To-Warn Claims*, 96 GEO. L.J. 461, 462 (2008) (arguing that the FDA’s new 2007 pro-preemption policy is a mistake because it will eliminate state tort law failure-to-warn cases).

2. See *Wyeth v. Levine*, 555 U.S. 555 (2009) (allowing an injured plaintiff to bring a failure-to-warn claim against a pharmaceutical manufacturer despite that manufacturer’s compliance with FDA required warning labels).

3. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2592 (2011) (Sotomayor, J., dissenting).

4. See Kessler & Vladeck, *supra* note 1, at 463 (citing Margaret Jane Porter, *The Lohr Decision: FDA Perspective and Position*, 52 FOOD & DRUG L.J. 7, 9 (1997) (detailing how state litigation acts as a “feedback loop” and enables the FDA to do its job better)).

PLIVA, Inc. v. Mensing strips away this layer of protection and will prevent individuals who are injured by inadequate labeling on *generic* drugs from seeking compensation from generic drug manufacturers.⁵ Currently, as long as a generic drug manufacturer includes a warning label that is identical to the brand name drug's FDA-approved warning label, an individual injured due to that generic drug's inadequate label will not be able to bring a state tort law failure to warn claim against that generic drug manufacturer.⁶

This decision demonstrated a strict application of "conflict preemption" principles by the Supreme Court; the plurality opinion also advanced an argument that the Supreme Court should no longer presume that state tort law is insulated from federal preemption.⁷ Unfortunately, the decision also left the plaintiffs, Gladys Mensing and Julie Demahy, without any compensation for the injuries they suffered.⁸ While the outcome of this case seems unfair, the Court correctly applied conflict preemption principles to the facts of the case and made the appropriate decision. However, the tough result raises the question of whether Congress should change the laws regulating generic-drug manufacturers to allow plaintiffs who take a generic drug to seek compensation if a manufacturer's failure to provide additional warnings on generic drugs resulted in injury. This Note analyzes that question and shows that there is no easy answer.

Section II of this Note describes the factual background and procedural history leading up to the Supreme Court's decision in *PLIVA, Inc. v. Mensing*. Section III addresses the various legal frameworks that influenced the Court's decision, including state tort laws for failure to warn, the federal regulatory framework

5. See *Mensing*, 131 S. Ct. at 2572 (holding that federal law pre-empted state laws imposing the duty to change a drug's label upon generic drug manufacturers).

6. *Generic drug makers not liable for warnings, U.S. Supreme Court rules*, NOLA.COM, June 23, 2011, http://www.nola.com/health/index.ssf/2011/06/generic_drug_manufacturers_not.html.

7. See *Mensing*, 131 S. Ct. at 2579-80 ("We do not read the Supremacy Clause to permit an approach to pre-emption that renders conflict pre-emption all but meaningless."); cf. *id.* at 2591 (Sotomayor, J., dissenting) ("We have long presumed that federal law does not pre-empt, or repeal, state law . . .").

8. See *id.* at 2581-82 (citing *Cuomo v. Clearing House Assn.*, 129 S. Ct. 2710, 2733 (2009)) (noting that although the result makes little sense, the Supreme Court is not tasked with deciding whether laws established by Congress are "unusual or even bizarre").

within which pharmaceutical manufacturers operate, and principles of preemption rooted in the Supremacy Clause of the United States Constitution. Section IV explains how the Court reached its holding in *PLIVA, Inc. v. Mensing*, outlines the rationale of both the majority and dissent, and briefly considers the plurality section of the opinion concerning the proper way to interpret the Supremacy Clause. Finally, Section V analyzes the result in three ways. First, Section V demonstrates that the dual-layered system of federal and state law is optimal for regulating the pharmaceutical industry. Second, Section V shows that, despite the apparent unfairness of the outcome in *PLIVA, Inc.*, the Court's analysis was legally sound. Third, Section V considers several suggested methods of reforming federal pharmaceutical regulation to prevent future cases similar to *PLIVA, Inc.*

In its Conclusion this Note proposes that Congress should carefully consider the ramifications of altering the current pharmaceutical regulatory framework. Any changes Congress makes will likely defeat the purpose of allowing generic drugs in the first place: to provide safe, affordable, and effective drugs.

II. FACTS AND HOLDING

After experiencing digestive tract problems, Mensing and Demahy both were prescribed the drug Reglan in 2001 and 2002, respectively, to treat their symptoms.⁹ When they each went to buy their prescriptions, their pharmacists provided the generic drug version of Reglan, known as metoclopramide.¹⁰ After taking metoclopramide for several years, both developed the disease tardive dyskinesia.¹¹ Tardive dyskinesia is a severe and irreversible neurological disorder, characterized by “grotesque involuntary movements of the mouth, tongue, lips, and extremities, involuntary chewing movements, and a general sense

9. *Mensing*, 131 S. Ct. at 2573. Reglan is a drug first approved by the FDA in 1980 for treatment “for two to eight weeks . . . for the relief of symptoms associated with acute and recurrent diabetic gastric stress.” See Brief for Respondents at 6, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) (Nos. 09-993, 09-1039, 09-1501), 2011 WL 686400, at *6 (citing PHYSICIAN'S DESK REFERENCE 1566 (39th ed. 1982)).

10. *Mensing*, 131 S. Ct. at 2573. The term “generic drug” refers to a drug that is the exact copy of a brand name drug, “identical in active ingredients, safety, and efficacy.” See *id.* at 2574 n.2 (citing *United States v. Generix Drug Corp.*, 460 U.S. 453, 454-55 (1983)). It is not an uncommon occurrence for pharmacists to substitute the cheaper generic drug version for the prescribed brand name drug.

11. *Mensing*, 131 S. Ct. at 2573.

of agitation.”¹²

At the time that Mensing and Demahy were taking metoclopramide, the generic manufacturer of the drug, PLIVA, Inc., asserted on its labeling that the risk of side effects such as tardive dyskinesia was low.¹³ The clinical pharmacology section of the label explained: “Like the phenothiazines, metoclopramide produces sedation and may produce extrapyridamal symptoms, although these are comparatively rare.”¹⁴ Additionally, the warnings section of the label provided in pertinent part that “extrapyramidal symptoms, manifested primarily as acute dystomic reactions, occur in approximately 1 in 500 patients treated with the usual adult dosages of 30 to 40 mg/day of metoclopramide.”¹⁵

However, in the years after the FDA granted its initial approval of Reglan, including an approval of the warning label, more extensive studies revealed that the risk of contracting side effects such as tardive dyskinesia was actually much higher than the two tenths of a percent mentioned on the warning label.¹⁶ Despite these studies, neither the manufacturer of brand-name Reglan nor the generic manufacturer of metoclopramide made any effort to update the warning label.¹⁷

Believing that the facts gave rise to a cause of action against the pharmaceutical companies for tortious failure to warn, Demahy and Mensing filed suit against the brand name and generic manufacturers in Minnesota and Louisiana.¹⁸ In both cases, the courts granted summary judgment in favor of the brand-name drug company because neither Demahy nor Mensing had ingested the brand-name drug.¹⁹ No liability existed for the

12. *McNeil v. Wyeth*, 462 F.3d 364, 366 (5th Cir. 2006).

13. *See* Brief for Respondents at 7, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) (Nos. 09-993, 09-1039, 09-1501), 2011 WL 686400, at *7.

14. *Id.* (explaining that the extrapyramidal system controls fine motor skills and that tardive dyskinesia is a particularly severe form of extrapyramidal symptoms).

15. Brief for Respondents at 8, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) (Nos. 09-993, 09-1039, 09-1501), 2011 WL 686400, at *8.

16. *Id.* at *9.

17. *Id.* at *10.

18. *See* *Mensing v. Wyeth, Inc.*, 562 F. Supp. 2d 1056 (D. Ct. Minn. 2008); *see* *Demahy v. Wyeth, Inc.* 586 F. Supp. 2d 642 (E.D. La. 2008).

19. *See* *Mensing v. Wyeth, Inc.*, 588, F.3d 603, 612 (8th Cir. 2009) (affirming summary judgment in favor of the brand name drug manufacturer because the plaintiff never actually consumed the defendant's product).

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brand-name drug manufacturer because its product had not injured the plaintiffs.²⁰

The generic-drug manufacturer raised a preemption defense.²¹ Specifically, the generic-drug manufacturer asserted that complying with any state law duty to provide a safer label for metoclopramide would make it impossible to concurrently follow the duty imposed by federal regulations to keep labels for generic drugs identical to the FDA-approved labels on the brand name version of the drug.²² In other words, the generic-drug manufacturers argued that because federal law required generic drugs to have a label that matched the brand-name drug's label, the generic manufacturers could not at the same time follow state laws requiring them to provide a safer label.²³

The Minnesota District Court ruled in favor of the generic drug manufacturers,²⁴ while the Eastern District of Louisiana ruled in favor of Demahy.²⁵ On appeal, both the Fifth and Eighth Circuits ruled in favor of the plaintiffs, allowing state law failure to warn claims to be brought against the generic drug manufacturers.²⁶ Ultimately, in a 5–4 decision, the Supreme Court reversed the Fifth and Eighth Circuits' decisions, accepted the generic drug manufacturers' preemption argument, and held that federal law preempted state laws from imposing a duty to change a drug's label upon generic-drug manufacturers.²⁷

III. BACKGROUND

A. FDA REGULATION OF THE DRUG APPROVAL PROCESS

To understand how the Supreme Court concluded that federal law preempted state failure to warn claims against generic-drug manufacturers, it is important to understand the process through which brand-name and generic drugs enter the market and how the FDA regulates this process. The federal

20. *Mensing v. Wyeth, Inc.*, 588 F.3d 603, 612 (8th Cir. 2009)

21. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2573 (2011).

22. *Mensing*, 131 S. Ct. at 2573.

23. *See, e.g.*, 21 U.S.C. §§ 355(j)(2)(A)(v), 355(j)(4)(G) (2006); 21 CFR §§ 314.94(a)(8), 314.127(a)(7) (2011).

24. *Mensing v. Wyeth, Inc.*, 562 F. Supp. 2d 1056, 1056 (D. Ct. Minn. 2008).

25. *Demahy v. Wyeth, Inc.* 586 F. Supp. 2d 642 (E.D. La. 2008).

26. *Mensing*, 131 S. Ct. at 2573.

27. *Id.* at 2572.

government regulates the prescription drug industry more heavily than almost any other consumer-product industry.²⁸ To protect consumers, Congress enacted the 1962 Drug Amendments to the Federal Food, Drug, and Cosmetic Act,²⁹ which require a manufacturer seeking federal approval to market a new drug to prove the following: (1) that the new drug is safe and effective; and (2) that the new drug's proposed label is accurate and adequate.³⁰

1. BRAND-NAME DRUG MANUFACTURERS AND THE NEW DRUG APPLICATION

To receive FDA approval of a new drug, manufacturers must submit a New Drug Application (NDA).³¹ This application process requires extensive and costly clinical trials. Overall, some studies estimate that it costs a pharmaceutical company an average of more than \$1 billion and takes more than seven years from the start of clinical trials to complete the necessary studies to gain FDA approval to market a new drug in the United States.³²

The FDA requires NDA applicants to submit full reports of any studies they have undertaken to determine whether use of the new drug is safe and effective.³³ Additionally, NDA applicants are required to propose labeling for the drug, which must identify appropriate use of the product, contraindications, warnings, precautions, and adverse reactions.³⁴ The proposed drug's label must bear "such adequate warnings against use . . . where its use may be dangerous . . . as are necessary for

28. Daniel E. Troy, *The Case For FDA Preemption*, in *FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS* 81, 82 (Richard A. Epstein & Michael S. Grieve eds., 2007).

29. The Drug Amendments of 1962, Pub. L. No. 87-781, 76 Stat. 780 (codified at 21 U.S.C. § 301 (2006)).

30. *Mensing*, 131 S. Ct. at 2574.

31. Sarah C. Duncan, *Allocating Liability for Deficient Warnings on Generic Drugs: A Prescription for Change*, 13 *VAND. J. ENT. & TECH. L.* 185, 191 (2010) (citing 21 U.S.C. § 355 (a)-(i)).

32. Press Release, Tufts Center for the Study of Drug Development, Drug Companies Still Under Pressure to Increase Pace of Development (Jan. 6, 2010), available at http://csdd.tufts.edu/news/complete_story/pr_outlook_2010 (hereinafter Tufts Press Release).

33. 21 U.S.C. § 355(b)(1)(A) (2006).

34. 21 C.F.R. § 201.56(d)(1) (2011).

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the protection of users.”³⁵ Under federal law, a drug is misbranded if its label “fails to reveal” material facts “with respect to consequences which may result from . . . customary or usual . . . use of the drug,” which includes common “off-label” uses.³⁶

2. GENERIC-DRUG MANUFACTURERS AND THE ABBREVIATED NEW DRUG APPLICATION

Another important aspect of the pharmaceutical industry is the process through which generic drugs enter the market place. Due to the extensive investment of time and resources required for a manufacturer to get a new drug approved for sale, pharmaceutical companies are interested in making a profit once they have an approved drug. However, only thirty percent of approved drugs typically generate enough revenue to cover the manufacturer’s research and development costs.³⁷ As a result, prescription drugs are very expensive for consumers, and between 1981 and 2004, the average price per prescription increased from \$9.50 to \$53.92.³⁸

In an effort to mitigate the expense of prescription drugs for consumers, Congress passed the Drug Price Competition and Patent Term Restoration Act in 1984.³⁹ This Act, commonly known as the Hatch–Waxman Amendments, creates a less expensive way for generic-drug companies to enter the market once the brand-name drug manufacturer’s patent expires. The Hatch–Waxman Amendments represent Congress’s attempt to balance two competing policy interests: “(1) inducing pioneering research and development of new drugs and (2) enabling competitors to bring low-cost, generic copies of those drugs to market.”⁴⁰ Under the Act, a generic-drug manufacturer is able to avoid the extensive and costly clinical trials that a brand-name manufacturer must conduct.⁴¹ An Abbreviated New Drug

35. 21 U.S.C. § 352(f)(2) (2006).

36. 21 U.S.C. §§ 321(n), 352(a) (2006).

37. Tufts Press Release, *supra* note 32.

38. Duncan, *supra* note 31, at 186 (citing Christopher Lea Lockwood, Comment, *Biotechnology Industry Organization v. District of Columbia: A Preemptive Strike Against State Price Restrictions on Prescription Pharmaceuticals*, 19 ALB. L.J. SCI. & TECH. 143, 149 (2009)).

39. Pub. L. No. 98-417, 98 Stat. 1585 (1984).

40. *Andrx Pharm., Inc. v. Biovail Corp.*, 276 F.3d 1368, 1371 (Fed. Cir. 2002).

41. 21 U.S.C. § 355(j)(2)(a) (2010).

Application (ANDA) allows generic-drug manufacturers to market a drug, provided that the generic drug is identical to an FDA-approved brand-name drug.⁴² The effect of providing generic manufacturers with a cheaper, quicker process to obtain FDA approval to market the drug is a dramatic drop in price. Once the brand-name manufacturer's patent expires, generic-drug manufacturers can quickly enter the market to compete with the brand-name drug. In 2007, the average brand-name-prescription price (\$119.51) was over three times the average generic price (\$33.34).⁴³

To survive the ANDA process and get FDA approval to market a generic drug, federal regulations require a manufacturer to demonstrate that the proposed warning label for the generic drug is identical to the FDA-approved label on the brand-name drug.⁴⁴ Nevertheless, under Congressional statute, a generic drug is required to have an adequate warning label.⁴⁵ In connection with this requirement, the FDA requires ANDA applicants to contact the FDA if the applicant believes new safety information should be added to a product's labeling; the FDA is then responsible for determining whether the labeling for both the generic and brand-name drugs should be revised.⁴⁶

B. POST-MARKETING SURVEILLANCE

Two specific shortcomings of pre-market clinical trials guarantee that many of an FDA-approved drug's significant risks and potential adverse effects will not be discovered until after the drug has been marketed and sold to consumers for an extended period of time.⁴⁷ First, the number of patients that take a new drug during pre-marketing clinical trials is limited, and second, the pre-marketing clinical trials do not last long enough to

42. See 21 U.S.C. § 355(j) (2010).

43. Press Release, Kaiser Family Foundation, Prescription Drug Trends (Sept. 2008), available at http://www.kff.org/rxdrugs/upload/3057_07.pdf.

44. 21 C.F.R. § 314.94(a)(8)(iv) (2011).

45. 21 U.S.C. § 352(f)(2)(2006).

46. Brief for Respondents, *supra* note 13, at *12-13 (citing 57 Fed. Reg. 17950, 17961, cmt. 40 (Apr. 28, 1992)).

47. *Id.* at *13 (citing Karen E. Lasser, et al., *Timing of New Black Box Warnings and Withdrawals for Prescription Medicines*, 287 JAMA 2215 (2002) (finding that half of all black box warnings on drugs introduced after 1975 were added after the drug had been on the market for seven or more years)).

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discover risks that only emerge with extended consumption.⁴⁸ Thus, previously undiscovered risks that only occur after extended consumption of the drug or after consumption by a larger number of people are expected to be discovered after the drug enters the market.⁴⁹ It is reported that half of a new drug's adverse effects are not discovered until after the drug has been sold for an extended period of time.⁵⁰ Because these risks are not discovered during the pre-marketing clinical trials, they are not mentioned on the warning labels.⁵¹ In anticipation of the discovery of new risks after the drug is approved and placed on the market for consumers, the FDA places post-approval obligations on both brand-name and generic-drug manufacturers to continue to monitor any new risks⁵² and to submit adverse event reports to the FDA.⁵³

C. HISTORY OF METOCLOPRAMIDE

In 1980, drug manufacturers first developed metoclopramide under the brand name Reglan to speed the movement of food through the digestive system.⁵⁴ Five years later, generic manufacturers began producing and marketing the drug.⁵⁵ Originally, the drug was designed for short-term use, but because reflux and gastroparesis are chronic conditions, physicians often prescribed the drug for longer periods.⁵⁶ The plaintiffs alleged in their complaint that both the generic and brand-name manufacturer knew about the prevalent, long-term use of metoclopramide but failed to adequately update the warning labels.⁵⁷

In 1985, the drug's label was modified to warn that tardive dyskinesia may develop in patients treated longer than twelve

48. Brief for Respondents, *supra* note 13, at *12-13.

49. Kessler & Vladeck, *supra* note 1, at 466; Brief for Respondents, *supra* note 13, at *13 (citing Karen E. Lasser, et al, *Timing of New Black Box Warnings and Withdrawals for Prescription Medicines*, 287 JAMA 2215 (2002)).

50. Brief for Torts Professors Mary J. Davis et al. at 14, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2572 (2011) (Nos. 09-993), 2011 WL 794114, at *14 (quoting THOMAS O. MCGARITY, *THE PREEMPTION WAR* 33 (Yale 2008)).

51. Kessler & Vladeck, *supra* note 1, at 463.

52. 21 U.S.C. § 355(k) (2012).

53. Brief for Respondents, *supra* note 13, at *13-14.

54. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2572 (2011).

55. *Id.*

56. See *McNeil v. Wyeth*, 462 F.3d 364, 369 (5th Cir. 2009).

57. Brief for Respondents, *supra* note 13, at *7.

weeks, and the package insert warned that “therapy longer than twelve weeks has not been evaluated and cannot be recommended.”⁵⁸ Over time, new evidence accumulated and demonstrated that 29% of patients taking metoclopramide for several years developed the neurological disorder tardive dyskinesia.⁵⁹ In 2004, the brand-name manufacturer of Reglan requested that the label be amended to explain that therapy *should not* exceed 12 weeks.⁶⁰ Finally, in 2009 the FDA ordered a black-box-warning label stating that treatment with metoclopramide can cause tardive dyskinesia and that treatment should not exceed twelve weeks except in rare cases.⁶¹ These warnings did not come soon enough to help either Mensing or Demahy.

D. STATE TORT LAW CLAIMS

As the new studies became available, the generic manufacturer of metoclopramide did not make any effort to change the labeling of its product. Mensing and Demahy argued that if the labels had been changed they would not have taken metoclopramide, and they would not have been injured. To seek compensation, they looked to state tort law.

Both Minnesota and Louisiana tort law require that drug manufacturers be aware of any dangers that their products pose to consumers.⁶² In Minnesota, “where the manufacturer . . . of a product has actual or constructive knowledge of danger to users, the . . . manufacturer has a duty to give warning of such danger.”⁶³ In Louisiana, “a manufacturer’s duty to warn includes a duty to provide adequate instructions for safe use of a product.”⁶⁴ These laws provide an extra layer of protection for consumers by incentivizing drug manufacturers to monitor their

58. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2573 (2011).

59. *Mensing*, 131 S. Ct. at 2572.

60. *Id.*

61. *Id.* A black-box warning is the highest warning label and is used to “call attention to serious or life-threatening risks.” *A Guide to Drug Safety Terms at FDA*, FDA CONSUMER HEALTH INFO. (Apr. 11, 2008), available at <http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/ucm107976.pdf>.

62. *Mensing*, 131 S. Ct. at 2573.

63. *Id.* (quoting *Frey v. Montgomery Ward & Co.*, 258 N.W.2d 782, 788 (Minn. 1977)).

64. *Id.* (quoting *Stahl v. Novartis Pharm. Corp.*, 283 F.3d 254, 269-70 (5th Cir. 2002)).

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products and notify consumers when they become aware of new risks, which raises an obvious question: How can a drug manufacturer change its drug's label when new information about adverse effects becomes available?

E. AVAILABLE METHODS OF CHANGING A DRUG'S LABEL

Under federal regulations, the FDA has found several possible options for a drug manufacturer to pursue in an effort to update a warning label. Once the FDA has interpreted these regulations, courts regard the FDA's views as "controlling unless plainly erroneous or inconsistent with the regulation[s]" or there is any other reason to doubt that they reflect the FDA's fair and considered judgment.⁶⁵

The first option is referred to as a "Changes Being Effected" process (CBE).⁶⁶ Pursuant to a CBE, brand-name manufacturers may "add or strengthen a contraindication, warning, [or] precaution" on their drug's label without waiting for prior FDA approval.⁶⁷ After doing so, the brand-name manufacturers must file a supplemental application to notify the FDA of their label change.⁶⁸ The FDA will then review the change and may allow the manufacturer to keep the change in place.⁶⁹ However, as Justice Thomas explained, the FDA only allows generic-drug manufacturers to change their drug's label "to match an updated brand name label or to follow the FDA's instructions."⁷⁰ Thus, the CBE is not available to generic-drug manufacturers.

A second option available to drug manufacturers to update their drug's warning label is a "Dear Doctor" letter.⁷¹ This option allows a brand-name drug manufacturer to mail out supplemental information to prescribing physicians about the newly discovered adverse side effects of the drug.⁷² However, because the FDA considers a Dear Doctor letter to be the equivalent of updating a drug's label, this option is not available

65. *Auer v. Robbins*, 519 U.S. 452, 461 (1997).

66. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2575 (2011).

67. 21 C.F.R. § 314.70(c)(6)(iii)(A) (2006).

68. *Wyeth v. Levine*, 555 U.S. 555, 568 (2009); 21 C.F.R. § 314.70(c)(6) (2008).

69. *See* 21 C.F.R. § 314.70(c)(7) (2008).

70. *Mensing*, 131 S. Ct. at 2575.

71. *Id.* at 2576.

72. 21 C.F.R. § 200.5 (2011).

to generic manufacturers.⁷³ Generic manufacturers would be misleading physicians by taking this step because the information would be in conflict with the brand-name drug's label, which had gone through extensive testing by the FDA.⁷⁴

A final option is for drug manufacturers to take the initiative of requesting that the FDA allow the manufacturer to change the warnings on a drug's label. The FDA has interpreted 21 U.S.C. § 352(f)(2) to require that all drug labeling shall be revised to include a warning as soon as there is reasonable evidence that a drug is associated with a serious hazard.⁷⁵ The imposition of this duty on manufacturers reflects the central premise of federal drug regulation: "the manufacturer bears responsibility for the content of its labels at all times."⁷⁶

To carry out this duty, manufacturers must take new information they receive and bring it to the FDA's attention; the FDA then reviews the information and makes a final decision on whether the label should be changed to warn of the potential hazard.⁷⁷ While this option is available to both brand-name and generic manufacturers, the Court in *PLIVA, Inc.* held that this option did not overcome a conflict preemption defense.⁷⁸

F. PREEMPTION PRINCIPLES AND THE PHARMACEUTICAL CONTEXT

1. TYPES OF PREEMPTION

Due to the unsettled relationship between federal regulations and state tort law, the possibility for federal preemption exists in the pharmaceutical context. Preemption is based on the Supremacy Clause of the United States Constitution, which provides that federal law "shall be the supreme law of the land; and the judges in every state shall be bound thereby, any Thing in the Constitution or Law of any state

73. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2576 (2011).

74. See Brief for the United States at 19, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) (Nos. 09-993, 09-1039, 09-1501), 2011 WL 741927, at *19.

75. *Mensing*, 131 S. Ct. at 2576.

76. See *Wyeth v. Levine*, 555 U.S. 555, 570-71 (2009).

77. *Mensing*, 131 S. Ct. at 2577 (quoting 57 Fed. Reg. 17961: "If a [generic drug manufacturer] believes new safety information should be added to a product's labeling, it should contact the FDA, and FDA will determine whether the labeling for the generic and listed drugs should be revised.").

78. See *infra* Section IV.A.

to the Contrary notwithstanding.”⁷⁹ The Supreme Court has established two principles to guide preemption analysis: (1) in determining whether preemption is proper, the purpose of Congress is the ultimate touchstone; and (2) in all preemption cases, particularly those in which Congress has legislated, the historic powers of the states are not to be superseded.⁸⁰

The courts have recognized three types of preemption: express preemption; field preemption; and conflict preemption. Express preemption occurs when Congress includes a clause in a statute that explicitly removes specific powers from the states.⁸¹ The provision in the Medical Devices Act preventing states from regulating medical devices is an example of express preemption by Congress.⁸² The Hatch–Waxman Act, by contrast, does not include any express provision preventing the states from regulating generic-drug manufacturers.⁸³

In the absence of express preemption, field preemption occurs when federal law encompasses so much of an area of law that courts can infer that Congress left no opportunity for state law to supplement federal law.⁸⁴ Although one commentator has argued that this type of preemption should govern cases involving drug manufacturers, lawyers have not advanced this theory of field preemption before the Supreme Court.⁸⁵

The third type of preemption, which the Court found in *PLIVA, Inc. v. Mensing*, is conflict preemption.⁸⁶ Conflict preemption occurs when federal law impliedly preempts state law, because “it is impossible for a private party to comply with both state and federal law.”⁸⁷ To prevail on this defense, a defendant must demonstrate that compliance with both federal and state law is a “physical impossibility.”⁸⁸ “Impossibility pre-

79. U.S. Const., Art. VI, cl. 2.

80. *Mensing*, 131 S. Ct. at 2586.

81. Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 226 (2000).

82. See 21 U.S.C. § 360k(a) (2006).

83. *Mensing*, 131 S. Ct. at 2586.

84. Nelson, *supra* note 81, at 227 (internal quotation omitted).

85. See Richard Epstein, *What Tort Theory Tells Us About Federal Preemption: The Tragic Saga of Wyeth v. Levine*, 65 N.Y.U. ANN. SURV. AM. L. 485, 488-89 (2010).

86. *Mensing*, 131 S. Ct. at 2577.

87. *Id.* at 2587 (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 372-73 (2000) (internal quotations omitted)).

88. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

emption is a demanding defense,” and the mere possibility of impossibility is not enough to successfully argue for preemption.⁸⁹

2. CURRENT DEBATE ON THE PRESUMPTION OF PREEMPTION

Determining whether a state law is preempted in a particular case requires interpreting both state and federal law. The general precedent of past Supreme Court decisions has been to interpret federal law so as to not impliedly preempt state law unless preemption “was the clear and manifest purpose of Congress.”⁹⁰ However, other scholars have suggested that the drafters of the Supremacy Clause intended the clause to be interpreted to include implied preemption of state law even without express Congressional intent.⁹¹ One commentator has suggested that there is a *non obstante* provision calling for courts to find that federal law *does* impliedly repeal conflicting state law.⁹² Justice Thomas has repeatedly advanced this view in his opinions dealing with preemption.⁹³

3. RECENT SUPREME COURT PRECEDENT CONCERNING PREEMPTION OF STATE LAWS REGULATING PHARMACEUTICAL MANUFACTURERS

Two years before *PLIVA, Inc. v. Mensing*, the Court decided *Wyeth v. Levine* in which it concluded that federal law did not preempt state failure to warn claims against brand name pharmaceutical manufacturers.⁹⁴ The plaintiff in *Wyeth* brought a state law failure to warn claim against a brand-name drug manufacturer, claiming that the manufacturer marketed a drug with an inadequate label.⁹⁵ The manufacturer argued that preemption should prevent the claim because the FDA had approved the label and it would be impossible to update it without subsequent FDA action.⁹⁶ However, the brand-name

89. *Wyeth v. Levine*, 555 U.S. 555, 573 (2009).

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

91. *See Nelson, supra* note 81, at 231 (explaining the history of the Supremacy Clause).

92. *Id.* at 232. *See id.* at 237-244 for a more in depth discussion of how a *non obstante* clause effects statutory interpretation.

93. *See, e.g., Wyeth*, 555 U.S. at 590, and *Mensing*, 131 S. Ct. at 2579 (Justice Thomas citing the Nelson law review article).

94. 555 U.S. 555 (2009).

95. *Id.* at 558.

96. *Id.* at 573.

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drug manufacturer had several alternative options to unilaterally change their drug's label, including the CBE process and Dear Doctor letters.⁹⁷ Although the FDA might have eventually prohibited any label change, the Court found that the mere possibility that the FDA may have eventually prohibited any label change was not enough to preempt a state law claim; instead, preemption required that the manufacturer show with certainty that the FDA would prevent the label change.⁹⁸

IV. THE SUPREME COURT'S DECISION

A. THE MAJORITY

In finding that federal law preempted the plaintiffs' state tort law claims, the Supreme Court reversed the Eighth and Fifth Circuits' decisions.⁹⁹ The Court compared the duties imposed on generic-drug manufacturers under state law with the duties imposed on them under federal law.¹⁰⁰ Under state law, the Court recognized that generic-drug manufacturers have a duty to label their products adequately and safely¹⁰¹ and that taking the plaintiffs' allegations as true, that duty required the generic manufacturers in this case to use a different, stronger label than the one actually used.¹⁰² However, the Court also recognized that under federal law, generic manufacturers have a duty to label their drug in the same way the brand-name drug is labeled.¹⁰³

Once the Court established the generic manufacturer's duties under state and federal law, it considered whether preemption was proper. Ultimately, the Court held that conflict preemption existed, finding that it was impossible for generic manufacturers to comply with both state and federal laws.¹⁰⁴ Although the Court assumed that federal law required generic manufacturers to seek FDA assistance in changing an inadequate label, the Court nonetheless concluded that preemption was proper because generic manufacturers could not unilaterally

97. *See supra* Section III.F.

98. *See supra* Section III.F.

99. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2574 (2011).

100. *Id.*

101. *Id.* at 2573-74.

102. *Id.* at 2577.

103. *Mensing*, 131 S. Ct. at 2575. The Court accepted that this duty existed by applying *Auer* deference. *Id.*

104. *Id.* at 2572.

change their drug's label. Specifically, the Court reasoned that federal law prohibited generic drug manufacturers from undertaking either a CBE application or a Dear Doctor Letter.¹⁰⁵ Further, even though a generic manufacturer may have been able to convince the FDA to allow a label change, there was no guarantee that this would occur.¹⁰⁶

The Court distinguished this case from *Wyeth* by pointing out that the brand-name manufacturer in *Wyeth* could unilaterally change their drug's label.¹⁰⁷ In this case, the generic manufacturer would need FDA approval before a label change could be implemented.¹⁰⁸ Thus, the Court held that although the generic manufacturer might have been able to comply with state law, conflict preemption was appropriate because the generic manufacturer could not comply with both state and federal law through an independent unilateral action.¹⁰⁹

Finally, in a plurality section of his opinion, Justice Thomas continued to advance the theory that the Supremacy Clause includes a *non obstante* provision.¹¹⁰ Thomas argued that the Court should interpret federal law so as to impliedly repeal conflicting state law.¹¹¹ In other words, Thomas argued that the Supreme Court should not stretch its interpretation of the ordinary meaning of federal law to find a way for federal law to coexist with current state law.

B. THE DISSENT

In her dissent, Justice Sotomayor expressed great dissatisfaction with the majority's conclusion that the "mere possibility of impossibility" was enough to establish conflict preemption.¹¹² Justice Sotomayor emphasized that because preemption is an affirmative defense, the defendant bears the demanding burden of proving that compliance with federal and state laws is impossible.¹¹³ She found an analogy in *Wyeth*, where

105. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2576 (2011).

106. *Mensing*, 131 S. Ct. at 2578.

107. *Id.* at 2581.

108. *Id.*

109. *Id.*

110. *Id.* at 2579.

111. *Mensing*, 131 S. Ct. at 2579-80.

112. *Id.* at 2582.

113. *Id.* at 2587.

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the Court held that conflict preemption did not release a brand-name manufacturer from liability for failure to warn unless the brand-name manufacturer could show with certainty that the FDA would reject any label change.¹¹⁴ Although she acknowledged that generic manufacturers, unlike brand-name manufacturers, could not use CBEs or Dear Doctor Letters to update their labels, Justice Sotomayor stressed that federal law permits generic manufacturers to propose a label change to the FDA in an effort to change their drug's label.¹¹⁵ Thus, Justice Sotomayor reasoned that because the generic manufacturers could propose a label change to the FDA, impossibility could not exist unless the generic manufacturers could show with certainty that the FDA would reject the proposed label changes.¹¹⁶

Justice Sotomayor concluded her dissent by dismissing the plurality's position on the *non obstante* provision, arguing that precedent held the opposite.¹¹⁷ In addition, she argued that the Court should interpret laws so as to disfavor preemption.¹¹⁸ For the dissent, the "absurd" result of the majority's holding, combined with the "presumption against preemption," were enough to find that the defendants had not met their burden of establishing the impossibility of complying with state and federal law.¹¹⁹

IV. ANALYSIS

The result of *PLIVA, Inc. v. Mensing* leaves both the majority and dissent unsatisfied.¹²⁰ The facts showed that the generic-drug manufacturer of metoclopramide had reliable information that their drug caused tardive dyskinesia if taken for longer than one year. Yet, the manufacturer continued to produce and market the drug without updating the warning label with an adequate warning. Due to this inaction, both Demahy and Mensing developed a permanent neurological condition far more severe than their original gastric reflux. Under state tort law in both Louisiana and Minnesota, it appeared that these women

114. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2588 (2011).

115. *Mensing*, 131 S. Ct. at 2585.

116. *Id.* at 2588-89.

117. *Id.* at 2591.

118. *Id.*

119. *Id.* at 2592-93.

120. *Id.* at 2583 (Sotomayor, J., dissenting) ("The court gets one thing right: 'this outcome makes little sense.'").

deserved to be compensated. Despite this, the generic manufacturers avoided liability because the Supreme Court held that federal law preempted state law and barred the women from bringing a failure to warn claim against the generic manufacturers.

Considering the existing laws and regulations governing the generic-drug pharmaceutical industry, the Supreme Court should be commended for avoiding the trap of making bad law in the face of tragic facts. Still, the result should lead observers to scrutinize how the pharmaceutical industry is regulated and question whether principles of preemption should interfere with federal and state government efforts to protect citizens. This Section argues that the dual-layered system evident in both *PLIVA, Inc. v. Mensing* and *Wyeth v. Levine* should not be dramatically altered. Second, this Section shows that the Supreme Court correctly applied conflict preemption principles to reach its holding in *PLIVA, Inc.* Third, this Section considers several potential methods to avoid the unfortunate result of *PLIVA, Inc.*

A. DUAL-LAYERED REGULATION OF THE PHARMACEUTICAL INDUSTRY

The FDA-approval process has a significant impact on society because many people are suffering from diseases and are desperate to receive treatment in the form of newly developed drugs. It is important to design a system that promotes the greatest benefits to the greatest number of people. Difficulties in the current FDA process arise in two ways: (1) the FDA may act too conservatively and not allow a safe drug to enter the market soon enough to help patients who could benefit from the safe drug; or (2) the FDA may act too quickly and approve a drug that has not been tested enough, which may cause adverse side effects and harms that would have been discovered with more extensive testing.¹²¹

Some free-market advocates have gone so far as to call for the elimination of the FDA altogether.¹²² This idea generally does

121. Richard A. Epstein, *The Case for Field Preemption of State Laws in Drug Cases*, 103 NW. U. L. REV. 463, 469 (2009).

122. See Benjamin Domenech, *Analysis: Ron Paul is Right About the FDA*, HEARTLANDER, Sept. 8, 2011, available at <http://news.heartland.org/newspaper-article/2011/09/08/analysis-ron-paul-right-about-fda> (discussing Ron Paul's response to a question about regulating the safety of medicine in which he explained that

not gain much ground due to the FDA's role in ensuring that products entering the market are safe.¹²³ Another idea, almost as radical, is to completely remove a plaintiff's ability to sue pharmaceutical industries under state law. A logical argument has been advanced to totally eliminate state law from the equation.¹²⁴ The FDA employs scientists who spend their careers studying the effects of these drugs. Once a pharmaceutical company has convinced the FDA that their drug is safe, it seems reasonable that the company should not have to worry about defending future lawsuits. The threat of future lawsuits requires manufacturers to raise prices, which in turn prevents many people in need of the drug from being able to afford it.¹²⁵ Additionally, allowing a jury of lay people to decide when a drug company knew or should have known of adverse effects will likely create an inconsistent pattern of results and could be very costly to society.¹²⁶

However, other commentators argue that the FDA and state tort system should act as a dual layer of consumer protectionism.¹²⁷ The FDA has limited resources and cannot successfully monitor the entire pharmaceutical market.¹²⁸ The state tort system provides another layer of protection to keep pharmaceutical companies in check.¹²⁹ Also, as evidenced by *PLIVA, Inc. v. Mensing*, new information comes to light once a drug enters the market and more people begin taking the drug. This layered system appears to be the best approach for regulating the pharmaceutical industry, but it also begs the question of how the two systems can most efficiently and effectively coexist.

government is not needed).

123. See *The History of Drug Regulation in the United States*, at 3, FDA (2006), <http://www.fda.gov/downloads/AboutFDA/WhatWeDo/History/ProductRegulation/PromotingSafeandEffectiveDrugsfor100Years/UCM114469.pdf> (documenting the FDA's vast amount of resources and its budget of \$1.83 billion).

124. Epstein, *supra* note 85, at 489 (“[T]he correct substantive position should therefore be to prevent all state law tort attacks.”).

125. See *id.* at 514.

126. See *id.* at 522.

127. See Kessler & Vladeck, *supra* note 1, at 465 (questioning “the wisdom of the FDA's efforts to restrict or eliminate the complementary discipline placed on the market by failure-to-warn litigation”).

128. See *id.*

129. See *id.*

B. WHEN SHOULD FEDERAL LAW PREEMPT STATE LAW

In its decision in *Wyeth v. Levine*, the Supreme Court established that when a pharmaceutical manufacturer can unilaterally comply with both state and federal law, conflict preemption does not immunize that pharmaceutical manufacturer from potential liability under state tort laws.¹³⁰ Because a brand-name drug manufacturer can unilaterally change its drug's label, the law should provide incentives to force the manufacturer to know when a label change is appropriate. Thus, *Wyeth* fits squarely with the dual-layered approach to regulating warning labels required of pharmaceutical manufacturers. While the FDA should provide a floor as to what is an adequate label, state law should continue to pressure brand-name drug manufacturers to change their labels to accurately warn of dangers that the manufacturer knows or should know about. This rule makes the industry more efficient and safer for society.

In contrast with *Wyeth*, *PLIVA, Inc.* demonstrates that generic-drug manufacturers do not fit as easily into the dual-layered approach. Generic manufacturers are only able to enter the market by demonstrating to the FDA that their product is identical in every aspect to the brand-name drug.¹³¹ As Justice Scalia noted, "this is the generic manufacturer, he doesn't know anything about science, he knows how to replicate this pill exactly, that's all he knows."¹³² Consumers feel comfortable taking the generic drug because they know that it is identical to an FDA-approved brand-name drug. However, while brand-name drugs are able to unilaterally update their labels, generic manufacturers do not have this ability. In *PLIVA, Inc.*, the Court firmly established this difference. While a plaintiff who took a brand-name pharmaceutical with an inadequate warning may bring a failure to warn claim against the brand-name manufacturer under state law, a plaintiff who took the generic version of the drug with an inadequate warning cannot due to conflict preemption. The Court based this decision on the recognition that brand-name manufacturers are permitted under

130. *Wyeth v. Levine*, 555 U.S. 555, 581 (2009).

131. *Duncan*, *supra* note 31, at 187.

132. Jonathan Tilove, *Slidell woman's generic drug case is argued before U.S. Supreme Court*, *TIMES-PICAYUNE*, Mar. 30, 2011, http://www.nola.com/crime/index.ssf/2011/03/supreme_court_hears_arguments.html.

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federal law to unilaterally change the label on their drugs through CBEs and Dear Doctor letters while generic-drug manufacturers are limited to requesting a label change from the FDA and waiting for a response.

The dissent argues that this difference defeats the purpose of requiring generics to be identical to brand-name drugs.¹³³ Also the dissent suggests that this fact might deter consumers from purchasing and taking generics.¹³⁴ However, the law prevents generic manufacturers from unilaterally changing their drug labels, and as the majority noted, it would be impossible to comply with both the federal duty and the state law duty. In addition, Justice Thomas strengthens his argument with his plurality opinion suggesting that courts should not stretch the law to find ways to make federal law and state law compatible.

C. SOLUTIONS TO THE PROBLEM

The Supreme Court's holding that conflict preemption prevented *Mensing* and *Demahy* from bringing a failure to warn claim against *PLIVA, Inc.*, leaves the plaintiffs without compensation merely because they consumed a generic drug.¹³⁵ This creates significant problems because most states have laws that allow physicians to prescribe the cheaper generic drug, and many insurance companies cover only the cheaper generic drugs. By removing any incentive for a generic manufacturer to monitor their drug once it is FDA approved, generic manufacturers are basically given a free pass. Another problem arises because often once a generic drug enters the market, the brand-name manufacturer will stop production, leaving no clear manufacturer liable for failure to warn claims.¹³⁶

In dealing with this problem, Congress must confront the economic dynamics at play and attempt to achieve a workable compromise. On one hand, Congress passed the Hatch–Waxman bill to drive down prices for drugs, making them more available to the general public.¹³⁷ Due to the extreme costs involved with

133. *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567, 2593 (2011) (*Mensing*).

134. *Id.*

135. *Mensing*, 131 S. Ct. at 2581.

136. *Id.* at 2584 (citing Brief for Marc T. Law et al. as Amici Curiae Supporting Respondents at 18, *PLIVA, Inc. v. Mensing*, 131 S. Ct. 2567 (2011) (Nos. 09-993, 09-1039, 09-1501), 2011 WL 794111, at *18.

137. *Duncan*, *supra* note 31, at 185.

developing new drugs, brand-name manufacturers must charge a high price. Allowing generic manufacturers to simply copy a brand-name drug dramatically reduces the price. Any regulation that places a greater burden on the generic manufacturer would likely force generics to increase their prices, defeating the purpose of generic drugs. On the other hand, generic-drug manufacturers should not be given a free pass while victims injured as a result of inadequate labeling are denied all legal recourse.

Observers have proposed various ways that Congress could attempt to remedy the problems inherent in the current situation. Some have suggested that Congress should create a victim's trust fund to provide compensation to those who are injured as a result of an inadequately labeled generic drug.¹³⁸ Under this system, money would be placed in a fund and handed out to those who can prove that they were injured by a generic drug's inadequate warning.¹³⁹ However, this idea would likely cause generics to raise prices and place a greater burden on the federal government to regulate the industry. Due to the current political climate, this would likely be an unpopular policy.

Other suggested solutions include bolstering FDA efforts.¹⁴⁰ By developing stronger post-market surveillance procedures, new side effects will be caught much sooner.¹⁴¹ The obvious flaw in this suggestion is that the FDA has limited resources. In the long run, placing more money into the FDA may create better surveillance, but it also will make the business of manufacturing drugs more expensive. This effort may not be worth the cost.

A final possibility is for Congress to establish a cause of action against generic manufacturers if the generic manufacturer fails to provide information to the FDA when the generic manufacturer should know that its product has an inadequate warning label. However, any proposal putting a greater burden on generics will again likely cause an increase in the price of generic drugs.

138. Duncan, *supra* note 31, at 185.

139. *Id.* at 210-11.

140. Leonard H. Glantz & George J. Annas, *Impossible? Outlawing State Safety Laws for Generic Drugs*, 365:8 N. ENG. J. MED. 681, 683 (2011).

141. *Id.*

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VI. CONCLUSION

There is no easy solution to the problem highlighted by *PLIVA, Inc. v. Mensing*. Under existing laws regulating generic-drug manufacturers, the Supreme Court correctly held that it was impossible for PLIVA, Inc. to concurrently comply with both state and federal law. But, as evidenced by the narrow 5–4 decision, disagreement still exists. The prevailing precedent is that even in circumstances where a defendant may theoretically have an avenue that might allow him to comply with state law, the courts will not stretch the law to avoid preemption.

While the dual layer of consumer protection provides for a good balance between allowing businesses to operate on a consistent playing field and providing individuals a fair opportunity to seek compensation when injured, attempts to regulate generic-drug manufacturers present unique challenges. If a change to the law is made, prices will increase, which will likely have a negative impact on many generic-drug consumers. However, these changes might prevent future damage similar to that suffered by Julie Demahy and Gladys Mensing. Congress must take all of these factors into account in proceeding after the Supreme Court’s decision in *PLIVA, Inc. v. Mensing*.

Gregory J. Feeney