

# ARNOLD & PORTER LLP

CLIENT ADVISORY

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## UPDATED ANALYSIS: PREEMPTION AFTER *WYETH v. LEVINE*

Last week, we circulated a Client Advisory on the Supreme Court's decision in *Wyeth v. Levine*, 555 US \_\_\_\_ (Mar. 4, 2009)<sup>1</sup>, which ruled against preemption in a failure to warn case against a pharmaceutical company. Among other things, the Advisory explained that even though the decision limited the range of permissible preemption arguments, the defense remained viable in certain contexts. Just a few days later, the first major appellate opinion interpreting *Levine* confirmed that view. In *McCarrell v. Hoffman-La Roche*, Docket No. A-3280-07T1 (N.J. App. Div. Mar. 12, 2008)<sup>2</sup>, the Appellate Division of the New Jersey Superior Court reasoned that a company can establish preemption by presenting "clear evidence" that the FDA would not have approved the label change urged by the plaintiff. The Appellate Division implied that such "clear evidence" might include a showing that the company advocated for a stronger warning and the FDA rejected it. How wide this window is remains to be seen. The decision confirms, however, that companies should continue to consider the preemption defense in appropriate cases and should revisit their regulatory strategies to bolster the defense in the future.

*We hope that you have found this client advisory useful. If you have additional questions, please contact your Arnold & Porter attorney or:*

**Robert N. Weiner**

+1 202.942.5855

Robert.Weiner@aporter.com

**Anand Agneshwar**

+1 212.715.1107

Anand.Agneshwar@aporter.com

**Daniel A. Kracov**

+1 202.942.5120

Daniel.Kracov@aporter.com

**Jeffrey L. Handwerker**

+1 202.942.6103

Jeffrey.Handwerker@aporter.com

**Brussels**

+32 (0)2 290 7800

**Denver**

+1 303.863.1000

**London**

+44 (0)20 7786 6100

**Los Angeles**

+1 213.243.4000

**New York**

+1 212.715.1000

**Northern Virginia**

+1 703.720.7000

**San Francisco**

+1 415.356.3000

**Washington, DC**

+1 202.942.5000

*This advisory is intended to be a general summary of the law and does not constitute legal advice. You should consult with competent counsel to determine applicable legal requirements in a specific fact situation.*

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1 Available at: [http://www.arnoldporter.com/public\\_document.cfm?id=14168&key=910#zoom=100](http://www.arnoldporter.com/public_document.cfm?id=14168&key=910#zoom=100).

2 Available at: <http://njcourts.judiciary.state.nj.us/web0/opinions/a3280-07.pdf>.