

# State AGs Choose Products Liability Case as Battleground for State Sovereignty

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A bipartisan coalition of 23 state attorney generals led by Virginia AG Jason Miyares recently went up in arms about a products liability ruling they believe will threaten state consumer protection laws. On May 30, the coalition filed an [amicus brief](#) in support of the plaintiffs' claims in *In Re: Fosamax (Alendronate Sodium) Products Liability Litigation*, a consolidated case where hundreds of plaintiffs claimed to suffer femur fractures as a result of taking Merck drug Fosamax.

The plaintiffs sued Merck under state products liability law, alleging the drug manufacturer failed to warn consumers of the risk of atypical femoral fractures. The District Court of New Jersey dismissed the claims, holding that the doctrine of impossibility preemption blocked the state law claims because the FDA rejected a warning label discussing the risk of stress fractures — making it impossible for Merck to comply with both state and federal law.

In the amicus brief, the state AGs' emphasized that “[s]tate sovereignty is the bedrock principal of our constitutional system,” and that “impossibility preemption is and must remain a demanding defense.”

The state AGs went on to argue that the court's application of impossibility preemption “vividly illustrates the potential for mischief” because the label rejection at issue did not involve the “atypical fractures that injured the plaintiffs,” but only “stress fractures.”

Overall, the AGs claimed that impossibility preemption should be rarely applied, and Merck did not meet the heightened “clear evidence” standard.

## Why It Matters

This intervention by state AGs on the appeal shows their concerns about the implications of the ruling and what it could mean in the future for their consumer protection statutory authority under their respective Unfair and Deceptive Trade Practices Acts.

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