Clear Evidence Clarified

ERIC LINDENFELD*

ABSTRACT

In 2009, the Supreme Court introduced the "clear evidence" standard for the defense of federal preemption in the pharmaceutical products liability context. For the next ten years, the contours of the standard were inconsistently applied by courts. The Supreme Court's 2019 decision in *Merck Sharp & Dohme Corp. v. Albrecht* offers significant clarity to litigants. While certain issues remain unaddressed by the Court, it is clear that the newly stated rule dramatically limits defendants' ability to assert the clear evidence standard. The rule is a positive step for consumer safety, provides a clear, administrable bright line, and is not unreasonably broad.

INTRODUCTION

In 2009, the Supreme Court in *Wyeth v. Levine* articulated a standard of federal preemption for failure-to-warn claims in the brand name drug context.[1] Specifically, the Court ruled that a defendant could only be afforded the benefit of federal preemption if it could present "clear evidence" that the warning which plaintiffs argued should have been included on the label would have been rejected by the Food and Drug Administration (FDA).[2] Over the next decade, courts took wildly divergent approaches to *Levine*'s clear evidence standard, creating uncertainty amongst plaintiffs and defendants alike.[3] Courts disagreed, for example, on whether FDA denial of the warning must be actual or hypothetical.[4] Moreover, courts applying the clear evidence standard disagreed on the relevance and import of similar drug label rejections, years-old label rejections for the same drug, scientific literature, independent FDA studies, emails, correspondence, or materials buried in thousand-page submissions.[5] The confusion spawned a labyrinth of conflicting rulings and a decade worth of confusing and inconsistent precedent.[6] It has also generated a

* Attorney, Robins Kaplan LLP. Any views expressed in this Article are solely of the author, not of his employers or academic affiliations.

1 Wyeth v. Levine, 555 U.S. 555, 571 (2009).

2 *Id.*

3 Michael M. Gallagher, *Clear Evidence of Impossibility Preemption After Wyeth v. Levine*, 51 GONZ. L. REV. 439 (2016).

4 *Id.* at 477.

5 *See* discussion *infra* Part IV.a.

6 *Id.*

significant amount of scholarship, including scholarship by this author, calling on the high court to revisit and rearticulate the standard.[7]

Recognizing, perhaps, that clarification of the clear evidence standard was long overdue, in May 2019, the Supreme Court issued a ruling in *Merck Sharp & Dohme Corp. v. Albrecht*, with major impact on the product liability landscape.[8] Most significantly, the Court rejected the use of hypothetical preemption, clarifying that clear evidence requires that defendants show that FDA actually and expressly rejected the warning which plaintiffs argued was necessary under state tort law standards.[9] The Court's newly articulated five-part test also establishes that in order to receive the benefit of federal preemption, defendants must demonstrate that they provided FDA all material and relevant information.[10] While certain nuances were left unaddressed by the Court, and certain interpretive issues have been hotly debated amongst the first wave of commentators, the newly stated rule provides much needed clarification on the clear evidence inquiry. This clarification is especially important given that the standard's application is most common in high stakes, consolidated litigation involving thousands of lawsuits and some of the most innovative and complex drugs and devices ever sold.[11]

This paper proceeds in five Parts. Part I provides a background on the federal regulatory regime governing prescription drugs, including the mechanisms available to manufacturers and FDA to supplement a brand name drug's label.[12] Part II briefly lays the groundwork of the evolution of federal preemption principles in the brand name preemption context, including the foundation of the clear evidence standard.[13] Part III explains the conflicting applications of the traditional clear evidence standard and then progresses into the genesis and holding of the Supreme Court decision in *Albrecht*.[14] Part IV then analyzes the Supreme Court's holding, carefully detangling and examining the language of the newly stated rule, as well as forecasting its prospective interpretation and application.[15] Having concluded that the newly stated rule, at the minimum, dramatically limits defendants' ability to assert the clear evidence standard, Part V analyzes its potential policy implications.[16] The paper

---

[7] *See* Eric Lindenfeld, *Brand Name Preemption*: *The New Frontier in Pharmaceutical Product Liability Litigation*, 72 FOOD & DRUG L.J. 636, 636 (2017); Elizabeth Y. McCuskey, *On Drugs: Preemption, Presumption, and Remedy*, 38 J. LEGAL MED. 365 (2019); *see also* Gallagher, *supra* note 3.

[8] Merck Sharp & Dohme Corp. v. Albrecht*,* 139 S. Ct. 1668 (2019).

[9] *Id.* at 1679.

[10] *See* discussion *infra* Part IV.c.

[11] Most recently, federal preemption has played a role in the national opioid litigation, where various governmental entities have asserted claims against the makers, distributors, and dispensers of prescription opioids for their role in the current public health crisis. *See* Louis M. Bograd, *SCOTUS Preemption Ruling Good News for Drug and Device Plaintiffs*, MOTLEY RICE LAW BLOG (May 28, 2019), https://www.motleyrice.com/blogpost/scotus-drug-device-preemption-ruling [https://perma.cc/4MBB-L4NZ].

[12] *See* discussion *infra* Part I.

[13] *See* discussion *infra* Part II.

[14] *See* discussion *infra* Part III.

[15] *See* discussion *infra* Part IV.

[16] *See* discussion *infra* Part V.

concludes that *Albrecht*'s new rule is a positive step for consumer safety, offers consistency, will not overburden FDA, and is not overly draconian.[17]

I. THE FEDERAL REGULATORY LANDSCAPE

A. New Drug Application

Prescription drugs are governed by the Federal Food, Drug, and Cosmetic Act (FDCA).[18] The FDCA includes a strict and elaborate approval process for those companies who wish to market a brand name drug.[19] These companies must submit a New Drug Application (NDA), which requires evidence of animal testing, as well as preclinical and clinical human testing, amongst other forms of evidence to show that a drug is safe and effective.[20] The manufacturer has the burden to demonstrate "substantial evidence" that its drug is "safe and effective" for use.[21] Additionally, the NDA requires FDA approval of the label, a process which recognizes that all drugs carry risks and possible contraindications.[22] However, it is well established that brand manufacturers are ultimately "responsible for the accuracy and adequacy" of the warnings on their labels.[23] Manufacturers are charged both with crafting an adequate label and with ensuring that its warnings remain adequate as long as the drug is on the market.[24]

B. Changes Being Effected

Consistent with the manufacturer's primary and ongoing responsibility for its labels, FDA's "changes being effected" (CBE) regulation allows brand name drug manufacturers who are already marketing their products to unilaterally and immediately make changes to their labels to reflect "newly acquired information"

---

[17] Importantly, this paper does not address another critical holding in *Albrecht*. Specifically, the Court also held that the clear evidence inquiry is an issue of law for a judge, as opposed to an issue of fact for a jury. Reversing the Third Circuit, the Court engages in a meta-analysis of the proper allocation of the fact-finding function of judges in the preemption arena. This question, while important, is beyond the scope of this Paper. Though others have already begun to plow that field. *See* Matthew Wessler, *Merck Moving Forward*, TRIAL, Oct. 2019, at 60, 61; Elizabeth McCuskey, *Opinion Analysis: Clarity on "Clear Evidence" of Drug Pre-Emption?*, SCOTUSBLOG (May 21, 2019, 9:18 AM), https://www.scotusblog.com/2019/05/opinion-analysis-clarity-on-clear-evidence-of-drug-pre-emption/ [https://perma.cc/RMJ6-T8SS]; Elie Biel, *Searching for "Clear Evidence" in the Wake of Albrecht*, ABA (July 23, 2019), https://www.americanbar.org/groups/litigation/committees/mass-torts/articles/2019/fall2019-searching-for-clear-evidence-in-the-wake-of-albrecht/ [https://perma.cc/9KDM-EDNG].

[18] 21 U.S.C. § 301 *et seq.* ("FDCA").

[19] *See generally* Eric Lindenfeld, *Brand Name Preemption: The New Frontier in Pharmaceutical Product Liability Litigation*, 72 FOOD & DRUG L.J. 636 (2017).

[20] *See* 21 U.S.C. § 355.

[21] *See id.* § 355(d).

[22] *See generally* 21 U.S.C. § 355; 21 C.F.R. § 201.57 (2015); 21 C.F.R. § 314.105 (2016).

[23] PLIVA v. Mensing, 564 U.S. 604, 613 (2011) (citing 21 U.S.C. §§ 355(b)(1), (d)).

[24] *See, e.g.*, 21 C.F.R. § 201.80(e) (manufacturer must change its label "to include a warning as soon as there is reasonable evidence of an association of a serious hazard with a drug"); § 314.80(b) (placing ultimate responsibility for postmarketing surveillance on the drug manufacturer); 73 Fed. Reg. 49603, 49605 (Aug. 22, 2008) ("Manufacturers continue to have a responsibility under Federal law . . . to maintain their labeling and update the labeling with new safety information.").

without waiting for FDA preapproval.[25] Pursuant to the CBE procedure, a manufacturer can update its label to "add or strengthen a contraindication, warning, precaution, or adverse reaction"[26] as soon as there is "reasonable evidence of a causal association with a drug; a causal relationship need not have been definitely established."[27] A manufacturer may also "add or strengthen an instruction about dosage and administration that is intended to increase the safe use of the drug product"[28] and "delete false, misleading, or unsupported indications for use or claims for effectiveness."[29] Though, following a CBE change, FDA conducts its own review and retains the authority to eliminate any CBE changes that do not meet its standards.[30]

C. Prior Approval Supplement

For "major changes" to a drug's label or design, brand name manufacturers must utilize a Prior Approval Supplement (PAS).[31] A major change is a change that has a "substantial potential to have an adverse effect on the identity, strength, quality, purity, or potency of a drug product as these factors may relate to the safety or effectiveness of the drug product."[32] It also includes changes to most portions of a drug's label to the exception of those required to add or strengthen a warning.[33] Unlike the CBE process, a PAS change does require prior FDA approval before it can be effected.[34] Though, an applicant may request that FDA expedite its review of a PAS for public health reasons or if a delay in making the change described in it would impose an extraordinary hardship on the applicant.[35] Upon review of the PAS, FDA issues a complete response letter, which "informs sponsors of changes that must be made before an application can be approved, with no implication as to the ultimate approvability of the application."[36]

D. FDA's Own Action—§ 355(o)

The final post-market label change procedure involves FDA's own action. In 2007, Congress amended the FDCA[37] to authorize the FDA Secretary to "promptly notify" the manufacturer if it becomes aware of new safety information that the Secretary

---

[25] *Id.* § 314.70(c)(6)(iii). For a discussion of FDA's regulation of drugs, see Jasper L. Tran & Derek Tri Tran, *(De)Regulating Neuroenhancement*, 37 U. LA VERNE L. REV. 179, 186–91 (2015).

[26] 21 U.S.C. § 314.70(c)(6)(iii)(A).

[27] *Id.* § 201.57(c)(6)(i).

[28] *Id.* § 314.70(c)(6)(iii)(C).

[29] *Id.* § 314.70(c)(6)(iii)(D).

[30] *Id.* §§ 314.70(c)(4)–(6).

[31] *Id.* § 314.70(b).

[32] *Id.* § 314.70(c)(1).

[33] *Id.* § 314.70(b)(2)(v).

[34] *Id.* § 314.70(b).

[35] *Id.* § 314.70(b)(4).

[36] Applications for Approval to Market a New Drug; Complete Response Letter; Amendments to Unapproved Applications, 73 Fed. Reg. 39588, 39598 (Jul. 10, 2008).

[37] Food and Drug Administration Amendments Act of 2007, Pub. L. No. 110–85, § 107, 121 Stat. 823, 841.

believes should be included in the labeling of the drug."[38] The manufacturer then has thirty days to respond to the notification, either with a proposed supplemental warning addressing the safety concern or with an explanation with "why such a change is not warranted."[39] If FDA is not satisfied with the manufacturer's response, it then has the authority to "initiate discussions to reach agreement on whether the labeling for the drug should be modified to reflect the new safety information."[40] After discussions, FDA may order the manufacturer to implement a label change as it deems appropriate.[41] Finally, the Amendments clarify that they "shall not be construed to affect the responsibility of . . . the [manufacturer] to maintain its label in accordance with existing requirements," including its requirement to "include a warning as soon as there is reasonable evidence of a serious hazard with a drug."[42]

II. PREEMPTION AND CLEAR EVIDENCE

Despite the two avenues available to brand name manufacturers to independently initiate updates to their labels, defendants have routinely argued that it was "impossible" to permanently implement such label changes, and therefore, state law tort claims against them are federally preempted.[43] The defense of federal preemption is rooted in the Supremacy Clause of the United States Constitution, which establishes that federal law "shall be the supreme law of the land."[44] The Supreme Court has recognized that state laws which conflict with federal law are "without effect."[45] There are two ways in which a state law can conflict with federal law, either expressly or impliedly.[46] State law is "expressly preempted" when federal law includes language expressly precluding application of state law.[47] In turn, implied preemption is applied where state law creates an obstacle for federal law, where federal law creates an inference of federal exclusivity, or where it is *impossible* for one to comply with both federal and state law.[48] The last type, known as "impossibility preemption," has been the basis of manufacturers' preemption arguments over the past several decades.[49]

In 2009, *Wyeth v. Levine* became the first in a series of Supreme Court cases to address the "impossibility preemption" defense in the brand name labeling context.[50]

---

[38] 21 U.S.C. § 355(o)(4).

[39] *Id.* § 355(o)(4)(B).

[40] *Id.* § 355(o)(4).

[41] *Id.* § 355(o)(4)(D).

[42] *Id.* § 355(o)(4)(I) (citing subpart B of part 201 and section 314.70 of Title 21, Code of Federal Regulations.).

[43] *See* Lindenfeld, *supra* note 19.

[44] U.S. CONST. art. VI, cl. 2.

[45] Maryland v. Louisiana, 451 U.S. 725, 746 (1981).

[46] Eric Lindenfeld, *The Unintended Pregnancy Crisis: A No-Fault Fix*, 17 MARQ. BENEFITS & SOC. WELFARE L. REV. 285, 302 (2016).

[47] *Id.*

[48] *Id.* (citing Tyler W. Olson, *The Supreme Court's Overreaching Preemption Interpretation and Its Consequences: Granting Generic Drug Manufacturers Legal Immunity Through "The Duty of Sameness" in Mutual Pharmaceutical Co. v. Bartlett and PLIVA v. Mensing*, 12 IND. HEALTH L. REV. 769, 783 (2015)).

[49] *See generally* Lindenfeld, *supra* note 7, at 636.

[50] *See* Wyeth v. Levine, 555 U.S. 555, 579–81 (2009).

Wyeth involved allegations that the manufacturer of the drug Phenergan had failed to warn doctors regarding less risk-prone IV-push methods for administering IV medications.[51] The defendant argued that the plaintiff's claims were preempted because it could not comply with both state and federal law.[52] The Court, noting "the central premise of federal drug regulation that the manufacturer bears responsibility for the content of its label at all times," disagreed with the defendant.[53] The Court found that it was not "impossible" for the defendant to comply with state law tort theories, as the defendant could have unilaterally updated its labels through the CBE process.[54] Recognizing, however, that FDA can ultimately disapprove of and reject the added CBE warnings, the Court ruled that if the defendant could demonstrate "*clear evidence* that the FDA would not have approved [the] change" in question, preemption would not apply.[55]

III. IN RE FOSAMAX

Over the past decade, courts have taken wildly divergent approaches to the "clear evidence" articulated in *Levine*. Courts have been split, for example, on whether similar drug label rejections, years-old label rejections for the same drug, scientific literature, independent FDA studies, emails, correspondence, or materials buried in thousand-page submissions can be considered by a court during the clear evidence inquiry.[56] The force of denied citizen petitions[57] and their potential impact on the clear evidence standard has also been a source of debate amongst lower and appellate courts.[58] Courts have also issued inconsistent rulings with regards to the sufficiency of defendants' submissions to FDA and its impact on the clear evidence inquiry.[59] Given these inconsistencies, this author has previously argued that "[t]he Supreme Court may choose to revisit the clear evidence standard in the near future."[60] In 2019, the Supreme Court indeed chose to clarify the clear evidence standard in *In Re: Fosamax*.

A. The Drug

Fosamax (alendronate) belongs to a class of drugs called bisphosphonates and is approved for the treatment and prevention of osteoporosis in menopausal women.[61] Osteoporosis, which literally means "porous bone," is a medical condition in which

---

[51] *Id.*

[52] *Id.*

[53] *Id.* at 571.

[54] *Id.*

[55] *Id.* (emphasis added).

[56] *See* discussion *infra* Part IV.a; *see also* Lindenfeld, *supra* note 7, at 642–44.

[57] An FDA citizen petition is a process provided by the United States Food and Drug Administration to make requests to FDA for changes to health policy.

[58] Lindenfeld, *supra* note 7, at 644–46.

[59] *Id.*

[60] *Id.* at 656.

[61] *See What's the Story with Fosamax?*, HARV. HEALTH PUBL'G: HARV. WOMEN'S HEALTH WATCH (Nov. 2008), https://www.health.harvard.edu/diseases-and%20conditions/whats_the_story_with_fosamax [https://perma.cc/S4AB-K9PR].

the density and quality of a bone are reduced, leading to brittle and porous bones susceptible to fracture.[62] Since the drug's inception, Merck was aware that Fosamax and other bisphosphonates were associated with, and could theoretically cause, certain types of bone fractures, including stress fractures.[63] While Merck did advise FDA regarding its findings, FDA did not require them to include the risk on the drug's label when it was approved.[64] From 1995–2010, scientific literature was published on the potential connection between bisphosphonate use for both stress and atypical fractures.[65] Much of this information was provided by Merck to FDA within their regular safety submissions.[66]

In June 2008, FDA requested more information on the potential link between atypical fractures and bisphosphonate use.[67] While FDA was analyzing Merck's submitted data, Merck attempted to revise, in part, the precautions section of the drug's label utilizing the PAS procedure to reflect the risk of both stress fractures *and* atypical fractures, as well as advising of a potential link between the two.[68] In May 2009, FDA responded, rejecting Merck's proposed label update because "[i]dentification of 'stress fractures' may not be clearly related to the atypical subtrochanteric fractures that have been reported in the literature."[69] Though FDA invited Merck to resubmit its application using alternative language, Merck instead withdrew its application.[70] After assigning its own task force to investigate the issue, in 2010 FDA required all bisphosphonate drugs, including Fosamax, to include a warning for the risk of atypical fractures only.[71] Unlike the proposed label submitted by Merck, the mandated label update contained no reference to stress fractures.[72]

---

[62] *What is Osteoporosis?*, INT'L OSTEOPOROSIS FOUND., https://www.iofbonehealth.org/what-is-osteoporosis [https://perma.cc/E2YP-RDBK] (last visited Oct. 17, 2020).

[63] *In re* Fosamax Alendronate Sodium Prods. Liab. Litig., 852 F.3d 268, 275 (3d Cir. 2017).

[64] *Id.*

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] The suggested label change provided as follows: "Low-Energy Femoral Shaft Fracture - Low-energy fractures of the subtrochanteric and proximal femoral shaft have been reported in a small number of bisphosphonate-treated patients. Some were stress fractures (also known as insufficiency fractures) occurring in the absence of trauma. Some patients experienced prodromal pain in the affected area, often associated with imaging features of stress fracture, weeks to months before a complete fracture occurred. The number of reports of this condition is very low, and stress fractures with similar clinical features also have occurred in patients not treated with bisphosphonates. Patients with suspected stress fractures should be evaluated, including evaluation for known causes and risk factors (e.g., vitamin D deficiency, malabsorption, glucocorticoid use, previous stress fracture, lower extremity arthritis or fracture, extreme or increased exercise, diabetes mellitus, chronic alcohol abuse), and receive appropriate orthopaedic care. Interruption of bisphosphonate therapy in patients with stress fractures should be considered, pending evaluation of the patient, based on individual benefit/risk assessment." *In re* Fosamax, No. 08-08 (JAP)(LHG), 2014 U.S. Dist. LEXIS 42253, at *14–15 (D.N.J. Mar. 26, 2014). For an example of a procedural misunderstanding, see Jasper L. Tran, *The Myth of Hush-A-Phone v. United States*, 41 IEEE ANNALS HIST. COMPUTING 6 (2019).

[69] Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1674 (2019).

[70] *Id.*

[71] *Id.*

[72] *Id.* at 1674–75.

B. The Litigation—Trial and Appeal

Soon after FDA's mandated warning change, plaintiff lawyers filed thousands of lawsuits across the country, with the Judicial Panel on Multidistrict Litigation consolidating the cases in May 2011 in New Jersey.[73] Most of these plaintiffs alleged that they experienced atypical femoral fractures and that Merck failed to take appropriate measures to warn them of the potential risk.[74] Following a jury verdict for Merck on plaintiffs' first bellwether trial, the trial court found for Merck on preemption, agreeing with Merck's contention that FDA's rejection of Merck's 2008 PAS application (which included the risk of atypical and stress fractures and connecting the two) satisfied *Wyeth*'s "clear evidence" standard.[75] The court reasoned that had FDA's main objection to the proposed label been the stress fracture language, and had it been willing to approve a label change including the risk of atypical fractures, FDA would have explicitly stated as much in their response letter.[76] As the court observed, FDA has the authority to request that defendants submit alternative language to a PAS supplement.[77]

In March 2017, the Third Circuit reversed the trial court's finding of federal preemption.[78] Writing for a unanimous court, Judge Chagares Fuentes first reviewed the *Wyeth* clear evidence standard, describing it as "cryptic and open-ended" and stating that "lower courts have struggled to make it readily administrable."[79] The Third Circuit identified various approaches to the clear evidence standard, with one approach as treating *Wyeth* itself as a yardstick and other courts as "exhaustively surveying the post-Wyeth case law and then testing the facts of a particular case against prior decisions."[80] Rejecting both theories as "[producing] valid outcomes in individual cases, but neither clarify[ing] or build[ing] out the doctrine," the court determined that in enunciating the clear evidence standard, the "Supreme Court intended to announce a standard of proof."[81] Reviewing literature on the term "clear evidence," the Third Circuit concluded that "the factfinder must conclude that it is *highly probable* that the FDA would not have approved a change to the drug's label."[82] The Court remanded the case back to the trial court instructing it to utilize the newly clarified standard.[83]

---

[73] *In re* Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II), 787 F. Supp. 2d 1355, 1357 (J.P.M.L. 2011).

[74] *See supra* note 69 (*In re* Fosamax).

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] *In re* Fosamax (Alendronate Sodium) Prods. Liab. Litig., 852 F.3d 268, 270 (3d Cir. 2017), *cert. granted sub nom.* Merck Sharp & Dohme Corp v. Albrecht, 138 S. Ct. 2705 (2018), and *vacated and remanded sub nom*. Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019).

[79] *Id.* at 282.

[80] *Id.* at 284.

[81] *Id.*

[82] *Id.* at 286.

[83] As discussed in *supra* note 17, the second half of the Third Circuit's opinion also determined that the clear evidence standard is typically a question of fact best reserved for the jury, rather than a judge. This issue, which is complex, and implicates age-old doctrines regarding the proper function of judge and jury, is beyond the scope of this Article. For an in-depth discussion of this issue, see Thomas E. Riley & Conor Doyle, *Recent Developments in Products Liability*, 53 TORT TRIAL & INS. PRAC. L.J. 545, 555 (2018);

C. The Supreme Court

Following the Third Circuit's ruling, defense-oriented legal scholar James Beck decried it as a "horrible decision,"[84] ranking it as the "worst prescription drug/medical device decision of 2017,"[85] and stated that "it flies in the face of more supposedly binding Third Circuit precedent than we have fingers."[86] Other defense-oriented commentators have used even more forceful language, suggesting that the court reached an "awful conclusion,"[87] that the decision was "pure hogwash,"[88] "truly bizarre,"[89] an "abomination,"[90] and "turns on dithering."[91] Though, many others, including this author, praised the ruling, but recognized that, regardless of the ruling's merits, it justified Supreme Court affirmation.[92] Then, in June 2018, the Supreme Court granted Merck's writ of certiorari.[93] In their briefs, Merck and various amici curiae argued that various informal agency communications, combined with FDA's rejection of a warning including the risk of atypical and stress fractures was sufficient to demonstrate *Levine*'s clear evidence standard.[94] In turn, plaintiffs and their amici

---

Elizabeth Y. McCuskey, On Drugs: Renovating Impossibility Preemption, Address at FDA: Past, Present, and Future Conference (Oct. 19, 2018); Adam Zimmerman, *Regulating Safety After Merck v. Albrecht*, REGULATORY REV. (July 18, 2019), https://www.theregreview.org/2019/07/18/zimmerman-after-merck-albrecht/ [https://perma.cc/2H7A-3334]; Max Kennerly, *The Solicitor General's Brief In Fosamax—An End To Levine Preemption?*, LITIGATION & TRIAL (May 24, 2018), https://www.litigationandtrial.com/2018/05/articles/attorney/solicitor-general-fosamax/ [https://perma.cc/J4F4-VH8B]; *see also* H. Albert Liou & Jasper L. Tran, *Internet (Re)Search by Judges, Jurors, and Lawyers*, 9 IP THEORY 1 (2019); *compare with* Jasper L. Tran, *Navigating the Cybersecurity Act of 2015*, 19 CHAP. L. REV. 483 (2016); Jasper L. Tran, *A Primer on Digital Rights Management Technologies*, *in* DIGITAL RIGHTS MANAGEMENT: THE LIBRARIAN'S GUIDE 27–48 (Catherine A. Lemmer & Carla P. Wale eds., 2016); *Id.* (SCOTUS remanded).

[84] James Beck, *Albrecht Oral Argument—Better Us Than Them*, DRUG & DEVICE LAW (Jan. 10, 2019), https://www.druganddevicelawblog.com/2019/01/albrecht-oral-argument-better-us-than-them.html [https://perma.cc/DY64-2DWE].

[85] James Beck, *The Lows—Mourning the Worst Prescription Drug/Medical Device Decisions of 2017*, DRUG & DEVICE LAW (Dec. 21, 2017), https://www.druganddevicelawblog.com/2017/12/the-lows-%E2%88%92-mourning-the-worst-prescription-drugmedical-device-decisions-of-2017.html [https://perma.cc/TJA5-UW7K].

[86] *Id.*

[87] Michelle Yeary, *Third Circuit Reinterprets Wyeth v. Levine for the Worse and Finds Preemption is a Jury Question*, DRUG & DEVICE LAW (Mar. 18, 2017), https://www.druganddevicelawblog.com/2017/03/third-circuit-reinterprets-wyeth-v-levine-for-the-worse-and-finds-preemption-is-a-jury-question.html [https://perma.cc/P89D-3ESN].

[88] Stephen McConnell, *The Bank Rejects Fosamax Folly*, DRUG & DEVICE LAW (Oct. 11, 2017), https://www.druganddevicelawblog.com/2017/10/the-bank-rejects-fosamax-folly.html [https://perma.cc/9FE8-UTCJ].

[89] Stephen McConnell, *The Third Circuit Fosamax Preemption Error Has Got to Go,* DRUG & DEVICE LAW (Sept. 13, 2017), https://www.druganddevicelawblog.com/2017/09/the-third-circuit-fosamax-preemption-error-has-got-to-go.html [https://perma.cc/QR6L-K776].

[90] *Id.*

[91] *Id.*

[92] *See* Lindenfeld, *supra* note 19, at 646–47.

[93] Merck Sharp & Dohme Corp v. Albrecht, 138 S. Ct. 2705 (2018).

[94] *See* Brief for Petitioner, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 4522276; Brief for Pharmaceutical Research and Manufacturers of America and Biotechnology Innovation Organization as Amici Curiae in Support of Petitioner, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 4611228; Brief of the Product Liability Advisory Council, Inc. and the Chamber of Commerce of the United States of America as Amici Curiae in

argued that at no time was it apparent that FDA would have rejected a label that included the clear risk of atypical fractures only, and so the clear evidence standard had not been satisfied.[95]

In May 2019, the Supreme Court, in a seventeen page opinion, reversed the Third Circuit.[96] Writing for the majority, Justice Breyer first rehashed the facts and holding of *Wyeth v. Levine* as well as its holding that "drug manufacturers bear the responsibility for the content of their drug labels."[97] The majority rejected the Third Circuit's reading of "clear evidence" as a standard of proof which means "highly probable."[98] The Court instead clarified that the standard simply required defendants to "show that it fully informed the FDA of the justifications for the warning required by state law and that the FDA, in turn, informed the drug manufacturer that the FDA would not approve changing the drug's label to include that warning."[99]

In so doing, the Court rejected defendants' arguments that the preemption standard could be satisfied through evidence regarding the hypothetical question of what FDA *would have done* had the label required under state law been proposed by defendants.[100] The Court emphasized that only "final agency actions with the force of law" can determine the answer to the preemption question.[101] Those include notice and comment rulemaking, formally rejecting a warning label, or "other agency action carrying the force of law."[102] Having clarified the relevant legal issues, the Supreme Court remanded the case back to the lower court to apply the standard.

Support of Petitioner, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 4562162; Brief for the United States as Amicus Curiae Supporting Petitioner, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 4562163; Brief of Washington Legal Foundation as Amicus Curiae in Support of Petitioner, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 4562161. For a discussion on bioprinting and 3D printing, see Jasper L. Tran, *To Bioprint or Not to Bioprint*, 17 N.C. J.L. & TECH. 123, 133–35 (2015); Jasper L. Tran, *Patenting Bioprinting*, HARV. J.L. & TECH.: THE JOLT DIGEST (May 7, 2015), https://jolt.law.harvard.edu/digest/patenting-bioprinting [https://perma.cc/GD5W-FXWW]; Jasper L. Tran, *The Law and 3D Printing*, 31 J. MARSHALL J. INFO. TECH. & PRIVACY L. 505, 505–08 (2015); Jasper L. Tran, *Press Clause and 3D Printing*, 14 NW. J. TECH. & INTELL. PROP. 75, 78 (2016); Jasper L. Tran, *3D-Printed Food*, 17 MINN. J. SCI. & TECH. 855 (2016).

[95] *See* Brief For Respondents, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 6012388; Brief of American Association for Justice as Amicus Curiae in Support of Respondents, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 6258929; Brief of the Cato Institute as Amicus Curiae in Support of Respondents, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 6191462; Brief of Medshadow and Former FDA Officials as Amici Curiae in Support of Respondents, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 6168774; Brief of Public Citizen as Amicus Curiae in Support of Respondents, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 6191463; Brief of Public Law Scholars as Amici Curiae in Support of Respondents, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 6168776; Brief of Tort Law Professors John C.P. Goldberg and Benjamin C. Zipursky as Amici Curiae in Support of Respondents, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 6168775.

[96] *Albrecht*, 139 S. Ct. at 1680.

[97] *Id.* at 1670.

[98] *Id.* at 1676.

[99] *Id.* at 1678.

[100] *Id.* at 1679.

[101] *Id.* at 1678.

[102] Though beyond the scope of this Article, the Court also rejected the Third Circuit's finding that the issue of preemption in the context of brand name pharmaceuticals is a question of fact to be determined

IV. *ALBRECHT*'S FIVE PART PREEMPTION TEST—A DEEP DIVE

The Supreme Court's newly articulated standard has five parts. To succeed on preemption it must be demonstrated that, "[(1)] the drug manufacturer [(2)] fully informed the FDA [(3)] of the justifications for the warning required by state law [(4)] and that the FDA, in turn, informed the drug manufacturer [(5)] that the FDA would not approve changing the drug's label to include that warning."[103] On their face, these five elements are an extremely positive development for plaintiffs resisting defendants' clear evidence arguments.[104] For example, it is now clear that hypothetical preemption arguments face an uphill battle and that in order to be successful on preemption, defendants must have submitted a proposed label change, a clear analysis of the relevant risk including all relevant information, and must show that FDA rejected this exact warning.[105] However, the analysis (and attendant five part test) leaves certain issues unclear, and require unpacking.

A. Hypothetical Preemption is (Nearly) Dead

It is clear that *Albrecht*'s directive concerning actual rejection of the label involving "agency action with the force of law" acts to preclude most preemption arguments based on hypothetical decisions by FDA.[106] Prior to *Albrecht*, defendants had argued that alternative forms of evidence could be used to demonstrate that FDA *would have* (i.e., hypothetically) denied the label had it been proposed by the defendant manufacturer itself, even if it had not actually been proposed by the defendant.[107] For

by a jury, as opposed to a question of law for the judge. The Court reasoned that "legal skills," especially those in administrative law, are required to measure undisputed facts to determine whether FDA disapproval occurred, as well as the nature and scope of FDA's determination. The Court further found that this result would "produce greater uniformity among courts," and that "greater uniformity is normally a virtue when a question requires a determination concerning the scope and effect of federal agency action." While the court conceded that "contested brute facts will prove relevant," especially regarding what facts were and were not provided to FDA by the manufacturer, it nevertheless concluded that "we consider these factual questions to be subsumed within an already tightly circumscribed legal analysis." Therefore, even submission of subsidiary factual questions of the jury is unjustified.

[103] *Id.* at 1672.

[104] As distinguished plaintiff-oriented commentator Maxwell S. Kennerly has observed, it is clear that "[t]he Supreme Court's analysis in Albrecht is far more narrow than any preemption argument ever proposed by drug manufacturers, and far more narrow than the 'clear evidence' tests many lower courts have been using since Wyeth . . . ." Maxwell S. Kennerly, *Merck v. Albrecht: The Supreme Court Eviscerates Preemption in Branded Drug Lawsuits*, LITIG. & TRIAL (May 31, 2019), https://www.litigationandtrial.com/2019/05/articles/attorney/merck-v-albrecht-impossibility-preemption/ [https://perma.cc/9AGV-XV89].

[105] *Id.*

[106] The *Albrecht* test specifically provides that defendants must show that they have submitted a warning change proposal, and "the FDA, in turn, informed the drug manufacturer that the FDA would not approve changing the drug's label to include that warning." Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1680 (2019).

[107] *See, e.g.*, *In re* Incretin-Based Therapies Prods. Liab. Litig., 142 F. Supp. 3d 1108, 1124 (S.D. Cal. 2015), *vacated*, 721 F. App'x 580 (9th Cir. 2017) ("The Supreme Court stated a manufacturer must demonstrate by clear evidence the FDA *would* have rejected a label change, not whether the FDA *did* reject the labeling change sought by a plaintiff."); Reckis v. Johnson and Johnson, 28 N.E.3d 445, 460 (2015) ("This is not to say that the *Wyeth* standard of clear evidence can be satisfied only by the FDA's rejection of a manufacturer's request for an additional warning."); Seufert v. Merck Sharp & Dohme Corp., 187 F. Supp. 3d 1163, 1169 (S.D. Cal. 2016) ("*Levine* does not premise clear evidence on manufacturer submission

example, the defendants had proffered, sometimes to great effect, other evidence in support of clear evidence, such as previous FDA label rejections for similar drugs.[108] In *Dobbs v. Wyeth Pharm.*, the court found that FDA's rejection of a *pediatric* suicidality warning was highly persuasive in finding the plaintiff's claims, which focused on warning of an increased risk of suicide in *adults*, preempted.[109] Emails and correspondence between the manufacturer and FDA have also been wielded by defendants in an attempt to buttress these arguments.[110]

Defendants had also been successful in arguing that FDA's failure to mandate a warning label change despite available scientific literature reflecting the risk (including FDA's own scientific reviews) was "clear evidence" that it would have rejected a label had it been proposed by defendants.[111] For example, in 2016, a California district court in *Seufert v. Merck Sharp & Dohme Corp.* observed that "*Levine* does not premise clear evidence on manufacturer submission of a proposed warning to FDA."[112] Reviewing the available evidence, the court then concluded that FDA's own, independent scientific review, in part, demonstrates that if the manufacturer had requested additional warnings of the drug reflecting pancreatic cancer, FDA would have denied their request. It is now clear that defendants have an uphill battle in demonstrating clear evidence preemption absent an actual rejection of the label change in question.[113]

B. The Force of Denied Citizen Petitions is Uncertain

The deterioration of hypothetical preemption also helps put to bed arguments that denied citizen petitions can be used to demonstrate what FDA would have done had the label change been proposed by defendants themselves. To be clear, even before *Albrecht*, many courts had rejected these arguments.[114] However, the approach had

---

of a proposed warning to the FDA."); Cerveny v. Aventis, Inc., 2:14-CV-00545, 2016 WL 1065826 at *24 (D. Utah, Mar. 16, 2016) ("Courts have universally rejected the notion that *Levine* requires a showing that the manufacturer attempted to apply the warning suggested by the plaintiff but that the labeling was ultimately rejected by the FDA.").

[108] Lindenfeld, *supra* note 19.

[109] Dobbs v. Wyeth Pharm., 797 F. Supp. 2d 1264, 1276-77 (W.D. Okla. 2011).

[110] Schilf v. Eli Lilly & Co., No. CIV 07-4015, 2010 WL 3909909, at *4 (D.S.D. Sept. 30, 2010); *In re* Fosamax, No. 08-08 (JAP)(LHG), 2014 U.S. Dist. LEXIS 42253, at *14–15 (D.N.J. Mar. 26, 2014).

[111] Lindenfeld, *supra* note 19, at 643.

[112] Seufert v. Merck Sharp & Dohme Corp., 187 F. Supp. 3d 1163, 1169 (S.D. Cal. 2016).

[113] To be clear, at least one court has recently determined that *Albrecht* has not done away with hypothetical preemption entirely. *See* Dolin v. GlaxoSmithKline LLC*,* 951 F.3d 882 (7th Cir. 2020). Acknowledging that "language in *Albrecht* . . . could be interpreted as a significant modification of the *Wyeth* standard for applying the CBE regulation to preemption of labeling claims," the Seventh Circuit in *Dolin* nevertheless characterized *Albrecht*'s "language of ordinary evolution and clarification in case law, not reversal and overruling." *Id.* at 890. Turning to *Wyeth*, the court found that *Wyeth*'s invocation of the phrase "'would not have approved' implies that the defendant may be able to satisfy the standard without showing that it actually requested a change for the label and that the FDA rejected it." *Id.* The court therefore found that hypothetical preemption was still appropriate.

[114] The majority of courts denied these arguments on the grounds that there is a fundamental difference between FDA refusing to mandate a label change pursuant to a citizen petition and prohibiting a label change pursuant to a manufacturer's request. *See, e.g.*, Staka v. Johnson & Johnson *(In re* Levaquin Prods. Liab. Litig.), No. 08-1943 (JRT), 2011 U.S. Dist. LEXIS 148892, at *16 (D. Minn. Dec. 28, 2011) (finding no preemption, "[b]ecause a brand name manufacturer has the responsibility to update a label with new safety information . . . the FDA could have responded differently to a petition from the Defendants than

previously been successful before the Tenth Circuit in *Cerveny v. Aventis, Inc*., which "conclude[d] that the rejection of a citizen petition may constitute clear evidence that the FDA would have rejected a manufacturer-initiated change to a drug label."[115] Two years prior, in *Reckis v. Johnson & Johnson*, the Massachusetts Supreme Court similarly determined that a previously denied citizen petition rejecting language concerning Stevens-Johnson Syndrome (STS) or Toxic Epidermal Necrolysis (TEN) on Children's Motrin provides the necessary "clear evidence" that such addition would have been rejected if proposed by the manufacturer.[116] Several other state and federal courts have ruled in accord with those decisions.[117]

Even in the wake of *Albrecht*, however, defendants have argued that denied citizen petitions still retain their preemptive force to the extent they are an actual rejection of a label by FDA, consistent with the *Albrecht* framework.[118] This argument, however, runs against the plain language of *Albrecht*. Under Part one of the *Albrecht* test, it must be the *manufacturer* who proposes the change.[119] On the other hand, many defense-

it did to the citizens' petition"); Batoh v. McNeil-PPC, Inc., 167 F. Supp. 3d 296, 319 (D. Conn. 2016) ("the FDA's rejection of the suggestions in a Citizens' Petition does not provide clear evidence that it would reject similar warnings proposed by a *manufacturer*."); Dorsett v. Sandoz, Inc., 699 F. Supp. 2d 1142, 1157 (C.D. Cal. 2010) (noting that "the FDA's rejection of those petitions constituted determinations that the warnings should not be *mandated*; they were not determinations that manufacturers could not choose to add warnings that they believed were scientifically substantiated"); Schedin v. Ortho-McNeil-Janssen Pharms., Inc., 808 F. Supp. 2d 1125, 1133 (D. Minn. 2011), *aff'd in part*, *rev'd in part sub nom*; Schedin v. Ortho-McNeil-Janssen Pharms., *Inc.*, (*In re* Levaquin Prods. Liab. Litig.), 700 F.3d 1161 (8th Cir. 2012) (denied citizen petition requesting change not sufficient to demonstrate clear evidence); Baumgardner v. Wyeth Pharms., No. 06-2519, 2010 WL 3431671, at *1 (E.D. Pa. Aug. 31, 2010) (denied citizen petition does not "prove[] that the FDA would have rejected relevant warnings had Wyeth, the manufacturer, proposed them"). Courts also reject defendants' arguments concerning denied citizen petitions on different grounds. Namely, because the denied citizen petition occurred many years prior to the ingestion of the drug, and "additional studies were conducted in the interim." Dobbs v. Wyeth Pharms., 797 F. Supp. 2d 1264, 1277 (W.D. Okla. 2011); *see also* Koho v. Forest Labs., Inc., 17 F. Supp. 3d 1109, 1117 (W.D. Wash. 2014) ("[T]he temporal gap between the latest rejection of a citizen petition in 1997 and Ilich's death in 2002 is significant."); Mason v. SmithKline Beecham Corp., 596 F.3d 387, 389 (7th Cir. 2010) ("This temporal gap is especially important in the analysis of prescription drugs because it constantly evolves as new data emerges."); Hunt v. McNeil Consumer Healthcare, 6 F. Supp. 3d 694, 701 (E.D. La. 2014) 6 F. Supp. 3d at 701 (same).

[115] Cerveny v. Aventis, Inc., 855 F.3d 1091, 1104 (10th Cir. 2017).

[116] Reckis v. Johnson & Johnson, 28 N.E.3d 445, 458 (Mass. 2015).

[117] Risperdal & Invega Prod. Liab. Cases, No. BC599531, 2017 WL 4100102, at *10 (Cal. Super. Ct. L.A. Cty., Mar. 16, 2017) (granting defendants' motion for summary judgment regarding all claims on preemption grounds because, inter alia, "[t]he denial of the Citizen Petition [through the FDA's November 2014 letter] . . . alone serves to provide 'clear evidence' that the FDA was satisfied with the current Risperdal label insofar as pediatric usage is concerned and would not have adopted Plaintiffs' proposed change"); Robinson v. McNeil Consumer Healthcare, 615 F.3d 861, 873 (7th Cir. 2010) ("The 'clear evidence' in this case is the agency's refusal to require a reference to SJS/TEN on the label of over-the-counter drugs containing ibuprofen, when it had been asked to do so in the submission [i.e., citizen petition] to which the agency was responding.").

[118] James Beck, *Breaking News—Albrecht Prescription Drug Preemption Case Decided—Worst Decision of 2017 Reversed*, DRUG & DEVICE BLOG (May 20, 2019), https://www.druganddevicelawblog.com/2019/05/breaking-news-albrecht-prescription-drug-preemption-case-decided-%E2%88%92-worst-decision-of-2017-reversed.html#:~:text=of%202017%20Reversed-,Breaking%20News%20%E2%80%93%20Albrecht%20Prescription%20Drug%20Preemption%20Case%20Decided,Worst%20Decision%20of%202017%20Reversed&text=(U.S.%20May%2020%2C%202019),2017) [https://perma.cc/W23V-DQUX] [hereinafter Beck, *Breaking News*]; James Beck, *"Fully Informing" the FDA*, DRUG & DEVICE BLOG (Sept. 26, 2019), https://www.lexology.com/library/detail.aspx?g=f70004f1-8e48-4280-859c-508414e0cba6 [https://perma.cc/K9P2-WP92].

[119] Merck Sharp & Dohme Corp., 139 S. Ct. 1668, 1679 (2019).

oriented commentators have argued that citizen petitions nevertheless satisfy the test, proposing that the Supreme Court's directive in Part one of the *Albrecht* test is "best understood as mere loose language—attributable to the fact that [*Albrecht*] itself was a case where the *manufacturer*, and not a third party, has provided relevant information to the FDA."[120] While the approach has some superficial appeal, it is unlikely the Supreme Court would be so casual with language in a legal test with so much prospective importance, especially given the previous debate on the issue.

The few courts that have been faced with the issue in the immediate wake of *Albrecht* have sided with defendants. For example, in August 2019, the Tenth Circuit in *Cerveny II* expressed approval for citizen petitions as a source of preemption, observing that "we see nothing in *Wyeth* or *Albrecht* excluding Aventis from justifying preemption on this basis."[121] Similarly, in July 2019, a North Dakota trial court denied plaintiffs' motion for consideration on the preemption issue.[122] Specifically, the court refused to "read Merck so narrowly," stating that "The *Merck* Court certainly did not decide whether other agency actions, such as the denial of a Citizen Petition, would be sufficient."[123] Ultimately, only time will tell if courts continue to find that citizen petitions remain a viable approach to federal preemption in the brand name context.

C. Defendants Must Have Provided Full Information to FDA

Part two of the *Albrecht* test, which requires that defendants "fully informed the FDA," precludes preemption where defendants cannot demonstrate that they provided FDA with all available information. This is critical, given that a growing number of courts have determined that any inquiry into the sufficiency of defendants' submissions to FDA is preempted under the Supreme Court decision of *Buckman Co. v. Plaintiffs' Legal Committee*.[124] In *Buckman*, the Supreme Court held that plaintiffs' state-law "fraud-on-the-FDA" claims against a medical device manufacturer were preempted because those claims were based upon duties established under federal law and therefore "inevitably conflict[ed] with the FDA's responsibility to police fraud consistently with the Administration's judgment and objectives."[125] Seizing upon this holding, several defendants in failure-to-warn context have argued that the nature of submitted data, or lack thereof, is necessarily a "fraud on the FDA" argument

---

[120] Jonah M. Knobler, *Merck v. Albrecht: Victories, Uncertainties, and Opportunities from Supreme Court's Return to Branded-Drug Preemption*, WASH. LEGAL FOUND. (June 28, 2019), https://www.wlf.org/2019/06/28/publishing/merck-v-albrecht-victories-uncertainties-and-opportunities-from-supreme-courts-return-to-branded-drug-preemption/ [https://perma.cc/R75Z-39B9]; *see also* Beck, *Breaking News*, supra note 118 (observing that [t]his definition avoids situations where the FDA was 'fully informed' (or not) by someone else, such as through a third-party Citizen's Petition. The majority doesn't reach facts not before it").

[121] Cerveny v. Aventis, Inc., No. BC599531, 2019 WL 3763441, at *7 n.3 (10th Cir. Aug. 9, 2019).

[122] State v. Purdue Pharma L.P., No. 08-2018-CV-01300, 2019 WL 3776653, at *2 (N.D. Dist. July 22, 2019).

[123] *Id.*

[124] Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341 (2001).

[125] *Id.* at 350.

irrelevant to the clear evidence inquiry and beyond the scope of appropriate and allowable discovery.[126]

Though plaintiffs have successfully pushed back on these arguments in certain circumstances,[127] a number of courts have held that *Buckman* precludes, at the clear evidence stage, inquiries into sufficiency of a manufacturer's submissions to FDA. For example, the trial court in *Fosamax* held that allegations "that Merck withheld information from the FDA" do not defeat preemption . . . . Plaintiffs' contention appears to be a fraud-on-the-FDA theory which was rejected by the Supreme Court in *Buckman* . . . ."[128] Similarly, in *Rheinfrank v. Abbott Labs., Inc*., the court rejected plaintiffs' arguments that defendants' failure to provide FDA with all relevant information could rebuff a clear evidence argument, observing that the argument "appears to be a fraud-on-the-FDA theory, which is preempted."[129] And in *Seufert v. Merck Sharp & Dohme Corp.*, the court found that "Buckman does not permit discovery on the grounds that information withheld from the FDA can rebut a finding of clear evidence. To hold otherwise would allow a plaintiff to cite any data, presumably unconsidered by the FDA, to overcome a conflict preemption defense."[130]

Part two of the *Albrecht* preemption test, therefore, puts the issue to bed, quelling the growing number of courts that have interpreted *Buckman* as having such a wide-ranging and preclusive effect on the clear evidence inquiry. Moving forward, plaintiffs who believe that defendants were less than forthright with FDA in their submissions regarding the risk in question will be able to point to *Albrecht* when resisting summary judgment or seeking discovery into defendants' scientific data. However, some issues were left unclear by the court. First, the court suggested that to "fully inform" FDA is to provide it with all "material" information.[131] But what is "material" information, and must the court itself make this determination? Must it be likely that the omitted information would have altered FDA's decision to decline the addition to the label? Most importantly, doesn't this inquiry teeter closely to the hypothetical preemption question the Court so emphatically rejected in *Albrecht*?[132] Obviously, lower courts

---

[126] *See generally* Joshua D. Lee, *Reconsidering the Traditional Analysis: Should Buckman Alone Support Preemption of Fraud-on-the-FDA Exceptions to Tort Immunity*?, 17 N.Y.U. J. LEGIS. & PUB. POL'Y 1055, 1057 (2014).

[127] Adams v. Merck Sharp & Dohme Corp. (*In re* Incretin-Based Therapies Prods. Liab. Litig.), 721 Fed. App'x 580, 581–82 (9th Cir. 2017) (finding that the district court erroneously "relied on Buckman to deem the plaintiffs' newly discovered evidence "irrelevant" to the court's preemption analysis at the summary judgment stage"); Allen v. Takeda Pharms. N. Am., Inc. (*In re* Actos), No. 15-56997, 2014 U.S. Dist. LEXIS 121648 at *79–89 (W.D. La. Aug. 28, 2014) (clear evidence is not present where a manufacturer resisted a label change and withheld pertinent information from FDA about a particular risk).

[128] *In re* Fosamax, No. 08-08 (JAP)(LHG), 2014 WL 1266994, at *17 (D.N.J. Mar. 26, 2014).

[129] Rheinfrank v. Abbott Labs., Inc., 119 F. Supp. 3d 749, 767 (S.D. Ohio 2015), *aff'd*, 680 F. App'x 369 (6th Cir. 2017).

[130] Seufert v. Merck Sharp & Dohme Corp., 187 F. Supp. 3d 1163, 1180 (S.D. Cal. 2016); s*ee also In re*: Incretin Mimetics Prods. Liab. Litig., No. 13md2452 AJB (MDD), 2014 WL 12539702, at *2 (S.D. Cal. Dec. 9, 2014) (rejecting arguments that discovery into adequacy of submissions to FDA for clear evidence purposes was not preempted by *Buckman*).

[131] Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1680 (2019) ("[L]itigants may dispute whether the drug manufacturer submitted all material information to the FDA.").

[132] *Id.* at Part IIA; *see also* E.I. Du Pont de Nemours & Co. v. Smiley, 138 S. Ct. 2563, 2564 (2018) (deference to agency litigation briefs may raise "serious equal protection concerns" "by incentivizing agencies to regulate by amicus brief"); Mutual Pharm. Co. v. Bartlett, 133 S. Ct. 2466, 2481 (2013) (Breyer,

have their hands full on this portion of the *Albrecht* test. However, it is abundantly clear that plaintiffs emerged from the high Court triumphant on this issue.

D. Defendants Must Have Provided Justification for the Warning

Part three of the *Albrecht* test requires defendants claiming preemption to have previously advised FDA "of the *justifications for the warning* required by state law."[133] *Albrecht*, then, shuts the door on defendants' arguments that FDA had never required inclusion of the relevant risk on their label despite routinely providing underlying and raw data reflecting a general risk.[134] In the United States, drug manufacturers are required, as part of their responsibilities under the FDCA, to provide FDA with reports, updates, and evaluations of reports on adverse drug experiences with a medicine.[135] As part of their required submissions, manufacturers are required to include information that would affect the safety, effectiveness, or labeling of the drug product.[136] In addition, manufacturers are also required to submit fifteen-day "Alert Reports" to FDA within fifteen days of receipt of new information on adverse drug experiences, including experiences from spontaneous reporting or scientific literature.[137] Prior to *Albrecht*, courts had generally rejected arguments that provision of raw data and oblique references to general risks were sufficient under the clear evidence inquiry.[138]

For example, in *Dobbs v. Wyeth Pharm.*, a case involving the risk of suicidality with use of the anti-depressant Effexor, the court granted defendants' preemption arguments, in part, upon defendants' "regularly submitted" adverse event reports and safety submissions and FDA's failure to require a warning reflecting the risk as evidence of preemption.[139] The court observed that "the FDA has not considered individual manufacturers' reports of adverse events sufficiently persuasive to provide 'reasonable evidence of an association' between the drug and the reported adverse consequence."[140] It is now clear that *Albrecht* categorically forecloses such future arguments based on routine submissions that do not contain a thorough analysis reflecting the risk. As stated, the Supreme Court explicitly provided that manufacturers must "fully inform[] the FDA of the *justifications for* . . . [a] . . . *warning*."[141] And as the *Albrecht* Court observed, those "justifications" would only be met by "suppl[ying]

J., dissenting) (refusing to defer to agency views "set forth . . . only in briefs filed in litigation, not in regulations, interpretations, or similar agency work product").

133 *Albrecht*, 139 S. Ct. at 1672.

134 *See infra* notes 138–38.

135 21 C.F.R. § 314.80(c)(2) (2015).

136 21 C.F.R. § 314.81(b)(2)(i) (2016).

137 21 C.F.R. § 314.80(c)(1)(ii) (2015).

138 *See In re* Testosterone Replacement Therapy Prods. Liab. Litig. Coordinated Pretrial Proceedings, 2017 WL 1836435, at *8 (N.D. Ill. May 8, 2017) (rejecting defendants argument "that over the years it provided the FDA with multiple analyses of potential safety signals and adverse event reports, including annual PSURs and comprehensive white papers . . . [,] yet the FDA never required additional warnings in response to these analyses").

139 Dobbs v. Wyeth Pharms., 797 F. Supp. 2d 1264, 1273–74 (W.D. Okla. 2011).

140 *Id.*

141 Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1672 (2019).

the FDA with an evaluation or analysis concerning the specific dangers' that would have merited the warning."[142]

Recently, a federal district court, taking note of the *Albrecht* analysis, agreed that *Albrecht* has completely shut the door on these types of arguments. *In re: Taxotere* involved allegations that Sanofi, the manufacturer of a chemotherapy drug, had failed to adequately warn of permanent hair loss.[143] In support of clear evidence preemption, defendants argued, in part, that they had provided "stacks of documents reflecting any information that would have supported stronger label language . . . [but] . . . the FDA did not request a stronger label."[144] Citing *Albrecht* and *Levine*, the court disagreed, observing that "it is of no moment that Sanofi inundated the FDA with study reports whenever Sanofi was seeking approval to expand the distribution of its drug. This falls short of fully informing the FDA of the justifications for a stronger label."[145]

E. FDA Must Have Communicated Denial of Warnings to Defendants

But even where defendants satisfied Part three of the test—i.e., having proffered an adequate analysis and justification for a label change—Parts four and five command that FDA must "*communicate its disapproval*" of the alternative label.[146] Indeed, *Albrecht*'s newly stated rule requires "the FDA . . . informed the drug manufacturer that [it] would not approve [the relevant] change to the drug's label." Though the Court prefaced its holding with the observation that "[t]he question of disapproval 'method' is not now before us," the Court advised that the manner in which the FDA decision was "communicate[d]" should be by (1) notice-and-comment rulemaking; (2) by formally rejecting a proposed warning label at the NDA stage or CBE stage;[147] (3) "or with other agency action carrying the force of law."[148] Defense-oriented commentators have expressed confusion with the newly stated rule, suggesting that the Supreme Court majority did not necessarily preclude FDA *inaction* as a method of disapproval.[149] Specifically, these commentators point to the majority's citation to 21 U.S.C. § 355(o)(4)(A) as an example of "other agency action carrying the force of law."[150]

As discussed in Part I above, 21 U.S.C. § 355(o)(4)(A) and its related subsections authorize FDA to engage in discussions and negotiations with defendants if FDA

---

[142] *Id.* at 1678.

[143] *In Re*: Taxotere (Docetaxel) Products Liability Litigation, 2:16-md-02740-JTM-MBN (Dkt. 7939) (E.D.L.A 2019).

[144] *Id.*

[145] *Id.*

[146] *Albrecht*, 139 S. Ct. at 1679.

[147] Interestingly, the court left out obvious clear-cut PAS disapproval method, which Justice Alito notes in his concurrence, for reasons which are unclear. *See Albrecht*, 139 S. Ct. at 1685 ("Second, for reasons that entirely escape me, the Court refuses to acknowledge that there are two ways in which a drug manufacturer may attempt to alter a drug's label.") (J. Alito, Concurring).

[148] *Id.* at 1679.

[149] Douglas H. Smith, *A Shift in the Preemption Landscape?*, 87 TENN. L. REV. 213 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3406918 [perma.cc/FM5D-3K6C]; Beck, *Breaking News*, *supra* note 118.

[150] Smith, *supra* note 149; Beck, *Breaking News*, *supra* note 118.

becomes aware of new safety information relating to the drug.[151] Defense-oriented scholars argue that, pursuant to the statute, FDA need take no affirmative action to express its disapproval of a potential label change, and so, the Court intended inaction to be a form of preemption.[152] Judge Alito, in his concurrence, similarly observed that "§355(o)(4)(A) [does not] require the FDA to communicate to the relevant drug manufacturer that a label change is unwarranted . . . . On remand, I assume that the Court of Appeals will consider the effect of §355(o)(4)(A) on the preemption issue in this case."[153] There is no doubt that the Supreme Court introduced a note of ambiguity into the analysis. This type of argument, which is a stretch, has also been adopted by a few lower-level courts.[154] The better explanation, however, is that the majority meant what it said by its use of the language, "*communicate* its disapproval," and that § 355(o)(4)(A) is relevant to the preemption analyses *only* when FDA makes clear through actual communications pursuant to its investigation under § 355(o)(4)(A) that a label change is not justified.

V. POLICY IMPLICATIONS OF *ALBRECHT*

As this author argued in 2017 in *Brand Name Preemption: The New Frontier in Pharmaceutical Product Liability Litigation*, high court elucidation of *Wyeth v. Levine*'s clear evidence standard was long overdue.[155] Taken together, *Albrecht*'s recent ruling fills that void, marking a significant step towards clarity in the pharmaceutical preemption landscape.[156] As explained above, it is now clear, after a full decade of conflicting court rulings, that "hypothetical preemption" is no longer a viable approach to preemption.[157] What FDA *would have done* had defendants proposed a label change is no longer relevant to the analysis—defendants must have proposed an official label change reflecting the risk in question, and that label change must have been rejected by FDA.[158] It is also clear that even if a defendant did submit a label change that was subsequently rejected, it serves no preemptive effect if it did not provide a comprehensive analysis with "full information" to FDA in connection with their request.[159]

Albrecht does leave many important questions unanswered. As explained, the preemptive force of citizen petitions remains unclear.[160] And while the Court did state defendants must have provided FDA with "full information," it is unclear exactly what

---

[151] 21 U.S.C. § 355(o)(4)(A).

[152] *See supra* note 118.

[153] Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668, 1684–85 (2019).

[154] Ridings v. Maurice, 444 F. Supp. 3d 973, 998 (W.D. Mo. 2020) ("[T]he FDA's continued inaction does represent clear evidence under these facts.").

[155] *See supra* note 19.

[156] *See* Louis Bograd, *SCOTUS Preemption Ruling Good News for Drug and Device Plaintiffs*, MARTINDALE (May 28, 2019), https://www.martindale.com/legal-news/article_motley-rice-llc_2517377.htm [https://perma.cc/6WAW-J6F7].

[157] *See* discussion *supra* Part IV.a.

[158] *See* discussion *supra* Part IV.c.

[159] *See* discussion *supra* Part IV.d.

[160] *See* discussion *supra* Part IV.b.

that necessarily entails.[161] It is also unclear if courts will consider FDA inaction as sufficient under the *Albrecht* test.[162] Nevertheless, the opinion is a considerable and positive step forward in brand name preemption landscape. First, the decision is a positive step for consumer safety, because it encourages defendants to provide prompt, clear, accurate, and fulsome requests for additional warnings. Second, the decision provides a clear, administrable bright line for lower courts, avoiding the need for intensive, expensive, and speculative fact development regarding FDA's likely course of conduct. The decision is also not unreasonably broad, but leaves several methods of preemption available to defendants.

A. Albrecht is a Win for Consumer Safety

It is well accepted that FDA establishes a baseline, but no guarantee, for the safety of available drugs.[163] The major "premise" of the FDCA is that "manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times."[164] State tort law is therefore generally viewed as a complementary form of drug regulation, providing additional and essential protections for consumers.[165] This makes sense, given FDA's own professed limitations with regards to post-market safety. As Dr. David Kessler, previous FDA Commissioner, has observed, FDA suffers from lack of resources to effectively and timely monitor the market, adverse events, submissions, and scientific literature for all dangerous side effects of approved drugs.[166] The agency is hamstrung with only "100 professional employees" to monitor over 11,000 drugs.[167] In fact, 70% of FDA doctors and scientists are of the opinion that FDA lacks adequate resources to guard the public's health,[168] and 66% are concerned that FDA is not sufficiently monitoring the safety of drugs once they have been approved.[169]

---

[161] *See* discussion *supra* Part IV.c.

[162] *See* discussion *supra* Part IV.e.

[163] McCuskey, *supra* note 7, at 366 ("Regulatory pre-approval by the FDA establishes baselines for the safety and efficacy of available drugs, but provides no guarantee and further contributes to the cost of innovation.").

[164] Wyeth v. Levine, 555 U.S. 555, 579 (2009).

[165] As former FDA chief counsel Margaret Porter has observed, "FDA product approval and state tort liability usually operate independently, each providing a significant, yet distinct, layer of consumer protection." Margaret Porter, *The Lohr Decision: FDA Perspective and Position,* 52 FOOD & DRUG L.J. 7, 9 (1997).

[166] 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, 485 (2008); *see also* Patrick O'Leary, *Funding the FDA: Assessing the User Fee Provisions of the FDA Safety and Innovation Act of 2012*, 50 HARV. J. ON LEGIS. 239, 242–43 (2013).

[167] Kessler, *supra* note 166, at 465; *see also Wyeth*, 555 U.S. at 578 ("The FDA has limited resources to monitor the 11,000 drugs on the market."); *see also generally* Hilda Bastian, Paul Glasziou & Iain Chalmers, *Seventy-Five Trials and Eleven Systematic Reviews a Day: How Will We Ever Keep Up*?, 7 PLOS MED 1 (Sept. 21, 2010), https://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1000326 [https://perma.cc/6FEB-B39L]; Joseph S. Ross & Aaron S. Kesselheim, *FDA Policy and Cardiovascular Medicine*, 132 CIRCULATION 1136, 1141 (2015), https://www.ahajournals.org/doi/10.1161/CIRCULATIONAHA.114.010295 [https://perma.cc/Y6KZ-3A6F].

[168] Jennifer A. Surprenant, *Should Preemption Apply in A Pharmaceutical Context? An Analysis of the Preemption Debate and What Regulatory Compliance Statutes Contribute to the Discussion*, 77 FORDHAM L. REV. 327, 355 (2008).

[169] Year in Review, AHLA-PAPERS P06270502.

Given the essential complement that state tort law provides for consumer safety, it is dangerous, and even reckless, to extrapolate, under any set of circumstances, that FDA *would have* rejected a label change had it been proposed by defendants.[170] For example, it cannot be reasonably said, with any degree of scientific certainty, that FDA's failure to request a label change, after review of data buried in highly complex thousand-page submissions, means that it would have denied a label change had it been proposed via a clearly direct submission by defendants.[171] Likewise, it is unnatural to assume, given FDA's resource limitations, that its rejection of a proposed label change to reflect a risk also means that it considered, but rejected, all alternative labeling changes reflecting similar risks.[172] FDA simply does not have the capability to accurately or adequately assess a post-market risk and all potential label changes, absent a direct, clear, and comprehensive report by the manufacturer, which includes the requested label change as well as all supporting data.[173] *Albrecht*'s disposal of hypothetical preemption, therefore, ensures a highly effective bright line rule that ensures state tort law is never inappropriately supplanted.

Albrecht's rejection of hypothetical preemption also reinforces positive conduct by defendants. Prior to *Albrecht*, defendants were incentivized to provide risk information to FDA piece meal, or obfuscated within other routine submissions and data.[174] Though FDA may have, in reality, overlooked the risk in question, defendants would, upon being sued under state tort law, have colorable preemption arguments on the grounds that FDA never required a label change.[175] And as Justice Gorsuch articulated in *Albrecht* oral argument, hypothetical preemption encourages defendants "to supply the FDA with a lot of information, overwhelming with data, but maybe not the most artfully drafted and maybe deliberately inartfully drafted warning that it thinks is reasonably calculated to be refused."[176] Moving forward, however, defendants will be incentivized to provide prompt, clear, accurate, and fulsome requests for additional warnings.

B. Albrecht Offers a Consistent Bight-Line Approach

Since *Levine*, the wildly divergent approaches to the clear evidence standard had led to a hodgepodge of conflicting opinions amongst lower and intermediate courts.[177]

---

[170] Brief of Amici Curiae American Association for Justice in Support of Respondents, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 6258929 at *2 ("This bright-line rule for impossibility preemption . . . avoids any need for the kind of freewheeling speculation about the FDA's hypothetical views that is required by drug manufacturers' reading of Wyeth.").

[171] *See generally* Kessler & Vladeck, *supra* note 166.

[172] It is entirely acceptable for FDA to reject an inappropriate warning for a specific issue but make no decision on alternative issues. It is inconceivable to place the burden on FDA to investigate all potential implications of its label change denial.

[173] *See generally* Bastian et al., *supra* note 167.

[174] Justice Kagan expressed at oral argument that the "idea that [FDA has] to look through all of your data . . . in order to find out what the real risk is, [] and that if they don't manage to do that, you're exempt from suit" seems to conflict with the statutory "rule of construction that says that manufacturers have primary responsibility over their labels." *See* Transcript of Oral Argument at 7–8, *Albrecht*, 139 S. Ct. 1668 (2019) (No. 17-290).

[175] *See supra* note 139 and accompanying text.

[176] *See* Transcript of Oral Argument at 13, *Albrecht*, 139 S. Ct. 1668 (2019) (No. 17-290).

[177] *See* Lindenfeld, *supra* note 19.

Prior to *Albrecht*'s clarification of clear evidence standard, courts relied erratically and unpredictably on a wide assortment of contextual clues in determining clear evidence, including FDA's own studies, scientific literature, adverse event reports, similar drug's label changes, emails, communications, and general internal FDA memoranda.[178] Often, the entire range of FDA's actions, communications, and studies, sometimes spanning the course of decades, was mined and considered by courts for hints of regulatory intent.[179] This highly variable and fact-intensive inquiry had not only created a degree of uncertainty amongst litigants considering to bring suit, but also required plaintiffs and defendants to engage in costly months- and even years-long fact discovery and development.[180] Plaintiffs, in an attempt to avoid the clear evidence defense, were required to pay exorbitant sums for top level experts in the fields of regulatory compliance to speculate, in retrospect, how FDA would have responded to a manufacturer-submitted label change at a specific point in time.[181]

Albrecht's limitation of preemption to cases in which FDA has acted provides a clear, administrable bright line for lower courts, avoiding the need for intensive, expensive, and speculative fact development regarding FDA's likely course of conduct.[182] Of course, *Albrecht* does not dispense of the need for fact development entirely. Defendants will still be required to demonstrate that the manufacturer provided a comprehensive analysis to FDA that attempted to adopt the relevant warning for the relevant time period, and that FDA rejected that warning.[183] As part of this inquiry, courts would still have to examine the precise warning language the manufacturer had submitted, as well as the available evidence known to the manufacturer at the time.[184] However, these inquiries are more defined and thus a step-up from clear evidence jurisprudence that had existed until *Albrecht*.[185] A court would not need to consider, for example, the import of FDA's inaction after a key study, its decision to permit or reject a similar warning on a similar drug, or any of the multitude of cryptic and open-ended communications between it and the manufacturer.[186]

C. Albrecht Will Not Lead to Overwhelming FDA

As discussed above, *Albrecht* found that clear evidence could not be met in scenarios where manufacturers have not "fully informed" FDA within their submission requesting a label change.[187] Commentators have criticized the rule as incentivizing manufacturers to flood and overwhelm FDA with non-useful

---

[178] *Id.*; *see also* discussion *supra* Part IV.a.

[179] *See* Lindenfeld, *supra* note 19; *see also* Forst v. Smithkline Beecham Corp., 639 F. Supp. 2d 948, 954 (E.D. Wis. 2009) (examining repeated period reviews and interactions with FDA).

[180] *See generally*, Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Roles of Lawyers in Mass Tort Litigation*, 57 DEPAUL L. REV. 509, 510–11 (2008).

[181] *See generally* Jeffrey C. Sindelar, Jr., *Of Form and Function: Lockean Political Philosophy and Mass Tort*, 90 NEB. L. REV. 887, 890–91 (2012); Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. Rev. 1273, 1293 (2012).

[182] Wessler, *supra* note 17, at 60.

[183] *See generally* discussion *supra* Part IV.

[184] *Id.*

[185] *Id.*

[186] *Id.*

[187] *See* discussion *supra* Part IV.c.

information and data in anticipation of the adequacy of their submissions being scrutinized by courts conducting a clear evidence review.[188] Specifically, defense-oriented scholars have decried this interpretation of *Albrecht* as running contrary to previous Supreme Court directive in *Buckman*, which held that fraud-on-FDA claims were preempted, partially on the grounds that such claims would encourage manufacturers to deluge FDA with information it neither needed nor wanted.[189]

However, the policy considerations underlying the concern in *Buckman* do not apply with equal force in post-approval drug label context. *Buckman*, which involved pre-market allegations, was primarily concerned with how the flood of information could lead to delayed *approval time* of devices and uses for potentially life-saving devices.[190] In the post-market context, however, drugs are already available—there is no comparable risk that any theoretical "deluge" would limit patients' access to otherwise life-saving drugs. And it is difficult to imagine what type of information a drug manufacturer may have that even tangentially relates to drug safety that the company is not already obligated to submit to FDA.[191] In any event, to the extent that there exists information not already required to be submitted to FDA, it is highly improbable that such information would assist them in the clear evidence inquiry.[192] Defendants would therefore not be incentivized to submit such information anyway.[193]

In *Albrecht*, Amici Pharmaceutical Research and Manufacturers of America (PhRMA)[194] argued that adoption of a rule for clear evidence that requires actual rejection of the risk in question would "create an incentive for manufacturers to submit multiple iterations of a warning to maximize the prospect that some future jury will

---

[188] *See* Michelle M. Bufano, *Supreme Court Unlikely to Rob Drug Companies of a Preemption Defense, Undermine FDA*, BLOOMBERG LAW (Feb. 27, 2019), https://news.bloomberglaw.com/us-law-week/insight-supreme-court-unlikely-to-rob-drug-companies-of-a-preemption-defense-undermine-fda [https://perma.cc/8DMM-MNB6].

[189] James Beck, *"Fully Informing" the FDA*, LEXOLOGY (Sept. 26, 2019), https://www.lexology.com/library/detail.aspx?g=f70004f1-8e48-4280-859c-508414e0cba6 [https://perma.cc/K9P2-WP92].

[190] Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 351 (2001) ("*Applicants* would then have an incentive to submit a deluge of information that the Administration neither wants nor needs, resulting in additional burdens on the FDA's evaluation of an *application*.") (emphasis added).

[191] *See* 21 C.F.R. § 314.80 (articulating comprehensive reporting requirements for drugs post-approval). Moreover, the duty to revise warning labels arises only when "there is reasonable evidence of an association of a serious hazard with a drug," 21 C.F.R. § 201.57(e), not every time a single adverse event report is received.

[192] *See id.*, listing comprehensive reporting guidelines for relevant documents and information.

[193] *Id.*

[194] PhRMA is a well-known organization that receives millions of dollars a year from companies including Merck & Co., Inc. *See Members*, PHRMA, https://www.phrma.org/en/About/Members [https://perma.cc/86VV-JBML]. For a discussion on other pharmaceutical litigation, see Jasper L. Tran, *Timing Matters: Prior Art's Age Infers Patent Nonobviousness*, 50 GONZ. L. REV. 189, 207–08 (2015); *compare with* Jasper L. Tran, *Software Patents: A One-Year Review of* Alice v. CLS Bank, 97 J. PAT. & TRADEMARK OFF. SOC'Y 532, 539–42 (2015) (discussing the current landscape for software patents); *accord* Jasper L. Tran, *Two Years After* Alice v. CLS Bank, 98 J. PAT. & TRADEMARK OFF. SOC'Y 354, 357 (2016); Jasper L. Tran & J. Sean Benevento, *Alice at Five*, 2019 PATENTLY-O PAT. L.J. 25; Jasper L. Tran, *Abstracting About "Abstract Idea"*, 102 IOWA L. REV. ONLINE 60 (2016); *see also* Jasper L. Tran, *Rethinking Intellectual Property Transactions*, 43 S.U. L. REV. 43, 149 (2015).

find the FDA's rejection sufficiently clear."[195] However, this argument is disingenuous in that, given the enormous costs for manufacturers associated with a label change, manufacturers are unlikely to ask FDA to add several versions of warnings for fear that FDA might comply with all their requests. Indeed, manufacturers are undoubtedly aware of the empirical data that suggests that "on average, aggregate demand declines by 16.9 percent within two years of a relabeling event."[196] The effect is undoubtedly compounded by several distinct versions of a similar warning on a single label change. It is thus clear that the newly stated rule is unlikely to lead to FDA being overly inundated by proposed label changes and data.

D. Albrecht Leaves Avenues of Preemption Available to Defendants

The decision is also not unreasonably broad and leaves several methods of preemption available to defendants. First, *Albrecht* does not affect preemption arguments by manufacturers that the change required under state law is a "major" change, as opposed to a minor or moderate change.[197] As discussed, major changes require approval from FDA via the Prior Approval Supplement (PAS) procedure.[198] However, moderate and minor changes do not and can be unilaterally conducted through the CBE procedure.[199] A failure-to-warn claim that is based on an alleged label deficiency that is "major" and would have required a PAS to conform the label to state tort law standards is virtually always preempted.[200] Second, even in the wake of *Albrecht*, defendants have effective arguments that claims regarding changes to the "highlights" section of the drugs' label, including the black box warnings, constitute a "major change" subject to PAS as opposed to CBE, and are therefore automatically preempted.[201] Third, defendants also retain powerful arguments that they cannot engage in any unilateral change via CBE to warn regarding unapproved uses of drugs.[202]

---

[195] Brief of Amici Curiae Pharm. Rsch. & Mfrs. of America & Biotechnology Innovation Organization in Support of Petitioner, Merck Sharp & Dohme Corp. v. Albrecht, 139 S. Ct. 1668 (2019) (No. 17-290), 2018 WL 4611228 at *26.

[196] Matthew J. Higgins, Xin Yan & Chirantan Chatterjee., *Market Effects of Adverse Regulatory Events: Evidence from Drug Relabeling* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24957, 2020), https://www.nber.org/papers/w24957.pdf [https://perma.cc/3QLB-NXPL].

[197] *See generally* Gustavsen v. Alcon Laboratories, Inc., 903 F.3d 1, 10 (1st Cir. 2018).

[198] 21 C.F.R. § 314.70(b).

[199] *Id.* §314.70(b)(2)(v).

[200] *See, e.g.*, *Gustavsen*, 903 F.3d at 14 ("For the foregoing reasons, we therefore conclude that changing the product bottle so as to dispense a different amount of prescription eye solution is a 'major change' under 21 C.F.R. § 314.70(b). That conclusion, in turn, means that plaintiffs' attempt to use state law to require such a change is preempted . . . ."); Yates v. Ortho-McNeil-Janssen Pharm., Inc., 808 F.3d 281, 298 (6th Cir. 2015) ("Yates's post-approval design defect claim is clearly preempted by federal law. FDA regulations provide that once a drug, whether generic or brand-name, is approved, the manufacturer is prohibited from making any major changes to the "qualitative or quantitative formulation of the drug product, including inactive ingredients, or in the specifications provided in the approved application . . . .").

[201] James Beck, *Preemption Highlights*, DRUG & DEVICE BLOG (Aug. 6, 2019), https://www.drugand devicelawblog.com/2019/08/preemption-highlights.html [https://perma.cc/6KWA-UNUR].

[202] *See generally* Byrd v. Janssen Pharms., Inc., 333 F. Supp. 3d 111, 117–18, 120 (N.D.N.Y. 2018).

Finally, defendants currently have virtually across-the-board arguments as it relates to generic drugs.[203] Indeed, in *PLIVA v. Mensing*, the Supreme Court found that all suits against generic drugs based on the adequacy of the label were preempted, so long as the label reflected its brand-name counterpart.[204] In so doing, the Supreme Court relied on the explicit prohibition of the generic manufacturer from making unilateral changes to a generic drug's label.[205] Experts in the field have observed that the decisions have essentially wiped out personal injury claims involving generic drugs.[206] Given the vast immunity now afforded to generic drugs, and the substantial reliance these drugs place on the safety monitoring, as well as the adequacy of the labeling of its brand name counterpart, it makes sense to impose a difficult preemption regime on manufacturers of brand name drugs.[207]

CONCLUSION

For over ten years, the contours of the clear evidence standard for the defense of federal preemption has been vague, muddled, and inconsistently applied. The Supreme Court's recent decision in *Albrecht* marks a significant step in offering clarity to litigants. While certain issues remain unaddressed by the Court, and while the Court did introduce notes of ambiguity into the analysis, it is clear that the newly stated rule, at a minimum, dramatically limits defendants' ability to assert the clear evidence standard. Finally, despite criticism by the first wave of defense-oriented commentators, *Albrecht*'s new rule is a positive step for consumer safety; provides a clear, administrable bright line for lower courts; and is not unreasonably broad.

---

[203] *See generally* Eric Lindenfeld & Jasper L. Tran, *Beyond Preemption of Generic Drug Claims*, 45 SW. L. REV. 241, 245–47 (2015); Eric Lindenfeld & Jasper L. Tran, *Prescription Drugs and Design Defect Liability: Blanket Immunity Approach to the Increased Costs and Unavailability of Prescription Medication*, 64 DRAKE L. REV. 111, 118 (2016).

[204] PLIVA v. Mensing, 564 U.S. 604, 618 (2011); *see also* 21 C.F.R. § 314.70(b)(2)(i) (2016) (prohibiting generic drug manufacturer from making any major changes to the "qualitative or quantitative formulation of the drug product, including inactive ingredients, or in the specifications provided in the approved [application]").

[205] *Mensing*, 564 U.S. at 621.

[206] *See* Lindenfeld, *supra* note 19, at 636–37; *see also* Diana J. Masters, Mutual Pharmaceutical Co. v. Bartlett *and the Demise of Recovery for Consumers of Generic Drugs*, 60 LOY. L. REV. 399, 422 (2014); Greg Ryan, *Post-Mensing Landscape a Wasteland for Plaintiffs*, LAW360 (June 25, 2012), https://www.law360.com/lifesciences/articles/353077/post-mensing-landscape-a-wasteland-for-plaintiffs [https://perma.cc/MME6-FPMV].

[207] *See* Ann M. Thayer, *30 Years of Generics*, CHEMICAL & ENGINEERING NEWS (Sept. 29, 2014), https://cen.acs.org/articles/92/i39/30-Years-Generics.html [https://perma.cc/YQ8X-W3VN].