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FIFRA and Preemption: Can State Common Law and Federal Regulations Coexist? Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir. 1991)

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FIFRA AND PREEMPTION: CAN STATE COMMON LAW AND FEDERAL REGULATIONS COEXIST? *PAPAS v. UPJOHN CO.*, 926 F.2d 1019 (11th Cir. 1991)

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)[1] governs the use, regulation, and labeling of pesticides[2] in the United States.[3] FIFRA grants states the authority to regulate the sale and use of pesticides[4] to the extent that regulation does not conflict with the Environmental Protection Agency's (EPA)[5] exclusive authority to regulate labeling and packaging.[6] Although FIFRA clearly establishes exclusive federal control over labeling and packaging at the expense of state authority,[7] courts differ when determining whether FIFRA similarly preempts[8] common law tort claims[9] brought against manufactur-

1. 7 U.S.C. §§ 136-136y (1988).

2. The Act defines a pesticide as: "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant." 7 U.S.C. § 136(u) (1988).

3. *See infra* notes 19-25 and accompanying text for a historical background of FIFRA.

4. "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." 7 U.S.C. § 136v(a) (1988).

5. *See infra* notes 19-21 and accompanying text for a brief discussion of Congress' intent in implementing FIFRA and the role of the EPA.

6. A "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U.S.C. § 136v(b) (1988).

7. *Id.*

8. The Supremacy Clause of the Constitution is the basis upon which federal preemption over state law rests. The clause provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

ers for inadequate labeling.[10] In *Papas v. Upjohn Co.*,[11] the Eleventh Circuit held that FIFRA impliedly preempts[12] state common law tort claims for inadequate labeling.[13]

In *Papas*, the plaintiff alleged that inadequate labeling of pesticides

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U.S. CONST. art. VI, cl. 2.

The doctrine of preemption addresses the distribution of regulatory power between the federal and state governments when their efforts overlap. The Supreme Court has outlined the circumstances under which federal law will preempt state law. First, Congress may explicitly state that the federal law will preempt all state regulation in the field. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 248 (1984). Second, preemption will exist in cases where compliance with both federal and state law is impossible. *Id.* Third, the state law may not act as an obstacle to the goals of the federal law. *Id.* However, there is a presumption that Congress did not intend to preempt the state law. Maryland v. Louisiana, 451 U.S. 725, 746 (1981). For a general survey of the doctrine of preemption, see generally Marilyn P. Westerfield, Note, *Federal Preemption and the FDA, What Does Congress Want?*, 58 U. CIN. L. REV. 263, 264-69 (1989) (discussing the circumstances which constitute implied and express preemption under the Supremacy Clause).

9. *See* Mary Lee A. Howarth, Comment, *Preemption and Punitive Damages: The Conflict Continues Under FIFRA*, 136 U. PA. L. REV. 1301, 1303 (1988) (noting the controversial and inconsistent cases regarding preemption of punitive damages issues).

10. *Id.* The author asserts that courts are unsettled in deciding failure-to-warn tort suits in light of FIFRA's comprehensive scheme governing labeling. *Id.* Courts have similarly disagreed on other preemption issues based upon FIFRA. *See* D-Con Co. v. Allenby, 728 F. Supp. 605, 607 (N.D. Cal. 1989) (holding that FIFRA does not preempt California's Safe Drinking Water and Toxic Enforcement Act to the extent that the California Act merely imposed restrictions on pesticide sale or use by posting restrictions in designated "safe harbors"). *But see* Professional Lawn Care Ass'n v. Village of Milford, 909 F.2d 929, 934 (6th Cir. 1990) (FIFRA preempts local ordinance requiring pesticide users to post public notices prior to and during use); Maryland Pest Control Ass'n v. Montgomery County, 646 F. Supp. 109, 113 (D. Md. 1986) (FIFRA held to preempt posting and notice requirements contained in county ordinances with respect to use of pesticides), *aff'd*, 822 F.2d 55 (4th Cir. 1987) (decision without published opinion), *cert. denied*, 110 S. Ct. 1524 (1990). The Supreme Court put this issue to rest in Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2487 (1991) (FIFRA does not preempt local government ordinance regulating the use of pesticides).

11. 926 F.2d 1019 (11th Cir. 1991), *petition for cert. filed*, 59 U.S.L.W. 3825 (U.S. May 29, 1991) (No. 90-1837).

12. *See infra* note 35 for a discussion on how courts infer preemption of a state law from a statute or regulation.

13. 926 F.2d at 1024. Actions which establish "labeling" present a separate issue. *See, e.g.*, New York State Pesticide Coalition v. Jorling, 874 F.2d 115, 119-20 (2d. Cir. 1989) (holding that a state statute's requirement that commercial pesticide applicators take certain steps to warn the immediate purchasers and general public of pesticide dangers did not constitute "labeling" pesticides and, therefore, was not preempted by FIFRA).

manufactured by the defendant led to his serious health problems.[14] The pesticide manufacturer moved for partial summary judgment, arguing that FIFRA, under which its product is registered, preempted the plaintiff's common law tort claims.[15] The district court granted the defendant's motion[16] and appeal was immediately granted.[17] On appeal, the Eleventh Circuit agreed with the district court and concluded that FIFRA preempts state common law tort claims for inadequate labeling.[18]

In 1947, Congress enacted FIFRA "for the protection of users, consumers and the general public."[19] In 1972, Congress restructured FIFRA and transferred implementation authority to the EPA[20] in an effort to cure initial shortcomings which made FIFRA unworkable.[21] The revitalized Act provided the EPA with direct control over pesti-

14. 926 F.2d at 1020. The complaint alleged negligence, strict liability and breach of implied merchantability on the part of the defendant pesticide manufacturer. *Id.*

15. *Id.* at 1020-21. For a discussion of preemption as a defense, see generally Georgene M. Vairo, *Survey of Recent Tort Preemption Cases*, 491 A.L.I.-A.B.A. 871 (1990).

16. 926 F.2d at 1020-21.

17. *Id.* at 1021. The district court noted that the FIFRA preemption issue involved a controlling question of law, warranting substantial grounds for difference of opinion. *Id. See infra* notes 28-29 for cases that illustrate the split of authority concerning FIFRA's preemption of state tort claims.

18. *Id.* at 1024-25 (holding that because the federal government occupies the entire field of labeling regulation, states have no room to supplement federal law through state common law tort actions).

19. *See* S. REP. NO. 92-838, 92d Cong., 2d Sess. 30 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3999. Federal control over pesticides began in 1910 with passage of the Federal Insecticide Act which "prevented the manufacture, sale or transportation of adulterated or misbranded insecticides and fungicides and authorized regulation of sales of insecticides and fungicides." *Id.* Because the number and variety of pesticides increased in both manufacture and use, Congress saw the need for more comprehensive and uniform laws to regulate registration, labels and use. *Id. See generally* Howarth, *supra* note 9, at 1320-21 (discussing the historical development of pesticide regulation and FIFRA and asserting that Congress intended FIFRA to preempt state regulation of pesticide packaging and labeling).

20. H.R. REP. NO. 100-939, 100th Cong., 2d Sess. 26 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3474, 3476.

21. *Id.* The dangers of pesticides and the shortcomings of the previous pesticide regulation system were highly publicized after the publication of Rachel Carson's *Silent Spring* in 1964. *Id.* at 3475-76. For example, some of the Act's problems included: (1) its failure to control the actual use of pesticides; and (2) "protest registration" which authorized manufacturers to market a pesticide in spite of the United States Department of Agriculture's refusal to register it. *Id.* at 3476.

cide labeling,[22] as well as registration of manufacturing plants and national monitoring programs.[23] The 1972 FIFRA Amendments expressly prohibit states from imposing any labeling or packaging requirements in addition to, or different from, those required under the Act.[24] Courts have had difficulty, however, interpreting this prohibition because Congress additionally bestowed states with the power to regulate the sale and use of pesticides.[25]

When balancing the federal government's right to regulate pesticide labeling with states' authority to regulate sale and use of pesticides under FIFRA, courts are split on the issues concerning when a state action interferes with federal law.[26] Specifically, courts have rendered inconsistent holdings when considering whether the doctrine of preemption precludes an individual from bringing state failure-to-warn claims against a manufacturer which has complied with FIFRA labeling guidelines.[27] One line of authority holds that a state law tort claim for inadequate labeling is regulatory in nature and, therefore, preempted by FIFRA.[28] The other line of authority interprets FIFRA as

22. FIFRA also permits the EPA to register a pesticide only if the EPA determines that "its labeling and other material required to be submitted comply with the requirements of this subchapter." 7 U.S.C. 136a(c)(5)(B) (1988).

23. H.R. REP. No. 100-939, 100th Cong., 2d Sess. 27 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3474, 3476.

24. Federal Environmental Pesticide Control Act of 1972, § 24(b), Pub. L. No. 92-516, 86 Stat. 973, 997 (codified as amended as part of FIFRA at 7 U.S.C. § 136v(b) (1988)).

25. FIFRA expressly grants states the authority to "regulate the sale or use of any federally registered pesticide." 7 U.S.C. 136v(a) (1988). *See* Chemical Specialties Mfrs. v. Allenby, 744 F. Supp. 934, 938 (N.D. Cal. 1990) (finding that FIFRA does not preempt California's regulation of pesticide sale and use).

26. *See infra* notes 28-29 and accompanying text describing the two lines of authority.

27. *See* Howarth, *supra* note 9, at 1303.

28. Several district court decisions have held that preemption exists under FIFRA. *See, e.g.*, Hurt v. Dow Chemical Co., 759 F. Supp. 556, 558-60 (E.D. Mo. 1990) (holding that FIFRA preempts state law failure to warn claims but not claims based upon state common law for sale or use of chemicals registered under FIFRA); Kennan v. Dow Chemical Co., 717 F. Supp. 799, 812 (M.D. Fla. 1989) (concluding that FIFRA preempts state law negligence claims to the extent that a state court jury verdict would have the effect of "regulating" the content of a warning label); Herr v. Carolina Log Bldgs., Inc., No. 85-262-c, slip op. at 8 (S.D. Ind. Sept. 22, 1989) (noting that state tort claims may cause manufacturer to petition EPA to change warning label and holding that FIFRA preempts plaintiff's negligent failure to warn claim); Watson v. Orkin Exterminating Co., No. 88-2427, 1991 U.S. Dist. LEXIS †7607, at *3 (D. Md. Nov. 18, 1988) (finding that the practical effect of allowing jury verdicts against a defendant who

allowing state law tort claims because these claims do not directly conflict with congressional goals.[29] Despite this clear division on the FIFRA labeling preemption issue, the Supreme Court has not yet addressed this issue.[30]

In 1984, the District of Columbia Circuit Court of Appeals rendered the first decision on FIFRA's preemption of state failure-to-warn cases[31] in *Ferebee v. Chevron Chemical Co.*[32] In *Ferebee*, the plaintiffs sued the manufacturer of a herbicide which allegedly caused the plaintiffs' father's illness and eventual death.[33] The chemical maker raised preemption as a defense, claiming that FIFRA preempted claims based on inadequate labeling.[34] The District of Columbia Circuit rejected this argument and held that FIFRA did not expressly or impliedly preempt state failure to warn claims.[35]

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has fulfilled FIFRA's labeling requirements for a violation of common law duty to warn would be to require the defendant to provide different warnings than those required by the federal label).

29. *See, e.g.*, Evenson v. Osmose Wood Preserving, Inc., 760 F. Supp. 1345, 1348 (S.D. Ind. 1990) (finding that Congress did not intend to occupy the entire pesticide use and labeling field, and therefore, FIFRA does not preempt state law tort claims for inadequate labeling); Arkansas Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 748 F. Supp. 1474, 1482-84 (D. Colo. 1990) (holding that FIFRA does not expressly or impliedly preempt state law tort claims against a pesticide manufacturer for negligent failure-to-warn of harm that may occur from the use of a chemical).

30. However, the Supreme Court has addressed the issue of use preemption. *See* Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2486 (1991) (holding that FIFRA did not preempt a local government ordinance regulating the control of pesticide use).

31. *See supra* note 10 for cases which have discussed other preemption issues litigated under FIFRA.

32. 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984).

33. *Id.* at 1533. The plaintiffs based their claim upon the alleged inadequacy of the warning label of the herbicide, which the manufacturer registered pursuant to FIFRA. *Id.* At trial, the jury returned a verdict in favor of the decedent's children based on the theory that the manufacturer failed to label the herbicide "in a manner which adequately warned that long-term skin exposure could cause serious lung disease." *Id.* at 1532. Therefore, the district court upheld the jury verdict finding the manufacturer strictly liable for the decedent's injuries and death. *Id.* at 1532-33.

34. *Id.* at 1539. Defendant asserted that because the EPA approved the label, a state jury may not find in a tort action that the label is inadequate. *Id.*

35. *Id.* In Louisiana Public Service Comm'n v. FCC, 476 U.S. 355 (1986), the Supreme Court held that implied preemption exists:

> [W]hen there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving

The *Ferebee* court based its conclusion that FIFRA did not preempt state law tort claims on several factors. First, the court found no explicit language in FIFRA mandating preemption of state law damage actions.[36] Second, the court considered a damage award to the plaintiff compensatory in nature and not a direct regulatory command that the manufacturer alter its label.[37] The decision merely gave the manufacturer the choice of either continuing to sell the product and compensating for injuries or providing a more detailed label.[38] The *Ferebee* court reasoned that because manufacturers could comply with both state law and federal law,[39] an implied preemption[40] theory would not bar the claim.[41] Finally, the court noted that because protection and safety are the goals of jury awards, state actions do not impede the objectives of

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no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Id. at 368-69 (citations omitted). *See also* Int'l Paper Co. v. Ouellette, 479 U.S. 481, 491-92 (1987) (holding that the Clean Water Act preempts a Vermont nuisance law because of the Act's comprehensive nature).

36. 736 F.2d at 1542. The *Ferebee* court further noted that FIFRA merely precludes states from directly changing EPA approved labels. *Id. See supra* notes 4 and 6 for the statutory language of FIFRA.

37. *Id.* at 1541. While the court found that the verdict was not a direct regulatory command, the court stated that jury damages resulting from a tort claim may "promote legitimate regulatory aims." *Id.* The court found that a verdict against the manufacturer may impose burdens on the manufacturer because, if the manufacturer elects to continue selling a herbicide, then the manufacturer must compensate victims for injuries resulting from the herbicide's use. *Id.*

38. *Id.* This choice given to the manufacturer has appropriately been deemed the "choice of reaction" because the manufacturer has the freedom to choose how to react. *See* Palmer v. Liggett Group, Inc., 825 F.2d 620, 627-28 (1st Cir. 1987).

39. 736 F.2d at 154. The court also stated that FIFRA clearly allows such dual obligation upon a manufacturer. *Id.* While FIFRA does not authorize states to demand additional labeling requirements, FIFRA does allow states to impose stricter restraints on the use of EPA-approved pesticides than those required by the EPA. *Id.* Section 136v(a) of FIFRA provides 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 [the Act]." 7 U.S.C. § 136v(a) (1988).

40. *See supra* note 35 for a list of the factors set forth by the Supreme Court to determine the existence of implied preemption.

41. 736 F.2d at 1545. In Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 257 (1984), the Supreme Court looked favorably upon the reasoning that implied preemption is not a defense when the defendant can adhere to both state and federal laws. The *Silkwood* Court upheld a $10 million punitive damage award for the survivor of an employee who died from plutonium exposure at a nuclear facility operating in compliance with federal safety regulations of radiation releases. *Id.* at 245. The Court held that because paying both federal fines and state punitive damages for the same incident is not physically impossible and because imposition of punitive damages does not frustrate the congres-

FIFRA.[42]

Although the District of Columbia Circuit Court of Appeals was the only federal appellate court to consider whether FIFRA preempts state law tort claims,[43] the issue continues to generate varying results in the district courts.[44] For example, in *Fitzgerald v. Mallinckrodt, Inc.*,[45] the United States District Court for the Eastern District of Michigan debated whether FIFRA preempts state law tort remedies[46] and criticized the "choice of reaction" analysis[47] established in *Ferebee*.[48] In *Mallinckrodt*, the court equated FIFRA to the Cigarette Labeling and Advertising Act[49] which several circuits have held to preempt state tort claims.[50] The court opined that any state law tort recovery based

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sional purpose to promote nuclear power, federal law did not preempt recovery of damages under state law. *Id.* at 256-57.

42. 736 F.2d at 1542-43.

43. *See supra* note 10 for examples of other preemption issues under FIFRA.

44. *See supra* notes 28-29 for a summary of district court opinions discussing the issue. *See also* Beverly L. Jacklin, Annotation, *Federal Preemption of State Commonlaw Products Liability Claims Pertaining to Pesticides*, 101 A.L.R. FED. 887 (1991) (discussing the collection of cases which address the question whether federal law preempts state law products liability claims).

45. 681 F. Supp. 404 (E.D. Mich. 1987).

46. *Id.* at 406.

47. The *Mallinckrodt* court explained the hypocrisy of the "choice of reaction" analysis as follows:

> Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. The most obvious change it can take, of course, is to change its label.

Id. at 407 (quoting Palmer v. Liggett Group, Inc., 825 F.2d 620, 627-28 (1st Cir. 1987), *cert. denied*, 488 U.S. 1030 (1989) (emphasis omitted)). *See also supra* notes 37-39 and accompanying text for a discussion of the choices which the *Ferebee* court left open to manufacturers.

48. 681 F. Supp. at 407. *See supra* notes 32-42 and accompanying text for a discussion of the *Ferebee* analysis.

49. 681 F. Supp. at 407. The Cigarette Labeling and Advertising Act is found at 15 U.S.C. §§ 1331-41 (1988).

50. 681 F. Supp. at 407. *See, e.g.*, Pennington v. Vistron Corp., 876 F.2d 414, 421 (5th Cir. 1989) (finding that plaintiff's claim that tobacco companies failed to adequately warn was preempted by the Cigarette Labeling Act); Raysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 235 (6th Cir. 1988) (holding that the Federal Cigarette Labeling and Advertising Act preempts a plaintiff's claim of inadequate warnings against a manufacturer who complied with the Act); Palmer v. Liggett Group, Inc., 825 F.2d 620, 626 (1st Cir. 1987) (holding a suit for damages under common law inadequate warning theory is preempted by the Federal Act where the warning complies with the Act); *cf.* Jones v. Rath Packing Co., 430 U.S. 519, 532 (1977) (holding that federal

on inadequate labeling would hinder Congress' goal of providing uniform regulations of pesticide labeling.[51] Therefore, the court concluded that because Congress has preempted state regulation of labeling and warning, FIFRA bars recovery in tort based on negligent labeling and failure-to-warn claims.[52]

Although the *Mallinckrodt* court rejected the *Ferebee* preemption analysis, other district courts have steadfastly adhered to the *Ferebee* decision.[53] For example, in *Cox v. Velsicol Chemical Corp.*,[54] the United States District Court for the Eastern District of Pennsylvania adopted the traditional preemption analysis applied in *Ferebee*[55] and criticized the reasoning behind *Mallinckrodt*.[56] The *Cox* court found that the manufacturer could be held liable for its failure to adequately warn about the risks associated with the use of its pesticides despite registering its product under FIFRA.[57] Similar to *Mallinckrodt*, the *Cox* court compared FIFRA to the Cigarette Labeling and Advertising Act.[58] However, the court diverged from the *Mallinckrodt* rationale by distinguishing the language of FIFRA from that of the Cigarette

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labeling guidelines for bacon products preempt state law claims for inadequate labeling); Stewart v. Int'l Playtex, Inc., 672 F. Supp. 907, 910 (D.S.C. 1987) (finding that Medical Device Amendment to Food, Drug, and Cosmetic Act, which contained labeling guidelines for tampon boxes, preempted state law claims for inadequate labeling). *See generally* Richard C. Ausness, *Cigarette Company Liability: Preemption, Public Policy, and Alternative Compensation Systems*, 39 SYRACUSE L. REV. 897 (1988) (outlining the ramifications of *Palmer v. Liggett Group, Inc.* on the doctrine of preemption in cigarette warning cases); Robert C. Carlsen, Comment, *Common Law Claims Challenging the Adequacy of Cigarette Warnings Preempted Under the Federal Cigarette Labeling and Advertising Act of 1965*: Cipollone v. Liggett Group, Inc., 60 ST. JOHN'S L. REV. 754 (1986) (arguing that preemption of cigarette inadequate warning claims impairs congressional intent behind the Federal Cigarette Labeling and Advertising Act).

51. 681 F. Supp. at 407.

52. *Id.* at 407-08. The court further reasoned that "[a]llowing recovery under state tort law where Congress has preempted state law would effectively authorize the state to do through the back door exactly what it cannot through the front." *Id.* at 407.

53. *See supra* note 29 for a list of cases finding no preemption of state common law tort claims under FIFRA.

54. 704 F. Supp. 85 (E.D. Pa. 1989).

55. *Id.* at 87. *See supra* notes 32-42 and accompanying text for a discussion of the *Ferebee* decision.

56. *See supra* notes 45-52 and accompanying text for a discussion of the *Mallinckrodt* decision.

57. 704 F. Supp. at 87. Plaintiffs' decedent was a pest control operator who allegedly developed lung cancer as a result of exposure to chlordane products manufactured by the defendant. *Id.* at 86.

58. The Cigarette and Labeling Act is found at 15 U.S.C. §§ 1331-41 (1988).

Labeling Act.[59] For example, the court noted that the Cigarette Labeling Act prescribes the exact warning label on each package.[60] To the contrary, the court reasoned that Congress merely intended to set minimum standards for pesticide labeling under FIFRA[61] because its language was less structured than the Cigarette Labeling Act.[62] Therefore, the *Cox* court held that FIFRA does not preempt plaintiffs' state law tort claims based on inadequate warnings.[63]

In *Papas v. Upjohn Co.*,[64] the Eleventh Circuit rejected the *Ferebee* approach[65] and endorsed the *Mallinckrodt* court's preemption analy-

59. 704 F. Supp. at 86. The *Cox* court also quoted from a footnote in *Palmer*, a case used to support the holding in *Mallinckrodt*:

> FIFRA, which applies to some 40,000 different herbicide and pesticide formulations, imposes an entirely different type of regulatory scheme from that established under the [Cigarette Labeling Act]. Under FIFRA, each manufacturer drafts a warning label for each product for EPA approval. Thus, two manufacturers of the same regulated product may use different labels of their own choosing, provided only that they obtain prior EPA approval. . . . In contrast, the [Cigarette Labeling Act] explicitly (i) applies to cigarettes only; (ii) mandates the precise language of the label; and (iii) prohibits any state from regulating any aspect of cigarette warnings.

Id. at 86 (quoting Palmer v. Liggett Group, Inc., 825 F.2d 620, 629 n.13). Therefore, the *Cox* court found that the analogy to *Palmer* must fail. 704 F. Supp. at 87. The Supreme Court has agreed to address whether state tort claims premised on a failure-to-warn theory are preempted by the Federal Cigarette Labeling and Advertising Act. Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1987), *cert. granted*, 111 S. Ct. 1386 (1991).

60. 704 F. Supp. at 86.

61. *Id.* at 86-87. The court was also persuaded by the fact that manufacturers submit their own labels to the EPA for approval. *Id.* at 87. The court reasoned that under this scheme, manufacturers should have an implied duty to adequately warn the user. *Id.*

62. *Id.* at 86-87. For other statutes expressly preempting state law, see Domestic Housing and International Recovery and Financial Stability Act, 12 U.S.C. §§ 1715z-17(a), 1715z-18(e) (1988) (stating that no "State constitution, statute, court decree, common law, rule, or public policy" shall preempt federal law concerning mortgages insured pursuant to this federal law); Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461, 1144(a), (c)(1) (1988) (preempting "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State" from interfering with any employee benefit plan described in this federal statute).

63. 704 F. Supp. at 87.

64. 926 F.2d 1019 (11th Cir. 1991).

65. *Id.* at 1026. The *Papas* court reasoned that, although a manufacturer may be able to comply with both federal regulations and state common law, damage awards would interfere with the EPA's regulatory power because manufacturers would demand labels that reflected the jury awards. *Id.* *See supra* notes 32-42 and accompanying text for a discussion of the *Ferebee* decision.

sis.[66] The Eleventh Circuit applied a two-step analysis[67] to determine the pivotal question of whether Congress intended FIFRA to supersede state law.[68] First, the court examined FIFRA's express prohibition of state labeling requirements[69] but declined to address whether FIFRA expressly preempts state law tort claims.[70] The court concluded that the federal government occupies the entire field of pesticide labeling regulation.[71] Second, the *Papas* court assessed the impact that damage awards would have on the FIFRA scheme.[72] A thorough evaluation of the realistic effects of jury awards persuaded the court to hold that state tort damage for inadequate labeling are regulatory in nature and therefore impliedly preempted[73] by FIFRA because they invade Congress' occupation of the pesticide labeling field.[74]

The *Papas* court expressed several rationales for holding that FIFRA preempts state common law tort claims.[75] First, the court found that the federal government occupies the entire field of labeling through its extensive labeling guidelines and restriction of supplemental state guidelines.[76] Second, although the Eleventh Circuit acknowledged that it might be possible for a manufacturer to comply with both federal regulations and state common law requirements under the *Ferebee* analysis,[77] the *Papas* court explicitly stated that damage awards

66. *Id.* *See supra* notes 45-52 and accompanying text for a discussion of the *Mallinckrodt* decision.

67. *Id.* at 1022-26.

68. *Id.* at 1022 (citing Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369 (1986)).

69. *Id.* at 1024. *See supra* notes 4 and 6 for the relevant text of FIFRA.

70. 926 F.2d at 1024. Although FIFRA precludes states from imposing additional labeling requirements, the Eleventh Circuit refused to hold that FIFRA expressly preempted state tort claims. Despite the court's view that the language "is a powerful limit on state power over labeling," it declined to answer the question whether FIFRA's language clearly expressed Congress' intent to preempt common law tort actions. *Id.* at 1023-24.

71. *Id.* at 1025.

72. *Id.* at 1024-26.

73. *See supra* note 35 for the Supreme Court's test to determine the existence of implied preemption.

74. 926 F.2d at 1026.

75. *Id.* at 1024-26.

76. *Id.* at 1025. *See supra* note 6 for the statutory text regarding states' rights under FIFRA.

77. 926 F.2d at 1026. *See supra* notes 32-42 and accompanying text for a discussion of the *Ferebee* decision.

would interfere with the EPA's regulatory process.[78] For example, the *Papas* court found that the state scheme directly conflicted with the federal regulation.[79] The court determined that because the EPA conducts an extensive cost-benefit analysis[80] for each chemical before approval, a jury could not later determine that a chemical posed an unreasonable health risk.[81]

Finally, the court found the state scheme to be an obstacle to attaining Congress' objectives through FIFRA.[82] Specifically, the court found that jury awards based on inadequate labels would force manufacturers to either change their label or risk future suits and would ultimately destroy label uniformity[83] because warning labels would no longer adhere to the same criteria from state to state.[84] In addition, manufacturers would press the EPA to change the labeling guidelines to reflect jury awards.[85]

The Eleventh Circuit reasoned that the regulatory effects of jury awards would allow juries to do what states are forbidden to do: im-

78. 926 F.2d at 1026. The *Papas* court relied upon the decision of a prior district court in the Eleventh Circuit. *Id.* In Kennan v. Dow Chemical Co., 717 F. Supp. 799, 806-07 (M.D. Fla. 1989), the court held "that a state court jury verdict would have the effect of 'regulating' the content of a warning label."

79. 926 F.2d at 1025-26. The *Papas* court specifically stopped short of stating that all regulations of pesticides are preempted by FIFRA. *Id.* at 1026. The court noted that 7 U.S.C. § 136v(a) (1988) provides states joint control with the federal government in regulating the use of pesticides. *Id.* at 1025, n.5. *See, e.g.*, Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2486 (1991) (finding that because Congress has not spoken on the issue, courts may only interpret section 136v(a) to preempt labeling, not to preempt the entire field of pesticide regulation); New York State Pesticide Coalition, Inc. v. Jorling, 874 F.2d 115, 118 (2d Cir. 1989) (noting that states have joint control over regulating the use of pesticides except where the EPA has exclusive supervision over labeling).

80. *See* Howarth, *supra* note 9, at 1323. The labeling process is a project between the EPA and the manufacturer to develop a safe label based on extensive data. The EPA then approves the label, and the manufacturer must comply to the letter. *Id.*

81. *Papas*, 926 F.2d at 1025. *See* Howarth, *supra* note 9, at 1323 (asserting that juries do not possess the expertise necessary to provide safe warnings).

82. 926 F.2d at 1025.

83. *Id.* at 1025-26. *See supra* note 47 for a discussion of this analysis in relation to the Federal Cigarette Labeling and Advertising Act.

84. 926 F.2d at 1025-26. *See also* Howarth, *supra* note 9, at 1323-24. The author stated that because states have different legal remedial standards, the judicial resolutions will vary and frustrate Congress' uniform regulations. *Id.* Furthermore, the resulting confusion will reach the consumers, whom FIFRA was designed to protect, because several differing labels will flow through commerce. *Id.*

85. 926 F.2d at 1026.

pose pesticide labeling requirements.[86] Therefore, the court concluded that a state common law action which possesses the same protective goal as the federal law in question is preempted if it peruses that goal by a method which countervails the federal methods.[87]

The *Papas* court reached the correct result for several reasons. First, the court examined the precise language of the statute and properly found that Congress occupies the entire pesticide labeling field.[88] Although the statute clearly precludes states from imposing label requirements on pesticides in addition to those required under FIFRA,[89] the court declined to hold that the provision expressly barred common law actions.[90] *Papas* reached this conclusion because FIFRA does not directly address whether a jury award for inadequate labeling[91] would produce the forbidden effect of enabling a state to "require" alterations of pesticide labels.[92]

Second, in the absence of explicit statutory language, the *Papas* court properly analyzed the harmful effects that jury awards impose upon the objectives of FIFRA.[93] A jury award in favor of a plaintiff leaves the manufacturer with unacceptable options. For example, the company may (1) keep the federally approved label and remain liable for state law claims for inadequate labeling; (2) conform its label to the safety

86. *Id.* The *Papas* court noted that although both federal and state law share the purposes of protecting "man and his environment," jury awards would inject irrelevant considerations into the EPA's evaluation and determination of safe pesticide labels. *Id.* Furthermore, jury damages would second guess the EPA's labels in direct derogation of FIFRA requirements. *Id.*

87. *Id.* (relying on Int'l Paper Co. v. Ouellette, 479 U.S. 481, 494 (1987)).

88. *See supra* note 70 and accompanying text for the *Papas* court's rationale in not finding express preemption.

89. *See supra* notes 4 and 6 for the relevant text of FIFRA.

90. *Papas*, 926 F.2d at 1024. The court was mindful that Congress would have expressly preempted common law actions if it had so desired. *Id.* (citing Taylor v. General Motors Corp., 875 F.2d 816, 824 (11th Cir. 1989)).

91. 926 F.2d at 1025. The *Papas* court did not extend its preemption analysis to all state law tort claims. *See* Kennan v. Dow Chem. Co., 717 F. Supp. 799, 812 (M.D. Fla. 1989) (granting defendant's motion for summary judgement to the extent that the plaintiff based her claims on inadequate labeling, but denying summary judgement on plaintiff's claims based on the defectiveness or unreasonable dangerousness of the defendant's product due to a defective design or manufacturing flaw).

92. *See supra* note 62 for examples of language which Congress employs to expressly preempt a state law.

93. *See supra* notes 64-85 and accompanying text for a discussion of the factors which the *Papas* court relied upon in holding that the conflicts between FIFRA and state common law mandated preemption.

requirements of the several states, thereby undermining the stated purpose[94] of FIFRA's guidelines; or (3) stop selling the product.[95] The District of Columbia Circuit in *Ferebee* acknowledged the burdens placed on manufacturers in resolving these choices but wrongly concluded that Congress would approve of such a result.[96] The formalistic "options" the *Ferebee* court proffers to manufacturers are realistically not options at all. Manufacturers forced to defend themselves in tribunals following the *Ferebee* analysis must inevitably adhere to the state regulations vis-à-vis jury awards or risk suffering great financial losses.[97] The better reasoned approach suggested in *Mallinckrodt*, and buttressed in *Papas*, eliminates this problem by eradicating state imposed burdens on manufacturers complying with FIFRA's labeling requirements.[98]

The practical impact of the *Papas* court's preemption analysis will depend on either a decision by the Supreme Court or a response from Congress. Due to the conflicting holdings of the District of Columbia Circuit and the Eleventh Circuit, in addition to the split among district courts,[99] the issue whether FIFRA preempts state common law claims for inadequate labeling appears ripe for Supreme Court review. Because the Supreme Court has recently decided other preemption issues

94. *See supra* notes 19-21 and accompanying text for discussion of congressional intent in passing FIFRA.

95. *See* Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1541 (D.C. Cir. 1984) (articulating the various choices a manufacturer may make with respect to labeling requirements).

96. *Id.*

97. *See* Howarth, *supra* note 9, at 1329-39 (arguing that state law tort claims for inadequate labeling should be preempted by FIFRA because of the harsh economic effects of punitive damages).

98. The Supreme Court may be moving closer to this conclusion. In Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2487 (1991), decided after *Papas*, the Supreme Court held that FIFRA does not preempt local government regulation of pesticide use. In reaching this conclusion, the Court reasoned that 7 U.S.C. § 136v(a) did not preempt the entire field of pesticide regulation, because § 136v(b) explicitly preempted labeling. *Id.* at 2486. The Court found that a determination that § 136v(a) preempted the entire field would render section 136v(b) superfluous. *Id.* At least one district court has interpreted this decision to mean that section 136v(b) preempts state law tort claims. *See* Worm v. American Cyanamid Co., No. 90-1424, 1991 U.S. Dist. LEXIS 10301, at *7 (D. Md. July 12, 1991) (following the Supreme Court reasoning in *Mortier* to hold that a state tort claim alleging inadequate labeling of a pesticide must be preempted by FIFRA as a matter of law).

99. *See supra* notes 28-29 for the conflicting district court cases regarding the FIFRA labeling preemption issue.

under FIFRA[100] and has agreed to respond to analogous preemption issues,[101] the Supreme Court may soon end the debate on state actions which are preempted by FIFRA.

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100. *Mortier*, 111 S. Ct. 2476, 2487 (1991) (holding that FIFRA does not preempt local government regulation of pesticide use).

101. The Supreme Court will review whether state tort claims premised on a failure-to-warn theory are preempted by the Federal Cigarette Labeling and Advertising Act. *See* Cipollone v. Liggett Group, Inc., 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991).

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