

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE SUBOXONE)	Case No. 1:24-md-03092-JPC
(BUPRENORPHINE/NALOXONE))	
FILM PRODUCTS LIABILITY)	MDL No. 3092
LITIGATION)	
This Document Applies to All Cases)	Hon. J. Philip Calabrese

**Notice of Supplemental Authority to PLC’s Response to Partial
Motion to Dismiss for Failure to State a Claim**

Per the Court’s Civil Standing Order, the PLC submits this Notice of Supplemental Authority to its Response (ECF No. 135) to Defendant’s Partial Motion to Dismiss (ECF No. 126-1). The PLC’s Response argues that, absent an express preemption by Congress, Plaintiffs’ state failure-to-warn and design-defect claims may not be dismissed under the implied preemption theory of impossibility because implied preemption is a judicially created doctrine and unconstitutional intrusion into State sovereignty. (ECF No. 135 at PageID #3247–57.) The PLC supported its argument, in part, by directing the Court to the Supreme Court’s recent decision in *Loper Bright v. Raimondo*, 144 S. Ct. 2244 (2024). (*Id.*, PageID #3250.) The PLC now notifies the Court of additional authority with respect to the impact of *Loper Bright* on the validity of impossibility preemption.

The Third Circuit recently faced the issue of implied preemption of state failure-to-warn claims in the drug labeling context. *In Re Fosamax (Alendronate Sodium) Prods. Liab. Litig.*, No. 22-3412, 2024 WL 4247311 (3d Cir. Sept. 20, 2024). In a vacatur and remand order, the court concluded that the district court “erred in its pre-emption analysis by giving too little weight to the required presumption

against preemption” and holding “that the Plaintiffs’ state law claims are not preempted.” *Id.*, at *1. The court relied on *Loper Bright* to support its conclusion that FDA’s statements were not sufficient to preempt the plaintiffs’ state-law claims. *Id.* at *26 n.27. Applying the Third Circuit’s *Fosamax* reasoning to Defendants’ preemption argument leaves room for only one conclusion: Plaintiffs’ state-law claims are not preempted.

The Sixth Circuit also recently relied on *Loper Bright* in warning against mechanical adherence to “zombie precedent,” referring to decisions that subsequent Supreme Court doctrine erodes short of expressly overruling. *Nat’l Republican Senatorial Comm. v. Fed. Election Comm’n*, No. 24-3051, 2024 WL 4052976, at *46 (6th Cir. Sept. 5, 2024) (Readler, J. dissenting). To the extent *Loper Bright* repudiates the doctrine of implied preemption (ECF No. 35, PageID #3254), the PLC encourages the Court to find that Plaintiffs’ state-law claims are not preempted.

Dated: September 27, 2024

Respectfully submitted,

/s/ Ashlie Case Sletvold
Ashlie Case Sletvold
PEIFFER WOLF CARR KANE CONWAY &
WISE, LLP
6370 SOM Center Road, Suite 108
Cleveland, OH 44139
(216) 589-9280
asletvold@peifferwolf.com
Plaintiffs’ Co-Lead Counsel

/s/ Erin Copeland
Erin Copeland
FIBICH, LEEBRON, COPELAND & BRIGGS
1150 Bissonnet Street
Houston, TX 77005
(713) 424-4682
ecopeland@fibichlaw.com
Plaintiffs’ Co-Lead Counsel

/s/ Timothy J. Becker

Timothy J. Becker
JOHNSON // BECKER, PLLC
444 Cedar Street, Suite 1800
St. Paul, MN 55101
(612) 436-1800
tbecker@johnsonbecker.com

Plaintiffs' Co-Lead Counsel

/s/ Alyson Steele Beridon

Alyson Steele Beridon
HERZFELD, SUETHOLZ, GASTEL,
LENISKI, & WALL, PLLC
610 Vine Street, Suite 2720
Cincinnati, OH 45202
(513) 381-2224
alyson@hsglawgroup.com

Plaintiffs' Liaison Counsel

/s/ Trent B. Miracle

Trent B. Miracle
FLINT COOPER COHN
THOMPSON & MIRACLE LLC
222 East Park Street, #500
Edwardsville, IL 62025
(618) 288-4777
tmiracle@flintcooper.com

Plaintiffs' Co-Lead Counsel