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Judi Abbott Curry

Cynthia Weiss Antonucci

Eric Portuguese

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# FEDERAL PREEMPTION OF PESTICIDE LABELING CLAIMS

JUDI ABBOTT CURRY,\*  
CYNTHIA WEISS ANTONUCCI\*\*  
& ERIC PORTUGUESE\*\*\*

## INTRODUCTION

The Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA")<sup>1</sup> is federal legislation which contains specific, uniform provisions that govern all aspects of pesticide registration, packaging and labeling. FIFRA's express statutory language prohibits states from continuing or imposing requirements for labeling or packaging that are different from, or in addition to, those required under FIFRA.<sup>2</sup> The doctrine of federal preemption<sup>3</sup> arguably precludes common law tort claims. Furthermore, this prohibition favors pesticide manufacturers joined as defendants in personal injury or property damage litigation based on failure to warn or improper labeling claims.

Since FIFRA's revision in 1972, a number of state and federal courts have addressed the issue of whether state common law tort claims are preempted by FIFRA. The majority view holds that claims based on inadequate labeling are preempted by FIFRA.<sup>4</sup>

\* Judi Abbott Curry is a partner at Lester Schwab Katz & Dwyer in New York, specializing in complex mass tort litigation. B.A., State University of New York at Stony Brook, 1983; J.D., Fordham University School of Law, 1986.

\*\* Cynthia Weiss Antonucci is a partner at Lester Schwab Katz & Dwyer, specializing in toxic torts, sick building syndrome and multiple chemical sensitivities litigation. B.S.N., State University of New York at Plattsburg, 1978; J.D., New York Law School, 1983.

\*\*\* Eric A. Portuguese is a former judicial law clerk with the Appellate Division, Second Department. Presently, he is a partner at Lester Schwab Katz & Dwyer specializing in state and federal appeals. B.S., Rensselaer Polytechnic Institute, 1977; J.D., Albany Law School, 1980. The authors wish to express their appreciation to the efforts of Catherine Feehan in publishing this article.

<sup>1</sup> Pub. L. No. 80-104, 61 Stat. 163 (1947) (codified as amended at 7 U.S.C. §§ 136-136e (1994)).

<sup>2</sup> *Id.* § 136v(b).

<sup>3</sup> *State v. McHorse*, 517 P.2d 75, 79 (N.M. Ct. App. 1973) (discussing policy of federal preemption).

<sup>4</sup> See *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 72 (8th Cir. 1995) (holding express warranty claim preempted); *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555, 561-63 (9th Cir. 1995) (holding implied warranty, negligent testing and failure to warn claims

The minority view, having its genesis in the United States Court of Appeals for the District of Columbia's *Ferebee v. Chevron Chemical Co.*,<sup>5</sup> has been adopted by a number of federal district courts throughout the country.<sup>6</sup>

The Supreme Court's preemption analysis in the controversial cigarette labeling case, *Cipollone v. Liggett Group, Inc.*,<sup>7</sup> has tipped the balance of this "split in circuits" toward preemption. The issue of preemption, as it relates to FIFRA, seems destined for Supreme Court review. It is expected that the Supreme Court will set forth a holding that common law tort claims for personal injury and property damage based on inadequate labeling and failure to warn of the dangers of pesticides are preempted by FIFRA. This article examines the statutory language, legislative history, regulatory scheme and judicial interpretations of FIFRA, all of which support preemption.

preempted); *King v. E.I. DuPont deNemours & Co.*, 996 F.2d 1346, 1349 (1st Cir. 1993) (holding FIFRA preempts state tort claims of inadequate labeling), *cert. dismissed*, 114 S. Ct. 490 (1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Worm v. American Cyanamid, Co.*, 970 F.2d 1301, 1303 (4th Cir. 1992), *aff'd on remand*, 5 F.3d 744 (4th Cir. 1993); *Arkansas-Platte & Gulf Part. v. Van Waters & Rogers, Inc.*, 959 F.2d 158, 158 (10th Cir.), *vacated*, 113 S. Ct. 314 (1992), *on remand*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 114 S. Ct. 60 (1993); *Papas v. Upjohn Co.*, 926 F.2d 1019, 1021 (11th Cir. 1991) (*per curiam*), *vacated sub nom. Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992), *on remand sub nom. Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied sub nom. Papas v. Zoecon Corp.*, 114 S. Ct. 300 (1993); *Brennan v. Dow Chem. Co.*, 613 So. 2d 131, 133 (Fla. Dist. Ct. App. 1993) (*per curiam*); *Begley v. Truly Nolan Exterminating, Inc.*, 573 So. 2d 1038, 1039 (Fla. Dist. Ct. App. 1991); *Yowell v. Chevron Chem. Co.*, 836 S.W.2d 62, 66 (Mo. Ct. App. 1992); *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931, 936 (Nev. 1992), *cert. denied*, 113 S. Ct. 1944 (1993). *Contra Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1532 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984); *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136, 138 (Ark. 1992).

<sup>5</sup> 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

<sup>6</sup> *Id.* at 1542. *Ferebee* holds that FIFRA does not either expressly or impliedly preempt state common law tort claims based on failure to warn. *Id.* The court's perspective has been adopted by certain federal district courts considering the issue. See *MacDonald v. Monsanto Co.*, 813 F. Supp. 1258, 1261 (E.D. Tex. 1993) (holding that FIFRA preempts state statutory labeling claims, not failure to warn claims), *rev'd*, 27 F.3d 1021 (5th Cir. 1994); *Couture v. Dow Chem. Co.*, 804 F. Supp. 1298, 1302 (D. Mont. 1992) (discussing that states are free to regulate use of pesticides through common law remedies); *Thorton v. Fondren Green Apts.*, 788 F. Supp. 928, 932 (S.D. Tex. 1992); *Montana Pole & Treating Plant v. I.F. Laucks & Co.*, 775 F. Supp. 1339, 1343-44 (D. Mont. 1991), *aff'd on other grounds*, 993 F.2d 676 (9th Cir. 1993); *Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500, 1505-06 (W.D. Mo. 1991); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345, 1348 (S.D. Ind. 1990); *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85, 87 (E.D. Pa. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195, 197 (N.D. Ill. 1988); see also *Wilson v. Chevron Chem. Co.*, No. 83 Civ. 762, 1988 WL 52779, at \*3 (S.D.N.Y. May 18, 1988).

<sup>7</sup> 505 U.S. 504 (1992).

## I. THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

FIFRA exclusively preempts state authority to regulate pesticide labeling and packaging.<sup>8</sup> The Act represents a comprehensive federal system for the strict regulation of pesticides. FIFRA was enacted in 1947 to supplant and expand the protection provided by its predecessor statute, the Insecticide Act of 1910,<sup>9</sup> the first federal act regulating the pesticide industry.<sup>10</sup> In 1972, increasing environmental and safety concerns motivated Congress to undertake a thorough revision of FIFRA. The 1972 amendments strengthened FIFRA's legislation and labeling standards significantly.<sup>11</sup> The two main goals of the 1972 revisions were to monitor the use of pesticides to protect man and the environment, and to extend federal pesticide regulation to intrastate actions.<sup>12</sup>

The 1972 revisions transferred responsibility for the regulation of pesticides from the Department of Agriculture to the newly formed Environmental Protection Agency ("EPA").<sup>13</sup> The administrator of the EPA is directed to register a pesticide if he or she determines that the pesticide will perform without causing unreasonably adverse effects on man's health or the environment.<sup>14</sup> A pesticide registered with the EPA must include EPA-approved warnings that aim to protect health and the environment on its labels.<sup>15</sup> As the United States Court of Appeals for the Tenth Circuit emphasized in *Arkansas-Platte and Gulf Partnership v. Van Waters & Rogers, Inc.*,<sup>16</sup> the EPA considers all adverse effects caused by a pesticide when it determines whether labels comply with FIFRA's requirements.<sup>17</sup> The labels must protect the public

<sup>8</sup> 7 U.S.C. § 136v(a)-(b) (1994). The relevant provisions provide that "[a] State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." *Id.* Furthermore, the Uniformity provision provides that "[s]tates shall not impose or continue in effect any requirements for labelling or packaging in addition to or different from those required under this subchapter." *Id.*

<sup>9</sup> See H.R. REP. NO. 313, 80th Cong., 1st Sess. (1947), reprinted in 1947 U.S.C.C.A.N. 1200, 1200.

<sup>10</sup> See S. REP. NO. 838, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 3993, 3999.

<sup>11</sup> See 7 U.S.C. § 136a (1994); see also *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 601 (1991).

<sup>12</sup> See S. REP. NO. 838, *supra* note 10.

<sup>13</sup> *Id.* at 4001.

<sup>14</sup> See 7 U.S.C. § 136a(c)(5)(C) (1994).

<sup>15</sup> See *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 805 (M.D. Fla. 1989).

<sup>16</sup> 959 F.2d 158 (10th Cir. 1992), *cert. denied*, 114 S. Ct. 60 (1993).

<sup>17</sup> *Id.* at 161-62.

from fraud and personal injury as well as serve to prevent unreasonable adverse effects on the environment.<sup>18</sup>

### A. Legislative History of FIFRA

Under FIFRA, the EPA maintains authority over the registration of pesticides and the approval of labels. FIFRA and its legislative history demonstrate an absolute congressional intent for the EPA to have exclusive control over the regulation of pesticide labeling.<sup>19</sup>

Congress intended that FIFRA's preemptive reach extend to any labeling requirement promulgated by a state.<sup>20</sup> The issue that arises is whether FIFRA's preemptive effect is limited to legislatively enacted laws and regulations, or whether FIFRA also precludes state common law tort claims. Both FIFRA and its legislative history broadly discuss preemption as applying to any labeling requirements that are different from those prescribed by FIFRA, not simply requirements that are legislatively enacted.<sup>21</sup> The authority to promulgate such regulations was reserved exclusively for the EPA.<sup>22</sup>

### B. Comprehensive Federal Regulation of Pesticide Labeling

The EPA has regulated practically every facet of pesticide labeling.<sup>23</sup> In order to register, FIFRA requires that each applicant file with the EPA a complete description of the tests conducted on the pesticides and their results.<sup>24</sup> Furthermore, FIFRA's regulations dictate the specific scientific tests that must be performed to test

<sup>18</sup> See *id.*

<sup>19</sup> See *Kennan*, 717 F. Supp. at 805.

<sup>20</sup> S. REP. NO. 838, *supra* note 10, at 4021.

<sup>21</sup> H.R. REP. NO. 511, 92d Cong., 2d Sess. 16 (1972). In a report accompanying the House bill, state power to regulate labeling was regarded by the House Committee as completely preempted. *Id.* "In dividing the responsibility between the [s]tates and the [f]ederal [g]overnment for the management of an effective pesticide program, the Committee had adopted language which is intended to completely preempt State authority in regard to labelling and packaging." *Id.*; see also S. REP. NO. 970, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 4092, 4128.

<sup>22</sup> See *Kennan*, 717 F. Supp. at 804-05.

<sup>23</sup> See *Papas v. Upjohn Co.*, 926 F.2d 1019, 1021 (11th Cir. 1991) (per curiam), *vacated sub nom.* *Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992), *on remand sub nom.* *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied sub nom.* *Papas v. Zoecon Corp.*, 114 S. Ct. 300 (1993).

<sup>24</sup> See 7 U.S.C. § 136a(c)(1)(F) (1994). This section requires a full description of tests made and the results when requested by the EPA. *Id.*

each category of pesticides.<sup>25</sup> This test data includes extensive information relating to a pesticide's product chemistry, residue chemistry, toxicity levels, as well as the effects of exposure to humans, wildlife and aquatic organisms and plant life.<sup>26</sup> Additionally, FIFRA regulations prescribe strict laboratory practice standards that must be satisfied when conducting tests or studies relating to an application for pesticide registration.<sup>27</sup>

FIFRA is equally stringent with regard to labeling. The EPA specifies, among other things, the particular warning language as well as the placement and type-size of the warning.<sup>28</sup> The EPA also requires that a statement of practical treatment, for example, first aid or other treatment appear on the label for each pesticide.<sup>29</sup> Extensive warnings and precautionary statements about risks to humans also are required by FIFRA and its regulations.<sup>30</sup> The EPA also requires that if a danger to humans or domestic animals exists, precautionary statements must indicate: (1) the specific hazard; (2) the routes of exposure; and (3) the precautions that should be taken to avoid accident, injury or property damage.<sup>31</sup>

The EPA requires that pesticide labels contain directions for use, stated in clear terms which easily can be read and understood.<sup>32</sup> A pesticide is considered misbranded under FIFRA's regulations if it does not include a warning or caution statement which may be necessary to protect health.

Additionally, FIFRA is equipped with a special review and a re-registration processes. Once a pesticide has been registered and its label approved, the pesticide and its label remain subject to EPA scrutiny through the special review<sup>33</sup> and the re-registration processes.<sup>34</sup> FIFRA provides that if after registration, additional factual information arises regarding unreasonable adverse effects,

<sup>25</sup> See 40 C.F.R. § 158 (1994).

<sup>26</sup> See 40 C.F.R. § 156.10 (1994).

<sup>27</sup> See 40 C.F.R. § 160 (1994).

<sup>28</sup> See 40 C.F.R. § 156.10 (1994).

<sup>29</sup> See 40 C.F.R. § 156.10(h)(1)(iii) (1994).

<sup>30</sup> See Table at 40 C.F.R. § 156.10(h)(1) (1994). Pesticides are grouped into four human toxicity categories: oral, inhalation, dermal toxicity and contact with the eyes or skin. *Id.* The warning on the label is based on the pesticide's toxicity category. *Id.*

<sup>31</sup> See 40 C.F.R. § 156.10(h)(2)(i)(A) (1994).

<sup>32</sup> See 40 C.F.R. § 156.10(i)(1)(i) (1994).

<sup>33</sup> See 40 C.F.R. § 154 (1994).

<sup>34</sup> See 40 C.F.R. § 152 (1994).

the registrant must provide such new information to the administrator.<sup>35</sup>

Moreover, a manufacturer may not alter or revise cautions or precautionary statements listed on a warning label without EPA approval.<sup>36</sup> Generally, with respect to label alterations and revisions, the manufacturer is required to submit to the EPA an application for an amended registration supported by extensive scientific test data.<sup>37</sup> The result of which is that a pesticide label cannot contain language which the EPA has not approved. The EPA's authority over pesticide labeling may be construed as an independent preemptive source by virtue of this comprehensive regulatory scheme.

## II. THE FEDERAL PREEMPTION DOCTRINE

The Supremacy Clause<sup>38</sup> of the United States Constitution permits Congress to preempt state law in several different ways. For example, Congress may expressly displace state law. The question in express preemption analysis is whether Congress has provided for preemption in express terms.<sup>39</sup>

Another type of preemption is implied preemption. One form of implied preemption asks whether congressional intent to preempt state law in a particular field may be inferred where the scheme of federal regulation is sufficiently comprehensive.<sup>40</sup> Federal law also impliedly preempts state law when the federal law conflicts with state law<sup>41</sup> and such conflict makes it impossible to comply with federal and state regulations concurrently.<sup>42</sup> Lastly, state law is impliedly preempted when it obstructs the purposes and goals of Congress.<sup>43</sup>

<sup>35</sup> See 7 U.S.C. § 136d(a)(2) (1994).

<sup>36</sup> See 7 U.S.C. § 136a(f)(1) (1994).

<sup>37</sup> See 40 C.F.R. §§ 152.44, 152.50, 158 (1994).

<sup>38</sup> U.S. CONST. art. VI, cl. 2. Article VI of the Constitution provides that the laws of the United States "shall be the supreme Law of the Land . . . any thing in the Constitution or Laws of any State to the Contrary notwithstanding." *Id.*

<sup>39</sup> See *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272, 280 (1987).

<sup>40</sup> See *id.* at 280-81; see also *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988) (finding that issue of preemption requires study of congressional intent which can be inferred by examining extent to which federal statute dominates field).

<sup>41</sup> See *Guerra*, 479 U.S. at 281; see also *International Paper Co. v. Ouellette*, 479 U.S. 481, 491 (1987).

<sup>42</sup> *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

<sup>43</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); see also *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981).

### A. *The Seminal Opinion Of Ferebee v. Chevron Chemical Company*

The United States Court of Appeals for the District of Columbia first considered whether state common law actions based on failure to warn claims were preempted by FIFRA in 1984, in *Ferebee v. Chevron Chemical Co.*<sup>44</sup> The court in *Ferebee* permitted a state jury to find a product inadequately labeled despite the EPA's determination that, under FIFRA, the label was adequate.<sup>45</sup> The court decided that FIFRA did not preempt state common law tort remedies, making the distinction between FIFRA as a regulatory measure and compensatory state tort remedies.<sup>46</sup> The court reasoned that its decision to allow a state cause of action is not necessarily regulatory, and the defendant Chevron can comply with both federal and state law by continuing to use the EPA-approved label and simultaneously paying damages to successful tort plaintiffs, such as Mr. Ferebee.<sup>47</sup>

Aside from this regulatory-compensatory distinction, the court, in *Ferebee*, acknowledged that FIFRA does not permit states to impose additional labeling requirements.<sup>48</sup> The court also noted that the legislature did not expressly preempt state damage actions, but it simply precluded states from directly ordering changes in the EPA-approved labels.<sup>49</sup> The *Ferebee* court's rationale, known as the "choice of reaction" analysis, has been specifically rejected by most courts, and implicitly rejected by a plurality of the Supreme Court in *Cipollone v. Liggett Group, Inc.*<sup>50</sup>

At present, the *Ferebee* decision, holding that FIFRA neither expressly nor impliedly preempts state common law tort claims based on failure to warn, remains the minority perspective.<sup>51</sup> Sub-

<sup>44</sup> 736 F.2d 1529 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984).

<sup>45</sup> See *id.* at 1540.

<sup>46</sup> See *id.* at 1541.

<sup>47</sup> See *id.*

<sup>48</sup> *Ferebee*, 736 F.2d at 1541.

<sup>49</sup> *Id.* at 1542.

<sup>50</sup> 505 U.S. 504 (1992).

<sup>51</sup> See *MacDonald v. Monsanto Co.*, 813 F. Supp. 1258, 1261 (E.D. Tex. 1993); *Couture v. Dow Chem. Co.*, 804 F. Supp. 1298, 1299 (D. Mont. 1992); *Thorton v. Fondren Green Apartments*, 788 F. Supp. 928, 929 (S.D. Tex. 1992); *Montana Pole & Treating Plant v. I.F. Laucks & Co.*, 775 F. Supp. 1339, 1344 (D. Mont. 1991), *aff'd on other grounds*, 993 F.2d 676 (9th Cir. 1993); *Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500, 1501 (W.D. Mo. 1991); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345, 1349 (S.D. Ind. 1990); *Stewart v. Ortho Consumer Prod.*, No. 87-4252, 1990 WL 36129, at \*6 (E.D. La. Mar. 26, 1990); *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85, 87 (E.D. Pa. 1989); *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195, 196 (N.D. Ill. 1988); see also *Wilson v. Chevron Chem. Co.*, No. 83 Civ.



sequent to *Ferebee*, the climate of FIFRA preemption was chilled. The *Ferebee* court had squarely held that state common law tort claims based on inadequate pesticide labeling were valid rights of recovery. Consequently, manufacturers could either change their label, refrain from selling their products in the states where such actions predominate or pay the judgment.

Beginning in 1987, several district courts revisited the *Ferebee* rule. In *Fitzgerald v. Mallinkrodt*,<sup>52</sup> the United States District Court for the Eastern District of Michigan rejected *Ferebee*, holding that allowing recovery for claims under state law, despite Congress' intent to provide uniform regulations governing the labeling of pesticides, would allow plaintiffs to use a back door to gain recovery.<sup>53</sup>

In *Palmer v. Liggett Group, Inc.*,<sup>54</sup> the United States Court of Appeals for the First Circuit analyzed whether the Federal Cigarette Labeling and Advertising Act<sup>55</sup> (the "Cigarette Labeling Act") preempted failure to warn claims.<sup>56</sup> In evaluating and rejecting the "choice of reaction" concept, the court in *Palmer* recognized that effecting such a change in the manufacturer's behavior and imposing such additional warning requirements through the imposition of liability is exactly what Congress sought to preempt by creating the Cigarette Labeling Act.<sup>57</sup> In effect, this holding grants a single jury the regulatory power explicitly denied to the states.<sup>58</sup>

*Fitzgerald* and subsequent decisions rejected the "choice of reaction" analysis, which in essence is a business choice between paying damages and changing the label, as illusory.<sup>59</sup> While *Ferebee*

762 1988 WL 52779, at \*3 (S.D.N.Y. May 18, 1988); *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1303 (4th Cir. 1992), *aff'd on remand*, 5 F.3d 744 (4th Cir. 1993).

<sup>52</sup> 681 F. Supp. 404 (E.D. Mich. 1987).

<sup>53</sup> *See id.* at 407.

<sup>54</sup> 825 F.2d 620 (1st Cir. 1987).

<sup>55</sup> Pub. L. No. 89-92, 79 Stat. 282, [hereinafter Cigarette Labeling Act] (codified as amended at 15 U.S.C. §§ 1331-40 (1988 & Supp. V 1993)).

<sup>56</sup> *Palmer*, 825 F.2d at 620.

<sup>57</sup> *See id.*

<sup>58</sup> *Id.* at 627-28.

<sup>59</sup> *See Fitzgerald v. Mallinkrodt*, 681 F. Supp. 404, 406-07 (E.D. Mich. 1987). *See, e.g., Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1301 (4th Cir. 1992), *aff'd on remand*, 5 F.3d 744 (4th Cir. 1993); *Arkansas-Platte & Gulf Part. v. Van Waters & Rogers, Inc.*, 959 F.2d 158, 162 (10th Cir.), *vacated*, 113 S. Ct. 314 (1992), *on remand*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 114 S. Ct. 60 (1993); *Papas v. Upjohn Co.*, 926 F.2d 1019, 1026 (11th Cir. 1991) (*per curiam*), *vacated sub nom. Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992), *on remand sub nom. Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied sub nom. Papas v. Zoecon Corp.*, 114 S. Ct. 300 (1993); *Hurt v. Dow Chem. Co.*, 759 F. Supp. 556, 559

continues to have a steady, minority following, its precedential value has been undercut by numerous state<sup>60</sup> and federal<sup>61</sup> decisions finding express or implied preemption of tort claims.

(E.D. Miss. 1990); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 805-06 (M.D. Fla. 1989); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283, 1288-89 (W.D. Mo. 1989); *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931, 931 (Nev. 1992).

<sup>60</sup> Courts in seventeen of eighteen states considering this issue have found preemption. See *Davidson*, 834 P.2d at 931; see also *Brennan v. Dow Chem. Co.*, 613 So. 2d 131, 131 (Fla. Dist. Ct. App. 1993); *Begley v. Truly Nolan Exterminating, Inc.*, 573 So. 2d 1038, 1039 (Fla. Dist. Ct. App. 1991); *Stiltjes v. Ridco Exterminating Co.*, 343 S.E.2d 715, 931 (Ga. Ct. App. 1986), *aff'd on other grounds*, 347 S.E.2d 568 (Ga. 1986); *Abelman v. Velsicol Chem. Corp.*, Civ. No. 12611, 1991 WL 213402, at \*2 (Md. Cir. Ct., May 17, 1991); *Yowell v. Chevron Chem. Co.*, 836 S.W.2d 62, 63 (Mo. Ct. App. 1992); *Hopkins v. Ciba-Geigy Corp.*, 432 S.E.2d 142, 145 (N.C. Ct. App. 1993). *Contra Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136, 144-45 (Ark. 1992).

See generally *Ramos v. Gollins*, No. C750551 (Cal. Sup. Ct. Los Angeles Cty., Feb. 21, 1992); *Macias v. State*, No. BC024-501 (Cal. Super. Ct. Los Angeles Cty., Jan. 29, 1992); *White v. Cal-X-Pest Control*, No. 51296, (Cal. Super. Court, Sacramento Cty., Oct. 28, 1991); *Bolduc v. Chemed Corp.*, No. 43-94-55 (Cal. Super. Ct. Orange Cty., Apr. 10, 1989); *Lopez v. Chevron Chem. Co.*, No. 89272 (Cal. Super. Ct. Ventura Cty., Oct. 25, 1988); *Bond v. Dow Chem. Co.*, No. 89-CV 133 (Colo. Dist. Ct. Delta Cty., Oct. 30, 1991); *South Colo. Farms, Inc. v. Green*, No. 88 CV 40 (Colo. Dist. Ct., Saguache Cty., June 7, 1991); *Oppermann v. Stevens*, No. 88 CV 1192 (Colo. Dist. Ct. Boulder Cty., June 1, 1990); *Perry v. Dow Chem. Co.*, Case No. CL-88-10227-AN, (Fla. Cir. Ct., Palm Beach Cty., June 5, 1991); *Moyer v. Dow Chem.*, No. CI89-8657 (Fla. Cir. Ct., Orange Cty., May 8, 1991); *Plott v. Ciba-Geigy Corp.*, No. 86-17740-CA (Fla. Cir. Ct. Deval Cty., Oct. 27, 1989); *Rogers v. Thumb Pest Control, Inc.*, No. 88-3462 (Fla. Cir. Ct. Hillborough Cty., Oct. 10, 1989); *Day v. Ciba-Geigy Corp.*, No. 12950-7-80 (Idaho Dist. Ct., Cassia Cty., Sept. 10, 1985); *Fullmer v. Arab Termite and Pest Control, Inc.*, No. 29C 018907 CT415 (Ind. Cir. Ct. Hamilton Cty., May 24, 1991); *Bander v. Southern States Coop., Inc.*, No. 92-CA-19196 (Md. Cir. Ct. Howard Cty., Dec. 31, 1992); *Dubois v. Ray's Feed Mill, Inc.*, No. 88-9140-NZ (Mich. Cir. Ct., Delta Cty., Jan. 26, 1990); *Tessman Seed & Chem. Co. v. Minnesota*, No. C8-89349 (Minn. Dist. Ct. Ramsey Cty., July 9, 1990), *aff'd on other grounds*, 467 N.W.2d 625 (Minn. Ct. App. 1991); *Merrill v. Dow Chem. Co.*, No. PI88-2630 (Minn. Dist. Ct., Hennepin Cty., May 1, 1990); *Wixson v. Sonford Products Corp.*, No. 24847 (Miss. Chancery Ct. Rankin Cty., May 1, 1989); *Paul v. NCH Corp.*, No. 48262 (N.Y. Sup. Ct. Niagara Cty., Dec. 11, 1989); *Tilton v. Dow Chem. Co.*, Civ. Div. GD 88-02950, No. 137710 (Pa. C.P. Ct., Alleghany Cty., Apr. 4, 1990); *Maberry v. Tomlin*, No. 141-104135-87 (Tex. Dist. Ct. Tarrant Cty., June 1, 1992); *Leonard v. Velsicol Chem. Corp.*, No. 236-10567-87 (Tex. Dist. Ct., Tarrant Cty., May 26, 1992); *Mechura Farms v. Ciba-Geigy Corp.*, No. 30, 144-S (Tex. Dist. Ct., Wharton Cty., May 5, 1992); *Rice v. Dow Chem. Co.*, No. 88-2-04556-4 (Wash. Sup. Ct., Pierce Cty., Oct. 25, 1991); *Selvig v. Lentz Fertilizer Inc.*, No. 85 CV456 (Wis. Cir. Ct., Dunn Cty., Dec. 26, 1988).

<sup>61</sup> *King v. E.I. du Pont DeNemours & Co.*, 996 F.2d 1346, 1347 (1st Cir. 1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Arkansas-Platte*, 959 F.2d at 158; *Worm*, 970 F.2d at 1301, 1303; *Papas*, 926 F.2d at 1019; *Kolich v. Sysco Corp.*, 825 F. Supp. 959, 961 (D. Kan. 1993); *Burge v. Jones*, Civ. No. B-92-022, 1992 WL 415263, at \*1 (S.D. Tex. Nov. 18, 1992); *Casper v. E.I. du Pont DeNemours & Co.*, 806 F. Supp. 903, 907 (E.D. Wash. 1992); *Gibson v. Dow Chem. Co.*, 842 F. Supp. 938, 940 (E.D. Ky. 1992); *Jordan v. Southern Wood Piedmont Co.*, 805 F. Supp. 1575, 1578 (S.D. Ga. 1992); *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1131 (E.D.N.Y. 1992); *Young v. American Cyanamid Co.*, 786 F. Supp. 781, 783 (E.D. Ark. 1991); *Herr v. Carolina Log Bldgs., Inc.*, 771 F. Supp. 958, 960 (S.D. Ind. 1989); *Hurt v. Dow Chem. Co.*, 759 F. Supp. 556, 559 (E.D. Miss. 1990); *Fisher*, 716 F. Supp. at 1283; *Kennan*, 717 F. Supp. at 812; *Watson v. Orkin Exterminating Co., Inc.*, No. Civ. JFM-88-2427, 1988 WL 235673, at \*1 (D. Md. Nov. 9, 1988); *Fitzgerald*, 681 F. Supp. at 404.

### B. Express Preemption of Failure To Warn Claims

Congress' comprehensive legislation bars states from interfering with regulation of pesticide labels, which are solely within the province of EPA.<sup>62</sup> The issue that remains, however, is whether a state court jury verdict assessing liability based on a failure to warn claim constitutes the regulation of pesticide labels.<sup>63</sup> It is asserted that Congress expressly intended to preempt state labeling requirements as well as state common law tort actions based on failure to warn in the 1972 amendments to FIFRA.<sup>64</sup>

Proponents of the majority view assert that the broad language of FIFRA that prohibits "any requirements" by states prohibits juries from assessing liability based on the adequacy of a label.<sup>65</sup> This interpretation of FIFRA's express preemptive reach conforms with both a plain reading of section 136v of FIFRA, as well as the United States Supreme Court's consideration of tort preemption in *Cipollone v. Liggett Group, Inc.*<sup>66</sup>

In *Cipollone*, the Court considered the preemptive effect of the Cigarette Labeling Act.<sup>67</sup> The Supreme Court's ruling in *Cipollone* mandates that state tort actions are preempted as a matter of law.<sup>68</sup>

The Supreme Court held that the Cigarette Labeling Act's preemption of state law requirements and prohibitions included the preemption of common law rules, even though this preemption was not expressly stated in the provision.<sup>69</sup> The Court rejected the plaintiff's argument that Congress did not intend to bar common

<sup>62</sup> See *supra* notes 19-22 and accompanying text.

<sup>63</sup> See *Arkansas-Platte*, 981 F.2d at 179; *Kennan*, 717 F. Supp. at 806-07.

<sup>64</sup> See *King*, 996 F.2d at 1348-49; see also *Shaw*, 994 F.2d at 370-71; *Arkansas-Platte*, 981 F.2d at 1179; *Chem. Specialties Mfrs. Ass'n., Inc. v. Allenby*, 958 F.2d 941, 945 (9th Cir.), *cert. denied*, 113 S. Ct. 80 (1992); *Levesque v. Miles Inc.*, 816 F. Supp. 61, 69 (D.N.H. 1993); *Casper*, 806 F. Supp. at 906-907; *Gibson*, 842 F. Supp. at 940; *Burke*, 797 F. Supp. at 1139-41; *Kennan*, 717 F. Supp. at 812; *Herr*, 771 F. Supp. at 961; *Watson*, No. Civ. JFM-88-2427, 1988 WL 235673, at \*2-3; *Fitzgerald*, 681 F. Supp. at 407.

<sup>65</sup> See *King*, 996 F.2d at 1348-49; *Shaw*, 994 F.2d at 370-71; *Papas*, 985 F.2d at 519; *Arkansas-Platte*, 981 F.2d at 1179; *Casper*, 806 F. Supp. at 906-907; *Herr*, 771 F. Supp. at 961.

<sup>66</sup> 505 U.S. 504 (1992).

<sup>67</sup> *Id.* at 508. See 15 U.S.C. §§ 1331-40 (1994). The 1969 version of the preemption clause provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Id.* § 1334(b).

<sup>68</sup> See *Cipollone*, 505 U.S. at 525-26. *Accord King*, 996 F.2d at 1349; *Shaw*, 994 F.2d at 370-71; *Papas*, 985 F.2d at 518-19; *Arkansas-Platte*, 981 F.2d at 1179; *Casper*, 806 F. Supp. at 906-07; *Burke* 797 F. Supp. at 1140.

<sup>69</sup> *Cipollone*, 505 U.S. at 530-31, 523 n.22 (plurality opinion).

law actions, reasoning that the plaintiff's position contradicts both the plain words of the 1969 Act and an accepted understanding of common law damages actions.<sup>70</sup>

In light of *Cipollone*, courts must focus on the meaning of "any requirement" under FIFRA.<sup>71</sup> As such, the inquiry is whether the legal duty of labeling or packaging, on which the action for common law damages is based, supplants the FIFRA requirements.<sup>72</sup>

Several federal courts have applied *Cipollone's* definition of "requirement" to FIFRA's statutory language prohibiting requirements for labeling.<sup>73</sup> The United States Court of Appeals for both the Tenth and Eleventh Circuits recently revisited the issue of FIFRA's preemption of labeling claims.<sup>74</sup> On remand from the Supreme Court, both circuits adhered to their original decisions that FIFRA bars labeling claims on the basis of express preemption.<sup>75</sup> Upon examination of the purpose underlying FIFRA's regulation of labeling and a state common law duty to warn, the Tenth Circuit, in *Arkansas-Platte v. Van Waters*,<sup>76</sup> found plaintiff's tort claim to be an impermissible requirement for labeling.<sup>77</sup> The Tenth Circuit used *Cipollone's* preemption analysis to buttress its prior holding, determining that the labeling provision of FIFRA is as inclusive as the labeling provision contained in the Cigarette Labeling Act, which the Court held preempted state common law labeling and duty to warn claims.<sup>78</sup> Similarly, the Eleventh Circuit, in *Papas v. Upjohn Co.*,<sup>79</sup> held, in light of *Cipollone*, that

<sup>70</sup> See *id.* at 522. Writing for a plurality, Justice Stevens explained that "common law damages are based on the existence of a legal duty" and that "it is the essence of the common law to enforce duties that are either affirmative requirements or negative prohibitions." *Id.*

<sup>71</sup> See *supra* notes 19-22 and accompanying text.

<sup>72</sup> See *Cipollone*, 505 U.S. at 522; *Casper* 806 F. Supp. at 907.

<sup>73</sup> See *supra* notes 19-22.

<sup>74</sup> *Arkansas-Platte & Gulf Part. v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1177 (10th Cir.), *cert. denied*, 114 S. Ct. 60 (1993); *Papas v. Upjohn Co.*, 985 F.2d 516, 516 (11th Cir.), *cert. denied sub nom. Papas v. Zoecon Corp.*, 114 S. Ct. 300 (1993).

<sup>75</sup> See *Warner v. American Fluoride Corp.*, 204 A.D.2d 1, 1, 616 N.Y.S.2d 534, 534 (2d Dep't 1994).

<sup>76</sup> 981 F.2d 1177 (10th Cir.), *cert. denied*, 114 S. Ct. 60 (1993).

<sup>77</sup> *Arkansas-Platte*, 981 F.2d at 1179. The court stated that "[t]he objectives of the common law duty and a regulatory statute are the same. Both address a manufacturer's duty to convey information about a product through the medium of a label." *Id.* Furthermore, the court found it necessary to hold that the common law duty to warn is subjected to the same federal preemptive constraints as a state statute. *Id.*

<sup>78</sup> See *id.*

<sup>79</sup> 985 F.2d 516 (11th Cir.), *cert. denied sub nom. Papas v. Zoecon Corp.*, 114 S. Ct. 300 (1993).

FIFRA expressly preempts claims to the extent they are based on inadequate labeling or packaging.<sup>80</sup>

Additionally, the United States Court of Appeals for the Seventh Circuit found that the plaintiff's position that common law tort actions were not preempted "evaporated" last summer when the Supreme Court decided *Cipollone*.<sup>81</sup> The court held that sweeping congressional efforts to preempt state regulation also bar state damages claims.<sup>82</sup>

On July 7, 1993, the First Circuit became the fourth circuit court to embrace the impact of *Cipollone* on FIFRA preemption.<sup>83</sup> Following *Cipollone*, the First Circuit, in *King v. E.I. DuPont deNemours & Co.*,<sup>84</sup> held that FIFRA preempts state law tort claims based on defendants' alleged failure to provide adequate warnings about the health hazards associated with the use of herbicides that they manufactured and sold.<sup>85</sup> The court noted that the *Ferebee* court did not have the benefit of the Supreme Court's subsequent *Cipollone* analysis and ruling.<sup>86</sup>

Congress defined FIFRA's preemptive effect using broad terminology prohibiting labeling "requirements" that differ from those required by FIFRA. If the Supreme Court finds that common law claims concerning cigarette labeling must impose "requirements," then common law claims concerning pesticide labeling must also impose "requirements" and are, therefore, expressly preempted.<sup>87</sup> FIFRA's contemplation of state authority expressly prohibits states from regulating label content. Such regulation necessarily includes jury verdicts based on failure to warn claims. Therefore, the Supreme Court's decision in *Cipollone* supports the view of express preemption.

<sup>80</sup> *Papas*, 985 F.2d at 517.

<sup>81</sup> *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 370 (7th Cir. 1993).

<sup>82</sup> *Id.* The court stated that a "broad statement in a federal law prohibiting state regulation does, in fact, wipe away, common law attempts to impose liability on top of the federal regulation." *Id.*

<sup>83</sup> See *King v. E.I. DuPont deNemours & Co.*, 996 F.2d 1346, 1349 (1st Cir. 1993).

<sup>84</sup> 996 F.2d 1346 (1st Cir. 1993).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 1351.

<sup>87</sup> See *supra* notes 66-86 and accompanying text (discussing impact of *Cipollone* preemption decision on issue of FIFRA preemption).

### C. FIFRA Impliedly Preempts Failure To Warn Claims

The Supreme Court held, in the context of cigarette labeling, that where Congress has considered the issue of preemption by including in the enacted legislation a provision explicitly addressing the issue, there is no need to infer congressional intent for preemption.<sup>88</sup> This broad rule may be construed as abrogating all prior FIFRA preemption law, thus challenging the analysis of a strong body of case law which developed prior to *Cipollone*, holding that FIFRA impliedly preempts common law tort claims.

Applying traditional principles of preemption, courts agree that FIFRA impliedly preempts state court failure to warn claims.<sup>89</sup> In *Worm v. American Cyanamid Co.*,<sup>90</sup> the United States Court of Appeals for the Fourth Circuit concluded that to the extent that state law places a duty to provide a warning that is different from, or in addition to, FIFRA labeling standards, it is preempted.<sup>91</sup>

In *Papas v. Upjohn Co.*,<sup>92</sup> the United States Court of Appeals for the Eleventh Circuit noted FIFRA's direction toward preemption and explained that states should not impose or maintain requirements for labeling beyond those imposed by FIFRA.<sup>93</sup> Thus, hesitant to bar the plaintiff's claims based on express preemption, the Eleventh Circuit concluded that FIFRA impliedly preempts state common law tort actions based on labeling claims in several ways.<sup>94</sup> After considering FIFRA's express prohibition of state labeling requirements and examining regulations adopted under

<sup>88</sup> See *Cipollone*, 505 U.S. at 517; see also, *Freightliner Corp. v. Murick*, 115 S. Ct. 1483 (1995) (holding express preemption clause does not entirely foreclose any possibility of implied preemption).

<sup>89</sup> See *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1303 (4th Cir. 1992), *aff'd on remand*, 5 F.3d 744 (4th Cir. 1993); see also *Papas v. Upjohn Co.*, 926 F.2d 1019, 1021 (11th Cir. 1991) (per curiam), *vacated sub nom. Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992), *on remand sub nom. Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied sub nom. Papas v. Zoecon Corp.*, 114 S. Ct. 300 (1993); *Begley v. Truly Nolan Exterminating, Inc.*, 573 So. 2d 1038, 1039 (Fla. Dist. Ct. App. 1991); *Yowell v. Chevron Chem. Co.*, 836 S.W.2d 62, 66 (Mo. Ct. App. 1992); *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931, 936 (Nev. 1992) *cert. denied*, 113 S. Ct. 1944 (1993); *Little v. Dow Chem. Co., Inc.*, 148 Misc. 2d 11, 12, 559 N.Y.S.2d 788, 790 (Sup. Ct. Erie County 1990).

<sup>90</sup> 970 F.2d 1301 (4th Cir. 1992), *aff'd on remand*, 5 F.3d 744 (4th Cir. 1993).

<sup>91</sup> *Id.* at 1303; see also *Hurt v. Dow Chem. Co.*, 759 F. Supp. 556, 559 (E.D. Miss. 1990) (holding that FIFRA preempted state failure to warn claim); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283, 1288-89 (W.D. Mo. 1989) (holding FIFRA preempted state common law claim for failure to adequately warn); *Young v. American Cyanamid Co.*, 786 F. Supp. 781, 783 (E.D. Ark. 1991).

<sup>92</sup> 926 F.2d 1019 (11th Cir. 1991).

<sup>93</sup> *Id.* at 1023-24.

<sup>94</sup> See *Papas*, 926 F.2d at 1021.

FIFRA, the court held that the federal government has occupied the field of labeling regulation, leaving no room for states to supplement federal law, even by means of state common law tort actions.<sup>95</sup>

Furthermore, the *Papas* court held that jury awards would result in direct conflict with federal law.<sup>96</sup> A state common law tort judgment that a pesticide's labeling is inadequate directly conflicts with the EPA's determination that the labeling is adequate to protect against health risks.<sup>97</sup> Moreover, the Eleventh Circuit found that allowing state common law tort suits for inadequate labeling would defeat the goal of uniformity for pesticide labeling.<sup>98</sup>

Upon the remand of *Arkansas-Platte* and *Papas*, the Supreme Court, through *Cipollone*, found express rather than implied preemption.<sup>99</sup> Thus, analysis of a statute's express preemptive reach should be the first order of inquiry in a preemption analysis.

FIFRA's preemptive effect on state common law labeling claims is discussed by the Supreme Court's opinion concerning the local regulation of pesticides in *Wisconsin Public Intervenor v. Mortier*.<sup>100</sup> In *Mortier*, the Supreme Court held that FIFRA did not preempt the regulation of pesticides by local or municipal governments.<sup>101</sup> The Court held that nowhere does FIFRA expressly supplant local regulation of pesticide use.<sup>102</sup> Silence in this respect is not enough to mandate the preemption of local authority.<sup>103</sup>

The *Mortier* Court further rejected the contention that FIFRA occupied the entire field of pesticide regulation, stating that certain provisions leave specific portions of the field to state regulation and much smaller portions to local regulation.<sup>104</sup> Moreover, the Court stated that local permit regulations, as distinguished

<sup>95</sup> See *id.* at 1024.

<sup>96</sup> *Id.* at 1025.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 1024-25; see also *Jordan v. Southern Wood Piedmont Co.*, 805 F. Supp. 1575, 1578 (S.D. Ga. 1992) (holding FIFRA preempted state tort law claims based on negligent labeling).

<sup>99</sup> See *Papas*, 985 F.2d at 518; *Arkansas-Platte*, 981 F.2d at 1179.

<sup>100</sup> 501 U.S. 587 (1991).

<sup>101</sup> *Id.* at 606.

<sup>102</sup> See *id.*

<sup>103</sup> See *id.*

<sup>104</sup> *Id.* at 612-14.

from labeling or certification,<sup>105</sup> are not within the area that FIFRA's program preempts.<sup>106</sup>

Based along these lines, the United States District Court for the Southern District of Georgia, in *Jordan v. Southern Wood Piedmont Co.*,<sup>107</sup> recognized that *Mortier* sets forth that FIFRA does not absolutely preempt all fields related to pesticides.<sup>108</sup> The *Mortier* Court recognized, however that FIFRA provides narrow preemptive coverage of certain areas, such as labeling.

### III. THE *FEREBEE* DECISION AND ITS PROGENY HAVE BEEN OVERRULED

The many cases that reject the *Ferebee* analysis do so in the context of implied preemption.<sup>109</sup> *Ferebee's* conclusion, that the imposition of failure to warn liability leaves pesticide manufacturers free to choose either not to sell the product in the state or to pay for liabilities resulting from sales, is not a realistic economic choice.<sup>110</sup> The *Ferebee* court dismissed claims of implied preemption by rejecting the notion that state common law tort claims constitute a true obstacle to and conflict with state and federal law. More importantly, however, *Ferebee* merely glossed over express preemption analysis.

In *Cipollone*, the Court recognized that regulation of a particular activity can be effectively exerted in the form of an award of damages. The obligation to pay damages can act, and is designed to act, as a means of influencing behavior and controlling policy.<sup>111</sup>

<sup>105</sup> *Arkansas-Platte & Gulf Part. v. Van Waters & Rogers, Inc.*, 959 F.2d 158, 163 (10th Cir. 1992), *vacated*, 113 S. Ct. 314 (1992), *on remand*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 114 S. Ct. 60 (1993); *see also* *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 370 (7th Cir. 1993) (stating FIFRA does not preempt generalized state regulation of pesticides).

<sup>106</sup> *Mortier*, 501 U.S. at 615.

<sup>107</sup> 805 F. Supp. 1575 (S.D. Ga. 1992).

<sup>108</sup> *See id.* at 1583.

<sup>109</sup> *See* *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1139 (E.D.N.Y. 1992) (citing *Papas v. Upjohn Co.*, 926 F.2d 1019, 1021 (11th Cir. 1991) (*per curiam*), *vacated sub nom. Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992), *on remand sub nom. Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied sub nom. Papas v. Zoecon Corp.*, 114 S. Ct. 300 (1993)); *see also* *Arkansas-Plate*, 959 F.2d at 164.

<sup>110</sup> *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931, 937 (Nev. 1992), *cert. denied*, 113 S. Ct. 1944 (1993).

<sup>111</sup> *See* *San Diego Bldg. Trades Counsel v. Garmon*, 359 U.S. 236, 246-47 (1959); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 628 (1st Cir. 1987) (stating award of damages arrogates to single jury regulatory power denied to states).



The Supreme Court expressed its disapproval of the *Ferebee* analysis of regulatory-compensatory impact in *International Paper v. Ouellette*.<sup>112</sup> The Court, in its determination that Vermont common law nuisance actions were preempted by the Clean Water Act,<sup>113</sup> noted that the inevitable result of such state suits would be that states could regulate the conduct of out-of-state sources indirectly.<sup>114</sup>

The Supreme Court implicitly rejected *Ferebee's* premise that jury verdicts do not constitute regulation in *Cipollone v. Liggett*.<sup>115</sup> A plurality of the Court found that the 1969 Cigarette Labeling Act, barring states from imposing any requirement or prohibition based on smoking or health concerns in cigarette package labeling sweeps broadly.<sup>116</sup>

#### CONCLUSION

State common law tort actions do regulate pesticide labels. As even the United States Circuit Court for the District of Columbia agrees, FIFRA expressly preempts state regulation of pesticide labeling. *Ferebee's* rejection of FIFRA preemption is invalid in light of *Cipollone*.

Over the last decade, more than fifty courts considering the issue of FIFRA preemption concur that common law tort claims are preempted. These courts, however, have had difficulty coming to grips with the precise basis for FIFRA preemption of plaintiffs' claims. Preemption has been found on both express and implied grounds. The express language and purpose of FIFRA strongly supports a defendant manufacturers' contention that the statute preempts plaintiffs' failure to warn claims. The so-called minority view, promulgated by the decision in *Ferebee* and its progeny, should be rejected because the reasoning, the "choice of reaction" analysis, has been rejected specifically by many courts and implicitly overruled by the United States Supreme Court. The Supreme

<sup>112</sup> 479 U.S. 481 (1987).

<sup>113</sup> Pub. No. L. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (1988 & Supp. V 1993)).

<sup>114</sup> See *Ferebee*, 479 U.S. at 495-97.

<sup>115</sup> 505 U.S. 504 (1992).

<sup>116</sup> See *Cipollone*, 505 U.S. at 520; see also *Papas v. Upjohn Co.*, 985 F.2d 516, 518 (11th Cir.), cert. denied sub nom. *Papas v. Zoecon Corp.*, 114 S. Ct. 300 (1993) (stating common law damages awards are form of state regulation and requirements within meaning of FIFRA).

Court's recent expression of federal preemption concepts in *Cipollone*, and post-*Cipollone* case law, are supportive of a defendant manufacturers' assertion that FIFRA expressly preempts common law tort claims based on inadequate labeling of pesticide products.

