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Undue Deference

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Undue deference

Using federal agency rulemaking to promote federal preemption is a new tactic to undermine the civil justice system. Here's how to make the case against assertions that courts should defer to pro-preemption statements in agency rules.

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President George W. Bush's announcement of a new doctrine of "preemptive war" radically altered the geopolitical landscape, sparking great debate and arousing great controversy. However, with significantly less fanfare but potentially far-reaching results, the Bush administration has aggressively pursued another type of preemption—one designed to undermine the civil justice system, with potentially disastrous results for millions of injured and cheated consumers nationwide.

Over the last several years, and more forcefully in recent months, the Bush administration has attempted to expand the doctrine of federal preemption to nullify state products liability and consumer protection laws. Federal agencies are the new weapons in the effort to chip away state law protections for injury victims and consumers. Under the guise of their rulemaking powers, they are asserting that state laws touching on their regulatory spheres are preempted and without effect.

The battle is being waged on many fronts. In early 2004, the Office of the Comptroller of the Currency (OCC), the federal agency responsible for regulating federally chartered banks, issued a series of regulations stating that state laws, both statutory and common law, do not apply to national banks "if they obstruct, impair, or condition a national bank's exercise of its lending, deposit-taking, or other powers granted to it under federal law."[1]

Several other agencies followed suit. Unlike the OCC, they did not adopt formal preemption rules that were codified into law, but these agencies—specifically the National Highway Traffic Safety Administration (NHTSA), the Food and Drug Administration (FDA), and the Consumer Product Safety Commission (CPSC)—have expressed in regulatory preambles that their rules preempt state law.

In the preambles for two rulemakings—one that sets "roof crush" standards for motor vehicles[2] and another that establishes fuel economy standards for minivans and sport utility vehicles[3]—NHTSA opined that its standards preempt state law. Similarly, in a recent FDA rulemaking concerning drug-labeling requirements, the agency asserted in a regulatory preamble that its decisions approving a drug manufacturer's labels preempt state law claims for failure to warn of drug risks.[4] The CPSC also joined the preemption parade, asserting in an interpretive section of a new rule on the flammability standards for mattresses that the rule "would preempt all non-identical state requirements which seek to reduce the risk of death or injury from mattress fires," including claims that are brought under state common law.[5]

Previously, agencies tended to limit their opinions on preemption to amicus briefs filed on a case-by-case basis. The Bush administration's new tactic is to express its views in regulatory statements published in the *Federal Register*. The potential danger is that, regardless of Congress's intent, once an agency incorporates its litigation position into the language of a federal rulemaking, courts may mistakenly give greater "deference" to the agency's opinion, making it increasingly difficult for victims of corporate misconduct to vindicate their state law rights.

Under the administrative law principle of "*Chevron* deference," when an agency adopts a formal rule interpreting a statute it administers, courts usually give that rule deference unless congressional intent is clear, meaning that the agency's interpretation of an ambiguous statute ordinarily will be upheld if it is reasonable.[6] A primary rationale for

deference is that an agency possesses specialized expertise over the statute it administers and has some degree of democratic accountability, making it a better institution than a court to decide ambiguous statutory questions.[7] Unlike formal rules meriting *Chevron* deference, informal agency rules, such as regulatory preambles, do not have the force of law, but courts will give them varying degrees of deference based on "the agency's care, its consistency, formality, and relative expertness, and . . . the persuasiveness of the agency's position."[8]

Corporate defendants are arguing that courts must adopt agencies' views on preemption, and courts have disagreed over whether this deference is warranted.[9] Plaintiff attorneys cannot afford to ignore this issue—the question of deference often will prove decisive in whether state law claims are preempted.

For the reasons that follow, federal agencies' recent pro-preemption statements do not merit any deference from courts. Many of those reasons, however, do not apply to an agency's statement opposing preemption, which may deserve deference in certain circumstances.

Opinions from the FDA, CPSC, and NHTSA on federal preemption expressed in regulatory preambles are not entitled to *Chevron* deference because they do not have the force of law. (The OCC's preemption rules are formal rules, but they also do not deserve deference for reasons explained below.) In *United States v. Mead Corp.*, the U.S. Supreme Court found that only rules adopted under formal rulemaking authority that carry the force of law are entitled to *Chevron* deference.[10] Regulatory preambles are neither enacted rules nor codified in the Code of Federal Regulations; they are not given the force of law. The FDA's own regulations specifically state that an "advisory opinion" such as a regulatory preamble has no legally binding effect.[11]

In the rubric of administrative law, regulatory preambles represent informal or "interpretive" rules, akin to an agency press release or informational statement.[12] As the Supreme Court stated earlier this year, an informal agency interpretation merits no special deference but is "'entitled to respect' only to the extent it has the 'power to persuade.'"[13] This means that an agency's informal views do not deserve any favored treatment and must rise and fall on their merits in the same manner as any other piece of legal authority.

Consequently, the Supreme Court has listened to an agency's opinion on preemption in the narrow circumstance where that opinion carried particular persuasive power. In *Geier v. American Honda Motor Co.*, the Court gave "some weight" to the Department of Transportation's view on the preemptive effect of an auto safety regulation because the agency was interpreting its own regulation, which was highly technical and set against a "complex and extensive" legislative backdrop.[14] In that unusual situation, the Court believed that the agency's "thorough understanding" of its own regulation made it "uniquely qualified" to express a view on preemption. In more typical circumstances, the Court has given an agency's pro-preemption interpretation no such deference.[15]

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Presumption against preemption

Whether embodied in informal preambles or formal rules, pro-preemption viewpoints should not be given deference because they conflict with the presumption against preemption.[16] The Supreme Court often has reiterated its "presum[ption] that Congress does not cavalierly preempt state law causes of action" and has refused to preempt state law unless "Congress has made such an intention clear and manifest."[17]

This principle derives from the U.S. Constitution's federalist structure, which recognizes the states' primacy in protecting the health, safety, and welfare of their citizens. Because federal preemption of state laws represents "a serious intrusion into state sovereignty,"[18] the Court established a strong presumption against preemption "in the interest of avoiding unintended encroachment on the authority of the states."[19] Moreover, by requiring a clear statement of congressional purpose in order to find preemption, the presumption ensures that preemption will not arise through the back door of congressional silence, but only when the question of preemption is addressed and debated in legislative chambers.[20]

With this presumption in place, courts should not infer preemption from statutory ambiguity. The court's duty, when faced with a statute susceptible to more than one interpretation, is "to accept the reading that disfavors preemption."[21]

Deferring to an agency's statement of preemption, however, would mean that preemption would be allowed when a statute is silent or ambiguous on Congress's intent. This would, in effect, turn the presumption against preemption on its head.[22]

Because a savvy lawyer can argue for statutory ambiguity on almost any issue, deferring to the agency's view could end up wiping away whole categories of state law causes of action, uprooting the federalist structure that the presumption against preemption is designed to pro-

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tect. As a result, even if principles of administrative law support deference to agency views in some cases, the presumption against preemption makes deference to an agency's pro-preemption opinion inappropriate.

When there is a clash between the presumption against preemption and the principle of administrative deference, the latter should give way to the former.

First, the presumption against preemption rests on constitutional concerns about maintaining the proper balance of federal and state authority; the principle of administrative deference turns on institutional concerns about administrative versus judicial competence. These internal concerns about the institutional advantages of one federal entity or another are secondary to the constitutional principles underlying the presumption against preemption.[23] This is because the question of how to distribute authority among the different federal branches does not address the first-order question of how much power the federal government is entitled to vis-à-vis the states in the first place. Because the question of administrative deference therefore does not come into play until the preemption question is answered, it cannot undermine the presumption against preemption.

Second, although the rule of deference arises from agencies' greater political accountability than the courts, as one court noted, "state legislatures are arguably yet more politically accountable" than agencies.[24] Thus, even under accountability principles, courts should show more deference toward protecting state law than toward an agency's opinion that state law is preempted.

The primary justification for giving deference to an agency—that it has greater expertise than the court—also lacks persuasive force when an agency takes a pro-preemption position. With preemption, the meaning of the federal statute is only one part of the equation. Determining whether a plaintiff's state law claim is preempted by federal law requires evaluation of both relevant federal law and the state law under which the claim arises. Certainly, a federal agency is no expert on the interpretation of *state* law, and its views on the role of state law are no more authoritative than anyone else's.

Moreover, the nub of any preemption question is the interaction of federal and state law and the extent to which the two conflict, rather than the meaning of federal law in isolation. The OCC's preemption rule, as well as the FDA's, NHTSA's, and CPSC's preemption preambles, all interpret the intersection of federal and state law—how much effect state law can have without running afoul of federal law.

Although an agency's interpretation of its own enabling statute may be entitled to deference, its interpretation of how a statute it administers interacts with other statutes is not.[25] If anything, the concerns militating against deference carry even greater weight when federal law interacts with state law rather than with other federal laws, providing an additional reason for denying

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Tort "reformers" have stepped up efforts to expand federal preemption of historically protected state and federal causes of action. In recent months, the FDA and other federal agencies have gotten into the act, drafting rules purporting to bar certain claims. ATLA offers resources to help members respond to these new and aggressive threats to the civil justice system.

By joining the **Preemption Law Litigation Group**, members can share resources they've gathered while representing clients in this evolving area of litigation. Working together, group members are developing a unified strategy to fight preemption and reduce the risk of adverse decisions in key cases. Membership is free to ATLA Regular, Sustaining, Life, and President's Club members. To join, contact litigation group leader Edward Parr by mail at Ury & Moskow, 1250 Connecticut Ave., N.W., Ste. 200, Washington, DC 20036, or by phone at (202) 261-6542.

The ATLA Exchange has established a **Preemption Document Library**, where members can share materials in a secure online environment. All documents in the library are available at no charge to ATLA Regular, Sustaining, Life, and President's Club members who are also members of the Preemption Law Litigation Group or of any ATLA practice section. For more information about sections, contact ATLA Sections by phone at (800) 424-2725, ext. 290, or visit www.atla.org/Sections/.

ATLA's **Regulatory Counsel** Gerie Voss frequently updates members about attempts by federal agencies to use the rulemaking process to impose preemption. If you have information to share or want to know more about what ATLA is doing to combat regulatory tort "reform," call Voss at (800) 424-2725, ext. 748, or e-mail her at gerie.voss@atlahq.org.

The **Center for Constitutional Litigation** (CCL) and Trial Lawyers for Public Justice (TLPJ) are looking for cases that raise FDA preemption issues, and their lawyers are prepared to offer assistance as cocounsel. For CCL/TLPJ assistance, contact Louis Bograd at CCL (lou.bograd@cclfirm.com) or Leslie Brueckner at TLPJ (lbrueckner@ tlpj.org).

ATLA Education's recent teleseminar, "Federal Preemption of State Claims: How to Fight Back and Win for Your Clients," addressed the following topics: The *Colacicco* Decision: What Does It Mean for Your Products Liability Case, and How to Structure Your Pharmaceutical Case to Avoid Preemption. To purchase the audio recording of this program, call iPlayback at (800) 241-7785 or visit www.iplaybackatla.com.

deference to federal agencies' aggressively pro-preemption opinions.

Nor do federal agencies possess any expertise in evaluating constitutional questions of federalism, assessing the value of allowing states to serve as individual laboratories for legislative invention, or determining the proper balance of federal and state authority. The judiciary is best poised to balance competing federal and state interests and to address the broader federalism concerns implicit in preemption determinations. Given the comparative expertise of the judiciary over a federal agency on questions of preemption, a number of courts have suggested that an agency's view that a statute preempts a particular state law claim should "always be decided de novo by the courts" without deference.[26]

Finally, unlike generalist judges, who are well suited to balancing the varying institutional interests of federal and state governments, agencies often have an interest in expanding preemption to expand their power relative to state legislators and regulators. Broad federal preemption can establish the federal agency as the only regulator in town, making it the sole authority on a particular issue by crowding out any competition from state institutions.[27]

An agency's pro-preemption position, therefore, may reflect a self-aggrandizing power grab more than reasoned policymaking. In fact, recent evidence suggests that agencies give short shrift to states' regulatory interests when considering questions of preemption.[28]

Conversely, an agency's opinion that it wishes to permit state regulation may be entitled to deference. Such an opinion demonstrates that the agency is adequately taking into account states' views and not giving too much weight to its own institutional interests. It also is perfectly consistent with the presumption against preemption. When agencies cede regulatory authority to the states, rather than attempting to take it away through federal preemption, courts have properly deferred to the agencies' views.[29]

Legalese v. expertise

Much of the pro-preemption rulemaking represents legalese rather than expertise. As if cut and pasted straight from an agency amicus brief—indeed, the FDA explicitly states it is using its preemption preamble to make arguments lifted from previous amicus briefs[30]—the agencies' discussion of preemption involves legal argument surrounding jurisprudential principles of preemption rather than any specialized agency knowledge. Courts are experts in matters of legal interpretation and reasoning; deference to the agencies' legal opinions is unjustified.

Perhaps the most striking example of an agency's attempt to usurp the judiciary's role in evaluating claims of federal preemption is the OCC's rulemaking. Although agencies typically use their rulemaking power to create or amend substantive regulations, the OCC explicitly declined to adopt any substantive rule regarding the powers and duties of national banks.[31]

Its rulemaking was devoted solely to "clarifying" the scope of federal preemption, adopting a wildly expansive preemption standard—that any state laws that "obstruct, impair, or condition" the powers of a national bank are preempted—while claiming that its new standard represents a "distillation of the various preemption constructs articulated by the Supreme Court."[32] In other words, the OCC's entire preemption rule was based on its own expansive interpretation of existing Supreme Court precedent on national bank preemption.

This form of armchair judging merits no deference. As the District of Columbia Circuit recently explained: "We are not obligated to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle. There is therefore no reason for the courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions."[33]

Similarly, the CPSC, FDA, and NHTSA (in its fuel economy rulemaking) devote a portion of their preambles to legal discussion of preemption principles, including their own interpretation of the legislative history of the relevant provisions.[34] Although the legislative history of an agency's enabling statute arguably has a greater connection to the agency's role than Supreme Court precedent, just as with judicial precedent, courts "are not required to grant any particular deference to the agency's parsing of statutory language or its interpretation of legislative history."[35]

While the Supreme Court on occasion has deferred to legal positions taken in agency amicus briefs, it did so either when the agency had taken an anti- rather than pro-preemption position[36] or when, in fairly unusual circumstances, the agency was "uniquely qualified" to opine on the meaning of its own highly technical regulation set against a "complex" legislative background.[37] As the recent regulatory preambles do not fall into either of these categories, deference is improper.

Agency self-interest

One reason courts ordinarily defer to agencies is that they are deemed impartial experts that are not swayed by their own institutional interests. The federal agencies' recent pro-preemption statements may reflect agency self-interest rather than objectivity. When institutional self-preservation becomes an issue, deference is no longer proper.

One form of agency self-interest is financial. The OCC, for example, has a vested monetary interest in broad fed-

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eral protections from state law for national banks.

The United States has a dual banking system, meaning that banks can obtain a charter from either state governments or the federal government. Because charters bring in hefty fees from the banks, the states and the federal government compete with each other to reel in as many banks as possible. Convincing banks to obtain a national rather than a state charter is critically important for the OCC—almost its entire budget comes from fees paid by federally chartered banks.[38]

One of the biggest incentives to obtain a national charter that the OCC can offer banks is the prospect of immunity from state law. While state-chartered banks are subject to state law, those laws may be preempted as applied to national banks. The broader the scope of federal preemption, the greater the benefit of the national charter.

The OCC's financial interest in expanding preemption as far as possible is not just a theoretical concern. The agency's chief, John Hawke, has explicitly stated that he intends to dangle the carrot of federal preemption to persuade banks to charter nationally, noting that federal preemption "is a major advantage of the national charter."[39]

Using preemption as a profit-making tool creates bad policy—it puts a regulatory agency in a position of immunizing rather than regulating the businesses it oversees and creates a race to the bottom between federal and state governments, each offering increasing regulatory freedom in the competitive race to obtain charters. In other contexts, courts have refused to give deference to agency decisions motivated by financial self-interest.[40]

The general arguments in this article apply across legal issues as to why courts should not defer to an agency's pro-preemption statements. But anyone facing a preemption motion in which the defendant relies on an agency's preemption statement should heavily scrutinize the agency's specific reasoning for that particular subject matter—there may be flaws specific to the subject matter that also reduce the force of the

agency's statement.[41] Both general and specific arguments are crucial in any effort to defeat federal preemption.

Enlisting federal agencies to promote federal preemption is part of the growing arsenal of weapons being used to attack the civil justice system. Although defense lawyers and industry counsel undoubtedly will rely on these agency pronouncements in future litigation, the argument that these pro-preemption pronouncements should be given deference by the courts is deeply flawed. ■

Notes

1. Final Rule, Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904 (Jan. 13, 2004) (codified at 12 C.F.R. §7.4008).

2. Notice of Proposed Rulemaking, Federal Motor Vehicle Safety Standards; Roof Crush Resistance, 70 Fed. Reg. 49223, 49245-46 (Aug. 23, 2005).

3. Final Rule, Average Fuel Economy Standards for Light Trucks, Model Years 2008-2011, 71 Fed. Reg. 17566, 17656-70 (Apr. 6, 2006).

4. Final Rule, Requirements on Content and Format of Labeling for Human Prescription Drug and Biological Products, 71 Fed. Reg. 3922, 3934-36, 3967-69 (Jan. 24, 2006).

5. Final Rule, Standard for Flammability (Open Flame) of Mattress Sets, 71 Fed. Reg. 13472, 13497 (Mar. 15, 2006).

6. *Chevron U.S.A., Inc. v. Natl. Resources Def. Council*, 467 U.S. 837, 843-44 (1984).

7. *Id.* at 865.

8. *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001) (footnotes omitted) (citing *Skidmore v. Swift*, 323 U.S. 134, 139-40 (1944)).

9. *Compare Colacicco v. Apotex, Inc.*, 432 F. Supp. 2d 514 (E.D. Pa. 2006) (deferring to the FDA's preemption preamble), *and Gourdine v. Crews*, No. CAL 05-00480, at 5 (Md. Cir. June 28, 2006) (same), *with Doherty v. Merck & Co.*, No. ATL-L-0638-05MT (N.J. Super. June 9, 2006) (describing the FDA's preemption preamble as "a political statement" that "has nothing to do with science" and that is "contrary to all the law on preemption"); *see also Jackson v. Pfizer, Inc.*, 432 F. Supp. 2d 964 (D. Neb. 2006) (rejecting FDA preemption); *Laisure-Radke v. Par Pharm., Inc.*, 426 F. Supp. 2d 1163 (W.D. Wash. 2006) (same).

10. 533 U.S. at 226-27.

11. 21 C.F.R. §10.85(j) (2005).

12. *See Pacific Gas & Elec. Co. v. Fed. Power Commn.*, 506 F.2d 33, 38-39 (D.C. Cir. 1976).

13. *Gonzales v. Oregon*, 126 S. Ct. 904, 915 (2006) (quoting *Skidmore*, 323 U.S. at 140).

14. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000).

15. *See e.g. Smiley v. Citibank (S.D.), N. Am.*, 517 U.S. 735, 744 (1996).

16. Several commentators have identified and discussed ways the presumption against preemption can conflict with the principle of administrative deference. *See e.g.* Nina A. Mendelson, Chevron *and Preemption*, 102 Mich L. Rev. 737, 795 (2004); Amanda Frost, *Judicial Review of FDA Preemption Determinations*, 54 Food & Drug L.J. 367, 374 (1999).

17. *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005).

18. *Medtronic v. Lohr*, 518 U.S. 470, 488 (1996).

19. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 663-64 (1993); *see also Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) (holding that the presumption ensures that "the federal-state balance will not be disturbed unintentionally by Congress or unnecessarily by the courts").

20. *See Will v. Mich. Dept. of Police*, 491 U.S. 58, 65 (1989).

21. *Bates*, 544 U.S. at 449.

22. *Cf. Teper v. Miller*, 82 F.3d 989, 998 (11th Cir. 1996) (recognizing the tension between agency deference and the presumption against preemption and describing the "paradoxical" argument for deferring to an agency's determination that a state law is preempted).

23. *See e.g. City of New York v. FCC*, 814 F.2d 720, 730 (D.C. Cir. 1987) (Mikva, J., dissenting) ("The federalism concerns at the heart of the preemption doctrine are far more compelling than the separation-of-power concerns at the heart of *Chevron* jurisprudence."); *see also Elizabeth Blackwell Health Ctr. for Women v. Knoll*, 61 F.3d 170, 196 (3d Cir. 1995) (Nygaard, J., dissenting) ("The balance tips sharply in favor of upholding state law, not a federal agency's interpretation.").

24. *Teper*, 82 F.3d at 998.

25. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143-44 (2002); *Johnson v. United States R.R. Ret. Bd.*, 969 F.2d 1082, 1088-89 (D.C. Cir. 1992); *see also* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Policy 203, 208 n. 11 (2004).

26. *See e.g. Smiley*, 517 U.S. at 744; *Colorado Pub. Utils. Commn. v. Harmon*, 951 F.2d 1571, 1579 (10th Cir. 1991); *see also Medtronic*, 518 U.S. at 512 (O'Connor, J., dissenting) ("It is not certain that an agency regulation determining the preemptive effect of *any* federal statute is entitled to deference.").

27. *See* Mendelson and Frost, *supra* n. 16.

28. *See* Mendelson, *supra* n. 16, at 783-84.

29. *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 68-69 (2002); *Medtronic*, 518 U.S. at 495-96; *see also New York v. FERC*, 535 U.S. 1, 25-28 (2002).

30. 71 Fed. Reg. at 3934.

31. 69 Fed. Reg. at 1908.

32. *Id.* at 1910.

33. *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (citation omitted).

34. *See* 71 Fed. Reg. at 13496 (CPSC's discussion); 71 Fed. Reg. at 17656-58 (NHTSA's discussion); 71 Fed. Reg. at 3934-35 (FDA's discussion).

35. *Rettig v. Pension Benefit Guar. Corp.*, 744 F.2d 133, 141 (D.C. Cir. 1984).

36. *See Sprietsma*, 537 U.S. 51, 68-69.

37. *See Geier*, 529 U.S. at 883.

38. *See* Arthur E. Wilmarth, *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 Ann. Rev. Banking & Fin. L. 225, 276-78 (2004).

39. OCC News Release, *Comptroller Calls Preemption a Major Advantage of National Bank Charter* (Feb. 12, 2002); Wilmarth, *supra* n. 38, at 274-78.

40. *See e.g. Chickaloon-Moose Creek Native Assn., Inc. v. Norton*, 360 F.3d 972, 980 (9th Cir. 2004); *Transohio Sav. Bank v. Dir., Off. of Thrift Supervision*, 967 F.2d 598, 614 (D.C. Cir. 1992) (courts should not defer to an agency's "self-serving views"). For a more general discussion, see Armstrong, *supra* n. 25.

41. For specific critiques of the FDA's new preemption preamble, see Leslie A. Bailey & Leslie A. Brueckner, *Federal Preemption: Why the FDA's Bark May Be Worse Than Its Bite*, 9 Andrews Drug Recall Litig. Rep. 11 (May 8, 2006); Allison M. Zieve & Brian Wolfman, *The FDA's Argument for Eradicating State Tort Law: Why It Is Wrong and Warrants No Deference*, 34 BNA Prod. Safety & Liab. Rep. 308 (Mar. 27, 2006).