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Dancing around the Issue of FIFRA Preemption: Does it Really Still Matter that the Supreme Court Has Not Made a Decision?

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DANCING AROUND THE ISSUE OF FIFRA PREEMPTION: DOES IT REALLY STILL MATTER THAT THE SUPREME COURT HAS NOT MADE A DECISION?

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I. INTRODUCTION

Most farmers spray pesticides on their yearly crops. Whether or not they read the warning label, follow the instructions, and avoid overexposure caused by prolonged inhalation of the pesticide, the pesticide may still harm them.[1] Manufacturers are compelled to comply with the Federal Insecticide, Fungicide, and Rodenticide Act[2] (FIFRA) and its regulations, requiring the pesticide and its label to be approved by the Environmental Protection Agency (EPA). However, their products may continue to cause detrimental health conditions for users. When this happens, sympathy for harmed plaintiffs increases because of the pesticide's failure to warn of the specific health problem acquired. Most people are more likely to sympathize with the innocent farmer, rather than the manufacturer who sent a harmful product into the market without an adequate warning.

However, this overlooks the fact that harm caused by the product equally surprised the defendant-manufacturer. After all, the manufacturer does not feel that they are at fault, since they went through the required steps for EPA approval of the label under FIFRA. FIFRA sets out the guidelines for an adequate pesticide label. The manufacturers follow the guidelines, relying on FIFRA to shield itself from liability under a state failure to warn cause of action. The manufacturer feels that it has complied through its actions by listing the risks of the pesticide known to it at the time.

Warnings are defective for many reasons, some of which may include the following: the warning is badly written; the manufacturer or the EPA consciously decides not to worry about a known risk; the risk is unknown at the time; or the manufacturer may not inform the EPA about a risk known at the time.[3] Most litigation over warnings concern

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[1] *See*, Scott D. Deatherage, *Scientific Uncertainty in Regulating Deliberate Release of Genetically Engineered Organisms: Substantive Judicial Review and Institutional Alternatives*, 11 HARV. ENVTL. L. REV. 203 (1987) (the environmental release of genetically engineered pesticides may cause new and untreatable diseases, seriously alter the balance of nature, or develop new strains of super pests).

[2] 7 U.S.C.A. §§ 136-136y (1988 & Supp. II 1990).

[3] See Richard C. Ausness, Learned Intermediaries and Sophisticated Users:

the proposition that the warning given was unclear or omitted a known risk, as opposed to omission of a risk unknown at the time or decidedly not worth worrying about.[4]

An adequate warning requires reasonableness under the circumstances.[5] The warning must have adequate factual content, which provides information about all significant risks of product use and the likelihood and gravity of such risks known to the manufacturer.[6] In addition, the physical format of the warning must be noticeable to the user and phrased to import danger without being ambiguous, equivocal, or contradictory.[7] The general public must easily understand the warning.[8] Finally, a warning may still be inadequate even by satisfying these requirements if it has not been communicated through the most effective channels.[9]

Even with these guidelines, pesticide users and manufacturers face confusion concerning warnings when plaintiffs seek damages for injuries caused by pesticides. FIFRA makes it clear that it preempts any state statutory enactments that purport to regulate pesticide labeling and packaging.[10] Yet, confusion exists about whether FIFRA preempts state common law failure to warn claims that essentially regulate pesticide labels and packages.

When courts consider failure to warn claims, they have no Supreme Court precedent to turn to for an answer. While the Supreme Court has decided preemption cases, it has not addressed preemption, with respect to pesticides. To date, the two most relevant decisions on this issue by the Court came to opposite conclusions: *Cipollone v. Liggett Group, Inc.* [11] held in favor of federal preemption of common law failure to warn claims while *Medtronic v. Lohr*[12] held against preemption. Most lower courts have followed the lead of *Cipollone*, holding in favor of FIFRA preemption.[13] However, confusion plagues

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Encouraging the Use of Intermediaries to Transmit Product Safety Information, 46 SYRACUSE L. REV. 1185, 1192 (1996).

[4] *Id.*

[5] *Id.* at 1192.

[6] *Id.*

[7] *Id.* at 1192-93.

[8] Ausness, *supra* note 3, at 1193.

[9] *Id.* at 1194.

[10] 7 U.S.C. §§ 136-136y (1988 & Supp. II 1990).

[11] 505 U.S. 504 (1992).

[12] 116 S.Ct. 2240 (1996).

[13] *See, e.g.*, Levesque v. Miles, Inc., 816 F. Supp. 61 (D. N.H. 1993); Casper v. E.I. du Pont de Nemours & Co., 806 F. Supp. 903 (E.D. Wa. 1992); Shaw v. Dow Brands, Inc., 994 F.2d 364 (7th Cir. 1993) (holding FIFRA preempts state failure to warn claims based on negligence or strict liability); Arkansas-Platte & Gulf P'ship v. Van Waters & Rogers, Inc., 981 F.2d 1177 (10th Cir. 1993) (holding FIFRA's preemptive provision is different from the 1969 Act in Cipollone but their effect is the same); Papas v. Upjohn, 985 F.2d 516 (11th Cir. 1993) (holding the word "requirements" in Section 136v(b) of FIFRA preempts state law negligence, strict liability, and

the courts over the effect of the recent *Medtronic* decision.

This note concludes that FIFRA does preempt these common law claims because FIFRA follows the statute at issue in *Cipollone* more than the statute at issue *Medtronic*. Therefore, until the Supreme Court decides preemption in the specific context of pesticides, courts should follow a *Cipollone* analysis in deciding FIFRA preemption cases. In addition, even without comparisons to the statutes involved in Supreme Court decisions, the language of FIFRA and the Congressional intent in its enactment show that the FIFRA statute clearly preempts common law failure to warn claims.[14]

II. THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

The Federal Insecticide, Fungicide, and Rodenticide Act developed over several decades. Its purpose changed as the concerns for individual users of pesticides turned into concerns for the environment. Through various revisions and amendments, FIFRA transformed from a simple labeling law for pesticides into a statute with complex regulations.[15]

A. The Creation and Purpose of FIFRA

Congress enacted FIFRA in 1947, replacing the Insecticide Act of 1910,[16] the primary purpose of which was to protect purchasers of insecticides from deception.[17] In the 1940s, the number of insecticides

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implied warranty claims premised on a failure to warn).

[14]*See, e.g.*, Caroline E. Boeh, Note, *Cipollone v. Liggett Group, Inc.: One Step Closer to Exterminating the FIFRA Preemption Controversy*, 81 KY. L. J. 749, 777 (1993) (concluding Congress expressly preempts all state tort law damage claims based on failure to warn, based on the explicit language of section 136v(b)); S. Douglas Fish, Note, *In Defense of FIFRA Preemption of Failure to Warn Claims*, 12 J. NAT. RESOURCES & ENVTL. L. 123, 140 (1997) (concluding preemption is by necessity, for the sake of Congressional intent of uniformity). *But see* Brian M. Brown, Note, *Federal Preemption of State Tort Law Failure to Warn Claims by FIFRA: Injury Without Relief?*, 4 S.C. ENVTL. L. J. 147, 163-64 (1995) (conceding that a goal of FIFRA is uniformity but distinguishes the 1969 Act in Cipollone from FIFRA in the approach each takes to achieve uniformity); R. David Allnut, Comment, *FIFRA Preemption of State Common Law Claims after Cipollone v. Liggett Group, Inc.*, 68 WASH. L. REV. 859, 880 (1993) (concluding that FIFRA's language and legislative history do not indicate Congressional intent to foreclose common law remedies).

[15]*See* Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2655 (1988); Food, Agriculture, Conservation and Trade Act Amendments of 1991, Pub. L. No. 102-237, 105 Stat. 1818 (1991); Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489 (1996).

[16]The Insecticide Act of 1910, ch. 191, 36 Stat. 331, *repealed by* Federal Insecticide, Fungicide, and Rodenticide Act of 1947, ch. 125, §16, 61 Stat. 172 (1947).

[17]William T. Smith, III & Kathryn M. Coonrod, *Cipollone's Effect on FIFRA Preemption*, 61 UMKC L. REV. 489, 490 (1991).

and herbicides produced progressively increased,[18] sparking numerous complicated, non-uniform state statutes and regulations.[19] FIFRA purported to give the Department of Agriculture authority over the pesticide registration process and regulation of the labels.[20] The purpose behind this was to make it more centralized and uniform.[21] FIFRA required registration of all pesticides to establish this desired uniformity.[22]

In the 1970s, concern increased over the effect of pesticides on the environment.[23] Because FIFRA focused on safety of immediate pesticide users, the regulation was not effective in protecting the environment from the consequences of pesticide use.[24] This concern led to substantial amendments to FIFRA in 1972 and the creation of the EPA, which assumed authority from the Department of Agriculture for administering and enforcing FIFRA.[25] In addition, further amendments to FIFRA took place in 1988[26], 1991,[27] and 1996,[28] but these were less important to the overall impact of FIFRA.

After the extensive revisions in 1972, FIFRA was no longer considered a labeling law.[29] Instead, FIFRA was transformed "into a comprehensive regulatory statute."[30] The EPA assumed authority to determine whether, and under what circumstances, a pesticide could be registered for manufacture and sale in the United States.[31] The

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[18]*See* H.R. Rep. No. 80-313, at 1200 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1200; Federal Insecticide, Fungicide, and Rodenticide Act of 1947, ch. 125, §§ 2-13, 61 Stat. 163-172 (1947).

[19]*See* H.R. Rep. No. 80-313, at 1205 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1200, 1205-06; *see also* S. Rep. No. 92-838, at 3993, 3999 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3999; H.R. Rep. No. 80-313, supra note 13, at 1205-1206.

[20]*See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984).

[21]*Id.*

[22]*See* H.R. Rep. No. 80-313 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1200; Federal Insecticide, Fungicide, and Rodenticide Act of 1947, ch. 125, §§ 2-13, 61 Stat. 163-172. (emphasis added).

[24]*See* H.R. Rep. No. 80-313 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1200; Federal Insecticide, Fungicide, and Rodenticide Act of 1947, ch. 125, §§ 2-13, 61 Stat. 163-172.; S. Rep. No. 88-573 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2166.

[25]Valle S. Dutcher, *The Marlboro Man Meets the Orkin Man: The Effect of Cipollone v. Liggett Group, Inc. on Federal Preemption by the Federal Insecticide Fungicide and Rodenticide Act of Failure to Warn Claims Brought Under State Tort Law*, 15 J. PRODUCTS & TOXICS LIABILITY 29, 35 (1993).

[26]Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2655.

[27]Food, Agriculture, Conservation and Trade Act Amendments of 1991, Pub. L. No. 102-237, 105 Stat. 1818.

[28]Food Quality Protection Act of 1996, Pub. L. No. 104-170, 110 Stat. 1489.

[29]Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 601 (1991) (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984)).

[30]*Id.* at 598-99.

[31]*See* Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991. Federal Insecticide, Fungicide, and Rodenticide Act of 1947, 7 U.S.C.A. § 136a(a) (1994) (providing that no pesticide may be sold in the United States unless it is registered with the EPA).

requirements for registering a pesticide include: its composition warrants the proposed claims for it; its labeling and other material required for submittal to the EPA comply with FIFRA; its use will not have unreasonable adverse effects on the environment; and when used in a recognized fashion, it will not generally cause unreasonable adverse effects on the environment.[32] In carrying out the goals of this statute, the EPA performs a cost-benefit analysis on each product to determine if, overall, the product represents "an unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of [the] pesticide."[33]

B. Warning Label Requirements of FIFRA

The EPA's labeling guidelines are extremely thorough in controlling the composition of a pesticide's label. These labeling provisions intend the product's warning label to reflect restrictions of the cost-benefit analysis[34] and prevent "unreasonable burdens [on] commerce," which would result if manufacturers had to create different forms of the same pesticide under varying state regulations.[35] Because the EPA decides whether a pesticide manufacturer has satisfied its duty of care in the product's safety and its duty to warn in the product's label, EPA approval represents a finding of due care on the manufacturer's part.

FIFRA demands that all pesticides be packaged with a warning label that indicates the EPA's approval.[36] The warning label must also provide information on the name, brand, or trademark of the product;[37] the name and address of the producer or registrant;[38] the product's contents;[39] a comprehensive ingredient statement containing the name and percentage weight of each of the product's active ingredients and the total percentage weight of all its inactive ingredients;[40] a warning of general toxicological hazards;[41] a statement of what to do in case of hazardous exposure;[42] directions for use, with limitations and

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[32]7 U.S.C. § 136a(c)(5) (1994).

[33]7 U.S.C. § 136(bb) (1994).

[34]*See* S. Rep. No. 92-838, at 91-92 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4032.

[35] S. Rep. No. 92-970, at 12 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4092, 4111-4112; *see also* 40 C.F.R. § 156.10(h)(1) (1995).

[36]7 U.S.C. §§ 136a(c)(1), (5) (1991).

[37]40 C.F.R. § 156.10(a)(1)(i) (1998).

[38]*Id* § 156.10(a)(1)(ii).

[39]*Id.* § 156.10(a)(1)(iii).

[40]*Id.* § 156.10(g).

[41]*Id.* § 156.10(h).

[42]40 C.F.R. § 156.10(h)(iii)(A) (1998).

restrictions to prevent unreasonable effects;[43] statement of use classifications (i.e. general use, restricted use);[44] and the nature of any restrictions.[45]

III. THE PREEMPTION DOCTRINE

The doctrine of federal preemption comes from the Supremacy Clause of the United States Constitution.[46] The Supremacy 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."[47] The United States Supreme Court has interpreted this clause to render any conflicting state law "without effect" and therefore preempted by federal law.[48] Moreover, the most important consideration under this basic theory of federal preemption is Congress' intent in enacting the law.[49]

A. Consequences of Preemption

Although federal preemption provides consistency, clarity and uniformity, broad use of authority to preempt state tort law has a number of negative consequences on state interests and the interests of injured parties.[50] First, the protection of public health and safety are traditionally matters of state interest.[51] Thus, serious federalism concerns arise when federal preemption infringes on a state's power to protect its own citizens.[52]

Another concern involves insulation of manufacturers against tort liability when federal safety standards prove to be inadequate or obsolete.[53] Additionally, the influence of politics and industry often compromise federal regulations.[54] Tort liability offsets these flaws,

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[43] *Id.* § 156.10(i)(2)(x).
[44] *Id.* § 156.10(j).
[45] *Id.* § 156.10(j)(2)(i)(B).
[46] U.S. CONST. Art. VI, cl. 2.
[47] *Id.*
[48] McCulloch v. Maryland, 17 U.S. (1 Wheat) 316 (1819) (holding that, due to the Supremacy Clause, any state law that conflicts with federal law is preempted by federal law).
[49] Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604 (1991).
[50] Richard C. Ausness, *The Case for a "Strong" Regulatory Compliance Defense*, 55 MD. L. REV. 1210, 1237 (1996).
[51] *Id.*
[52] *Id.* at 1237-38.
[53] *Id.*
[54] *Id.*

providing an incentive for manufacturers to exceed federal requirements when proven to be cost-effective.[55] Federal preemption would foreclose this incentive to exceed minimal standards because the manufacturer could escape tort liability by meeting the inadequate federal standards.[56]

Finally, preemption leaves injured parties without the protection of state law remedies by relieving the manufacturer of any duty to compensate victims.[57] Tort liability shifts the costs of accidents from individuals to manufacturers. The manufacturers can spread liability costs to consumers through the pricing mechanism,[58] further shifting the costs of accidents to the general public.[59] This promotes social welfare by reducing "secondary" accident costs.[60] However, federal preemption precludes these loss-spreading benefits that individuals could derive from utilizing state law remedies.

B. Requirements for Preemption

Particularly in certain subject areas, constant disagreement exists between the states and the federal government to determine who will ultimately regulate the same matter. Most federal preemption litigation involving FIFRA has focused on two primary issues: (1) the labeling and packaging requirements delegated to the EPA, and (2) section 136v(b) of FIFRA.[61] In the typical tort case, plaintiffs claim that a pesticide injured them or damaged their land, that the EPA approved an inadequate label or package, that the inadequacy caused their injuries, and that they should get relief from state tort law under a failure to warn claim.[62] In response, manufacturers argue that the federal government controls this field because it has preempted state tort claims.[63] To find preemption, Congressional intent to supersede

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[55]*Id.*

[56]Ausness, *supra* note 50, at 1238.

[57]*Id.*

[58]*Id.*; *See also* W. Page Keeton, *Products Liability--Liability without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 856 (1963).

[59]W. Page Keeton, *Products Liability--Liability without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 856 (1963).

[60]Ausness, *supra* note 50, at 1238.; *See also* Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 517-18 (1961) (stating that losses are least harmful if broadly spread).

[61]7 U.S.C. § 136v(a)-(b) (1988).

[62]*See* Arkansas-Platte & Gulf P'ship v. Van Waters & Rogers, Inc., 981 F.2d 1177 (10th Cir. 1993); Worm v. American Cyanamid Co., 5 F.3d 744 (4th Cir. 1993); Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir. 1991).

[63]*Papas*, 926 F.2d at 1020-21; Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1532 (D.C. Cir.1984), *cert. denied*, 469 U.S.1062 (1984).

state law must be "clear and manifest."[64] The Supreme Court feels reluctant to find preemption when state common-law doctrines encompass years of judicial development and concern in traditional areas of state interest.[65] The Court particularly hesitates to find preemption if it threatens the state's ability to exercise its police power to protect the health and safety of its citizens[66] or apply its common law.[67]

Federal court decisions on FIFRA preemption of state tort law damage claims have held that either FIFRA either expressly or impliedly preempts state law,[68] or it does not.[69] Preemption occurs in several ways, including when Congress declares its intent to preempt by express language; when a federal regulatory scheme occupies the field, leaving no room for state regulation; and when state law conflicts with federal regulatory objectives.[70]

1. Express Preemption

In express preemption, the court looks to the statutory language to determine if the plain language specifically preempts an area of law.[71] The Supreme Court will invalidate any state regulation that Congress has expressed intent to preempt through explicit statutory language.[72] Express preemption occurs when a federal statute specifically excludes a state regulation in a particular area or by a federal agency's regulations when the agency is acting within the scope of its authority.[73]

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[64]Richard C. Ausness, *Federal Preemption of State Products Liability Doctrines*, 44 S.CAR. L. REV. 187, 191-92 (1993).

[65]*Id.* at 192.

[66]*See, e.g.*, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 442-43 (1960) (upholding local pollution controls); H.P. Welch Co. v. New Hampshire, 306 U.S. 79, 84-85 (1939) (upholding state truck safety requirements).

[67]*See Ferebee*, 736 F.2d at 1542 (noting that state common law claims are within "the scope of state superintendence"), *cert. denied*, 469 U.S. 1062 (1984); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 256 (1984) (courts must not lightly infer conflict between a federal regulation and a state compensatory damage action because the two pursue different goals).

[68]*See* Burke v. Dow Chem. Co., 797 F.Supp. 1128, 1136 (E.D. N.Y. 1992); Young v. American Cyanamid Co., 786 F. Supp. 781, 782 (E.D. Ark. 1991); Herr v. Carolina Log Bldgs., Inc., 771 F. Supp. 958, 961 (S.D.Ind. 1989); Kennan v. Dow Chem. Co., 717 F. Supp. 799, 804 (M.D. Fla. 1989); Fisher v. Chevron Chem. Co., 716 F. Supp. 1283, 1286 (W.D. Mo. 1989); Fitzgerald v. Mallinckrodt, Inc., 681 F. Supp. 404, 406 (E.D. Mich. 1987).

[69]*See* Thornton v. Fondren Green Apartments, 788 F.Supp. 928, 932 (S.D. Tex. 1992); Riden v. ICI Ams., Inc., 763 F. Supp. 1500, 1503 (W.D. Mo. 1991); Evenson v. Osmose Wood Preserving, Inc., 760 F. Supp. 1345, 1347 (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, 199 (N.D. Ill. 1988).

[70]Ausness, *supra* note 64, at 192-93.

[71]Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992).

[72]Jones v. Rath Packing Co., 430 U.S. 519, 530-32 (1977).

[73] Ausness, supra note 64, at 192-93.

2. Implied Preemption

On the other hand, implied preemption arises when a statute is so thorough that Congress clearly intended to occupy that field.[74] In these situations, the Court has held states powerless to regulate fields where federal law is so pervasive that Congress has left no room for the states to act.[75] This may arise from a dominant federal interest justifying federal occupation of a field or from a pervasive federal regulation excluding even supplementary or parallel state regulations.[76]

Implied preemption also arises where state law directly conflicts with federal law.[77] Even absent express intent, federal law will preempt state regulations that "conflict in fact" with a federal scheme.[78] Several ways a conflict may occur include when state law requires action that federal law forbids, making it impossible to comply with both; when state law impairs the exercise of federally created rights; and when state law frustrates federal regulatory goals by hindering the conduct that Congress is trying to encourage or promoting the same conduct Congress is trying to discourage.[79]

While the Supreme Court has ruled on the issue of federal preemption of pesticide use,[80] it has not addressed the issue of federal preemption of state regulation of failure to warn claims concerning pesticide labeling and packaging.[81]

IV. THE EVOLUTION OF CASELAW AFFECTING FIFRA PREEMPTION

Section 136v of FIFRA is the most important provision in any discussion of FIFRA. Section 136v(a) grants the states power to "regulate the sale or use of any federally registered pesticide or device in the State," with the exception that states cannot regulate such sale or use in contradiction of FIFRA.[82] This subsection is known as the "savings provision" of FIFRA because it explicitly reserves at least

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[74]Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); *See also* 7 U.S.C. § 136v (1988); text at nn. 11 & 12.

[75]*See, e.g.*, Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 535 (1959); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947).

[76]Ausness, *supra* note 64, at 194-95.

[77]Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992); *see also* 7 U.S.C. § 136v nn. 11 & 12 (1988).

[78]*See, e.g.*, Rose v. Arkansas State Police, 479 U.S.1, 3 (1986); Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta, 458 U.S. 141, 153 (1982).

[79]Ausness, *supra* note 65, at 196-97.

[80]*See* Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 615-16 (1991).

[81]Chemical Specialties Mfrs. Ass'n v. Allenby, 958 F.2d 941, 948 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 80 (1992).

[82]7 U.S.C. § 136v(a) (1988).

some power for the states.[83]

However, Congress evidences its desire for uniform regulation of pesticides in the context of labeling in FIFRA where it grants the EPA exclusive authority to regulate the content of pesticide warning labels. Thus, section 136v(b) provides: "Such 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."[84] Clearly, Congress has disallowed direct state regulation of labeling or packaging on pesticides. Yet, the question remains about the possible preemptive effect of FIFRA on state common law tort actions for failure to warn.

A. Caselaw Prior to *Cipollone*

Prior to the important 1992 decision of *Cipollone v. Liggett Group, Inc.*, [85] the courts were divided as to whether FIFRA preempted state tort law failure to warn claims based on inadequate labeling or packaging. The first case to address the question of whether FIFRA preempted such a claim was *Ferebee v. Chevron Chemical Co.*[86] In that case, the court found FIFRA served a regulatory function, while state common law tort actions served the different function of compensating individuals for injuries.[87] This was critical because the court essentially stated that compensation for injuries under state law was not included in the same category as regulations.[88]

Therefore, FIFRA preemption did not cover state common law failure to warn claims because FIFRA and state common law belonged in two separate categories with no overlap. State tort claims neither make compliance with FIFRA impossible nor prevent accomplishment of FIFRA's defenses.[89] The Court found no express or implied preemption in section 136v(b) of FIFRA.[90] This decision has become the leading case for the proposition that FIFRA does not preempt state tort law claims, even though the pesticide's label complies with FIFRA's labeling requirements.[91]

However, other court decisions addressing FIFRA preemption

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[83]Burke v. Dow Chem. Co., 797 F. Supp. 1128, 1136 (E.D.N.Y. 1992).

[84]7 U.S.C. § 136v(b) (1988).

[85]505 U.S. 504 (1992).

[86]736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984).

[87]*Id.* at 1540.

[88]*Id.* at 1541.

[89]*Id.* at 1542.

[90]*Id.*

[91]*See also* Montana Pole & Treating Plant v. I.F. Laucks & Co., 775 F. Supp. 1339, 1344 (D. Mont. 1991); Riden v. ICI Ams., Inc., 763 F. Supp. 1500, 1507-08 (W.D. Mo. 1991); Evenson v. Osmose Wood Preserving, Inc., 760 F. Supp. 1345, 1348 (S.D. Ind. 1990).

reached different conclusions. The court in *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*[92] agreed with the reasoning in *Papas v. Upjohn Co.*,[93] which had found implied preemption where jury awards of damages in failure to warn actions would directly conflict with federal law.[94] According to the *Arkansas-Platte* court, "[w]hile FIFRA explicitly instructs [that] states can regulate the sale or use of federally registered pesticides, § 136v(b) precludes 'any requirements for labeling or packaging in addition to or different from those required pursuant to this act.' The Papas court reasoned jury awards of damages in these actions would result in direct conflict with federal law. We agree."[95]

The *Arkansas-Platte* court also relied on the Supreme Court decision in *Wisconsin Public Intervenor v. Mortier*[96] to make the distinction between the regulation of pesticide use and the regulation of pesticide labeling and packaging.[97] Although the Supreme Court in *Mortier* said that local use regulations were not preempted, it suggested that FIFRA preempted regulation of pesticide labeling.[98] The *Arkansas-Platte* court concluded that, while Congress had not occupied the broad field of pesticide regulation, it had occupied the narrower field of pesticide labeling and packaging.[99] The court explained that "[s]tate court damage awards based on failure to warn would constitute ad hoc determinations of the adequacy of statutory labeling standards [by individual state juries]. This would hinder the accomplishment of the full purpose of § 136v(b), which is to ensure uniform labeling standards."[100]

While the Supreme Court has not specifically addressed the issue of federal preemption of labeling and packaging faced in *Ferebee* and *Arkansas-Platte*, certain statements made by the Court in *Mortier* indicate it might find preemption in the field of pesticide labeling if it were to decide the issue. The Supreme Court stated that the language of section 136v(b) would be surplusage if Congress had intended to occupy the entire field of regulating pesticides.[101] This proposition supports the claim that labeling regulation does not fall under sale or

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[92]Arkansas-Platte & Gulf P'ship v. Van Waters & Rogers, Inc., 959 F.2d 158, 161 (10th Cir.) (1991).

[93]926 F.2d 1019 (11th Cir. 1991).

[94]*Id.* at 1024.

[95]*Arkansas-Platte & Gulf P'ship*, 959 F.2d at 161 (quoting Papas, 926 F.2d at 1024).

[96]501 U.S. 597 (1991).

[97]*Arkansas-Platte & Gulf Partnership*, 959 F.2d 158 (10th Cir. 1993).

[98]*Mortier*, 501 U.S. at 613, 615 (1991).

[99]*Arkansas-Platte & Gulf P'ship*, 959 F.2d at 160.

[100]*Id.* at 162.

[101]*Mortier*, 501 U.S. at 613 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984)).

use regulation of section 136v(a). The Court also noted that local use regulations, unlike labeling, do not fall within an area that FIFRA preempts.[102] This implies that FIFRA does preempt labeling, so that states may not regulate this area.[103] Yet, even with this existing dicta for courts to consider, the issue is still unresolved. The Supreme Court or Congress must directly address it eventually.

B. The Supreme Court Decides Preemption: *Cipollone*

In 1992, the United States Supreme Court decided *Cipollone v. Liggett Group, Inc.*[104] Although the issue in the case was federal preemption of state tort law damage actions in the context of cigarette labeling,[105] the decision had a pronounced impact on FIFRA labeling and packaging litigation. Where courts had previously been split as to whether FIFRA preempted state common law failure to warn actions, the majority of post-*Cipollone* decisions hold that FIFRA does preempt such actions.[106]

The petitioner, the son of Rose Cipollone, alleged that respondents were responsible for his mother's lung cancer and ultimate death from the cigarettes produced by respondents.[107] His claims consisted of failure to warn,[108] design defect, breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud.[109] Petitioner challenged the preemptive effect of the Federal Cigarette Labeling and Advertising Act of 1965[110] and its successor, the Public Health Cigarette Smoking Act of 1969.[111] The respondents contended that the above Acts preempted all state tort law damage claims "based on conduct after 1965"[112] and that Rose Cipollone began smoking cigarettes prior to the enactment of either provision.[113]

The Court determined that when Congress specifically addresses federal preemption in a statute, as the 1965 and 1969 Acts did with § 1334, courts are prohibited from applying an implied preemption analysis and can "only identify the domain expressly [preempted] by"

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[102] *Id.* at 615.

[103] *See Arkansas-Platte v. Gulf P'ship*, 959 F.2d at 163; Young v. American Cyanamid Co., 786 F. Supp. 781, 783 (E.D. Ark. 1991).

[104] 505 U.S. 504 (1992).

[105] *Id.*

[106] William T. Smith, III & Kathryn M. Coonrod, *Cipollone's Effect on FIFRA Preemption*, 61 UMKC L. REV. 489, 502 (1991).

[107] *Cipollone*, 505 U.S. at 504.

[108] *Id.* at 508.

[109] *Id.* at 508-09.

[110] *Cipollone*, 505 U.S. 504; *see also* 15 U.S.C. §§ 1331-1340 (1965).

[111] *Cipollone*, 504 U.S. 504; *see also* 15 U.S.C. §§ 1331-1340 (1969).

[112] *Cipollone*, 505 U.S. at 510.

[113] *Id.* at 508.

the statute section in question.[114] Therefore, courts can only determine the extent to which Congress intended to expressly preempt by the section in question, but cannot perform an implied preemption analysis on the statute at all.[115] Because of this presumption against preemption and because no conflict existed between federal preemption of state warning requirements and continued allowance of state common law actions for damages,[116] the Court held there was no preemption of state common law damages.[117] The Court stated that the requirement of a specific warning label does not automatically preempt an entire field[118] and the term "regulations" in the purpose statement of the 1965 Act only referred to positive enactments of law and not state common law damages.[119]

As to the 1969 Act,[120] the *Cipollone* court reached a different conclusion.[121] The Court looked principally to changes in the language of the 1969 provision as indicating Congressional intent to broaden the scope of preemption from the 1965 Act.[122] The plurality said that the phrase "requirement or prohibition" encompassed both positive enactments and common law damages,[123] and furthermore that the phrase "imposed under State law" included statutes, regulations and common law rules.[124]

C. The Further Effects of *Medtronic* on FIFRA Litigation

Most recently, the Supreme Court decided *Medtronic v. Lohr*,[125] a case that could strongly impact FIFRA litigation. *Medtronic* involved design defect and failure to warn claims for a defective pacemaker part regulated under the Medical Device Amendments of 1976 (MDA).[126] The Supreme Court held that the MDA did not preempt the design defect claim. More importantly, the Court split 5-4 against preemption on the failure to warn claim. The plurality focused on the MDA's

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[114] *Id.* at 517.
[115] *See id.*
[116] *Id.* at 518.
[117] *Cipollone*, 505 U.S. at 530-31.
[118] *Id.* at 518.
[119] *Id.* at 519.
[120] 15 U.S.C. §§ 1331-40 (1969).
[121] *Cipollone*, 505 U.S. at 519.
[122] *Id.* at 520-21.
[123] *Id.* at 521.
[124] *Id.* at 521. (citing Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n, 499 U.S. 117 (1991)).
[125] 116 S.Ct. 2240 (1996).
[126] The Medical Device Amendments of 1976, 21 U.S.C. §§ 301 (1976); *see also* Medtronic, 518 U.S. 470, 475.

process of reviewing the requirements medical devices must meet before entering the market.[127] Because the review process contained reviewing exceptions for devices on the market prior to the MDA and for products "substantially equivalent" to devices already being sold on the market, not all medical devices went through the extensive MDA review.[128] The pacemaker device in this situation fell within these exceptions.[129] To decide the case, the Court emphasized that states are sovereign entities, so Congress would not "cavalierly" preempt state common law.[130] Therefore, the Court must look to Congress' purpose of the statute to determine its meaning.[131]

The Court stated that Congress could not have intended the MDA to preempt all common law actions because then state courts could not protect medical device users from injuries.[132] In looking at the language of the statute, the plurality found the word "requirement" to be an "odd word" to use if Congress intended total preemption.[133] The Court distinguished the *Cipollone* decision because MDA preemption would have a greater impact on state sovereignty and plaintiffs' ability to obtain redress if allowed.[134]

The concurring opinion in *Medtronic* recognized the FDA's regulation that the state requirement must be "different from, or in addition to, the specific requirements" of the MDA.[135] Since the common law failure to warn claim did not specifically conflict with the MDA regulations, there was no preemption.[136] The dissenting opinion's stand regarding the failure to warn claim disagreed with the plurality's analysis of the word "requirement," instead the dissenters focused on the Supreme Court's rationale in *Cipollone* as relevant and controlling precedent.[137]

This most recent decision on preemption found that the MDA statute does not preempt state law on failure to warn claims. However, this does not affect the trend of finding FIFRA preemption of these types of claims because the *Medtronic* decision does not apply to FIFRA. It initially appears that the dissenting opinion does the best job focusing on the rationale behind *Cipollone* and applying it to the situation in *Medtronic*. However, even conceding the plurality's

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[127] *Medtronic*, 518 U.S. 470, 474.
[128] *Id.* at 477.
[129] *Id.* at 475.
[130] *Id.*
[131] *Id.* at 484.
[132] *Id.* at 486
[133] *Medtronic*, 518 U.S. at 486.
[134] *Id.* at 486-87.
[135] *Id.* at 506-07.
[136] *Id.*
[137] *Id.* at 509-11.

distinction of *Cipollone* and *Medtronic*, FIFRA can still stand on its own. The differences between FIFRA and the MDA leave ample room for the Supreme Court to decide that FIFRA preempts state common law failure to warn claims.

In fact, *Lewis v. American Cyanamid Co.*[138] discussed the effect of the *Medtronic* decision on FIFRA and found that FIFRA still preempted state common law claims.[139] In this case, the plaintiff was injured when a flame from the pilot light of a gas oven or a spark from a refrigerator motor ignited an insecticide can.[140] The court stated that "since FIFRA would preempt a state statute or regulation which imposes a monetary penalty on a manufacturer for not using a pesticide label different from that approved by the EPA, FIFRA also preempts a common law rule that would subject a manufacturer to a damage judgment for the same adherence to federal rather than state law."[141] The *Lewis* court found preemption by distinguishing *Cipollone* from *Medtronic*. FIFRA resembles the statue at issue in *Cipollone,* not *Medtronic*. The court stated that *Cipollone* and *Medtronic* reached different results because the legislative intent reflected in the legislation at issue in *Cipollone* was different from the kind present in *Medtronic*.[142] Therefore, courts should still apply the *Cipollone* analysis to FIFRA cases because the legislative intent is the same. This application of the *Cipollone* analysis will effectively result in the conclusion that FIFRA preempts state common law actions.

First, the *Lewis* court points out that the analysis of the MDA's language does not apply to FIFRA because the MDA is much more vague.[143] The MDA never says what state requirements it preempts,[144] while FIFRA specifically preempts labeling and packaging requirements different from or in addition to the federal requirements.[145] Therefore, Congress clearly had intended FIFRA to preempt failure to warn claims because they are included in labeling and packaging.[146] More importantly, FIFRA's preemptive provision was labeled "Uniformity."[147] This further shows Congress' intent for preemption.

In addition, the *Lewis* court points out that the proposition that the word "requirement" does not include state common law tort actions was not supported by a numerical majority of the *Medtronic* Court, who

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[138]682 A.2d 724 (N.J. Super. App. Div. 1996).
[139]*Id.* at 732.
[140]*Id.* at 725.
[141]*Id.* at 732.
[142]*Id.* at 730.
[143]*Id.*
[144]*See* 21 U.S.C. § 360k(a) (1994).
[145]7 U.S.C. § 136v (1988).
[146]Lewis v. Am. Cyanamid Co., 682 A.2d 724, 732 (N.J. Super. App. Div. 1996).
[147]7 U.S.C. § 136v(b) (1988).

in fact concluded the opposite.[148] The dissenters in *Medtronic* best understood the analysis of the word "requirement." Common law failure to warn claims do, in fact, fall into the category of "state requirements different from or in addition to" federal regulation.[149] As will be discussed below, failure to warn tort and contract principles put conditions on manufacturers to follow, so they will be free of liability, resulting in "requirements" by the states.[150] Therefore, the MDA language specifically preempts these claims. If the term "requirements" can never include these actions, the congressional intent for FIFRA preemption would not be effectuated. To be consistent with Congress' intent, it must be that the term "requirements" used in FIFRA includes state common law failure to warn actions.

Furthermore, even though the Supreme Court focused on congressional intent in both decisions,[151] the *Lewis* court recognized that the analysis of "intent" by the plurality in *Medtronic* did not apply to FIFRA.[152] In *Medtronic*, the Court concluded that Congress could not have intended the exceptions to the extensive MDA review process to swallow the rule, allowing no protection to injured plaintiffs.[153] While this presents a feasible argument against preemption by the MDA, FIFRA does not contain these same concerns about exceptions. In fact, FIFRA puts pesticides and their labels through an extensive EPA review, while regulating the substance of the labels.[154] In addition, the mandated EPA review has no provisions to allow "substantially equivalent" products to have a lesser, abbreviated review like the MDA does.[155]

Finally, the *Lewis* court showed how plaintiffs would not be denied protection and redress of injuries under FIFRA, as the Supreme Court feared in analyzing the MDA.[156] As discussed below later, plaintiffs will be able to seek relief on many other grounds, such as a design defect claim and a duty to warn apart from the label. FIFRA preemption is confined to common law failure to warn claims based on inadequate labeling. These other areas of redress are not affected by allowing federal preemption by FIFRA.

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[148] *Lewis*, 682 A.2d at 731.

[149] *Medtronic*, 518 U.S. at 509-514.

[150] *See infra* Part V.

[151] *Id.* at 729-30 (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) and Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996)).

[152] *Lewis*, 682 A.2d at 731-32.

[153] *Id.* at 731.

[154] *Id.*

[155] *Id.*

[156] *Lewis*, 682 A.2d at 724.

V. THE FUTURE OF FIFRA PREEMPTION

Even in light of the Supreme Court decision in *Cipollone*, some courts feel that the conclusions drawn in that case should not be applied to a FIFRA preemption case. Courts addressing this issue still disagree over whether section 136v(b) expressly preempts state tort law failure to warn claims.[157] However, the majority of courts have found that FIFRA does preempt such actions,[158] recognizing *Cipollone* as having decisive implications for the FIFRA preemption controversy.[159]

These courts have the task of applying the Supreme Court's analysis in *Cipollone* to FIFRA preemption. They feel there is no longer a question of whether the analysis should be applied; the only question left is how it should be applied.[160] The analysis of the Federal Cigarette Labeling and Advertising Act[161] applies to FIFRA preemption, evidenced by the Supreme Court's decision to vacate *Papas* and *Arkansas-Platte*, two FIFRA cases remanded in light of its *Cipollone* decision.[162] The fact that the statute involved in *Cipollone* requires a specific label,[163] while FIFRA only requires approval of a manufacturer's label,[164] no longer distinguishes the application of cigarette labeling cases from those under FIFRA.[165]

Within four months of the *Cipollone* decision, the courts in

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[157]*Compare* Worm v. American Cyanamid Co., 5 F.3d 744 (4th Cir. 1993) (holding that only those state tort claims that have a cause of action based on "an alleged failure to warn or communicate information about a product through its labeling" are preempted) *and* Arkansas-Platte & Gulf P'ship v. Van Waters & Rogers, Inc., 981 F.2d 1177 (10th Cir. 1993) (reaffirming its decision in Arkansas-Platte I in finding preemption, this time relying on an express preemption analysis) *with* Couture v. Dow Chem. U.S.A., 804 F.Supp. 1298 (D. Mont. 1992) (finding no preemption).

[158]William T. Smith, III & Kathryn M. Coonrod, *Cipollone's Effect on FIFRA Preemption*, 61 UMKC L. REV. 489, 502 (1991). *See also* Welchert v. American Cyanamid, Inc., 59 F.3d 69 (8th Cir. 1995) (finding no meaningful distinction between the 1969 Act in Cipollone and FIFRA); Taylor AG Indus. v. Pure-Gro, 54 F.3d 555, (9th Cir. 1995) (holding the preemptive reach of Section 136v(b) extends to common law damage actions); MacDonald v. Monsanto Co., 27 F.3d 1021 (5th Cir. 1994) (holding FIFRA preempts state law in the area of labeling); King v. E.I. DuPont De Nemours & Co., 996 F.2d 1346 (1st Cir. 1993) (holding preemption of state common law actions and positive enactments); Levesque v. Miles, 816 F. Supp. 61 (D.N.H. 1993) (finding express preemption).

[159]*See* The Supreme Court, 1991 Term; *Leading Cases*, 106 HARV. L. REV. 347, 352-57 (1992).

[160]*See* Palmer v. Liggett Group, Inc. 825 F.2d 620, 628 n.13 (1st Cir. 1987).

[161]15 U.S.C. §§ 1331-40 (1969).

[162]Arkansas-Platte & Gulf P'ship v. Dow Chem. Co., 113 S.Ct. 314 (1992); Papas v. Zoecon Corp., 112 S.Ct. 3020 (1992).

[163]Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); 15 U.S.C. §§ 1331-40, 1333(a) (1969).

[164]7 U.S.C. §§ 136-136y, 136a(c)(1)(C) (1988 & Supp. II 1990).

[165]*See* Kennan v. Dow Chem. Co., 717 F. Supp. 799, 805-06 (M.D. Fla. 1989); Palmer v. Liggett Group, Inc., 825 F.2d 620, 623 n.5, 628 n.13 (1st Cir. 1987).

Burke v. Dow Chemical Co.[166] and *Couture v. Dow Chemical U.S.A.*[167] ruled against FIFRA preemption. However, it is important to note that these courts relied on the *Cipollone* analysis in addressing the preemptive scope of section 136v(b).[168] Therefore, even though they decided against FIFRA preemption, the courts reveal that *Cipollone* analysis should still be used in addressing FIFRA preemption, regardless of the ultimate outcome on the preemption issue.

In *Burke*, the court found that the language of section 136v "lies somewhere in between the 1965 and 1969 cigarette laws" so no basis existed to justify the broad preemptive effect the Supreme Court conceded the 1969 Act had in *Cipollone*.[169] The Court in *Cipollone* found for preemption in the 1969 Act's statutory language because it used broader terms than the 1965 Act.[170] Because FIFRA does not contain the same broad language of the 1969 Act, the *Burke* court could not fully equate the two statutes and found no FIFRA preemption.[171]

In *Couture*, the court used the "narrow construction" approach of *Cipollone* to find that sections 136v(a) and 136v(b) were "expressly designed to preclude states' rule making bodies from mandating labeling and packaging requirements different from those imposed by the EPA pursuant to FIFRA."[172] The *Couture* court said that state tort law damages were actually state attempts to regulate the "sale or use" of pesticides.[173] Therefore they are not "requirements" under section 136v(b), but instead are issues properly left to the states under section 136v(a).[174]

However, most courts do not follow the reasoning of *Burke* and *Couture* in ruling against preemption, instead applying a different treatment to the issue of FIFRA preemption.[175] When applying *Cipollone* analysis to FIFRA cases, it appears that FIFRA does expressly preempt state tort law damage claims based on a failure to

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[166]797 F. Supp. 1128, 1140-1141 (E.D.N.Y. 1992).

[167]804 F. Supp. 1298, 1302 (D.Mont. 1992).

[168]*See generally Burke*, 797 F. Supp. 1128; *Couture*, 804 F. Supp 1298.

[169]*Burke*, 797 F. Supp. at 1140.

[170]Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992).

[171]*Burke*, 797 F. Supp. at 1140.

[172]*Couture*, 804 F. Supp. at 1302.

[173] *Id.*

[174]*Id.*

[175]*See, e.g.*, Cattell v. Great Lakes Chem. Corp., 1995 WL 250400 (D.N.J. 1995) (rejecting the reasoning in Burke that FIFRA is limited to labeling and not to warnings apart from labeling or packaging); King v. E.I. DuPont Numerous & Co., 806 F. Supp. 1030, 1037 N.4 (D.Me. 1992); DerGazarian v. Dow Chem. Co., 836 F. Supp. 1429, 1433 n.2 (W.D. Ark. 1993); Reutzal v. Spartan Chem. Co., 903 F.Supp. 1272, 1281 (N.D. Iowa 1995)(stating "...failure to warn claims are preempted by FIFRA..."); Wright v. Dow Chem. U.S.A., 845 F. Supp. 503, 508 (M.D. Tenn. 1993) (concluding that under Cipollone FIFRA explicitly forbids certain state regulation).

warn.[176] Most pre-*Cipollone* cases involving FIFRA mistakenly passed over the question of express preemption, relying instead on implied preemption analysis.[177]

For example, the *Ferebee* court stated that "Congress has not explicitly preempted state damage actions; it has merely precluded states from directly ordering changes in the EPA-approved labels."[178] This rationale supported an implied, instead of an express, preemption analysis. In addition, the *Arkansas-Platte* court used the "intent to occupy a field" test of implied preemption to conclude that Congress had occupied the field of pesticide labeling and packaging.[179] Yet, because FIFRA contains an express preemptive provision regarding state authority,[180] courts are bound to consider only the express language of FIFRA to determine the preemptive scope.[181] They can no longer use implied preemption analysis after the holding in *Cipollone*.[182]

In *Cipollone*, the Supreme Court explicitly stated that it focused solely on the statutory language, not on the purpose according to legislative history.[183] In the case of *Worm v. American Cyanamid Co.*,[184] the court stated that when a statute expressly addresses preemption (like FIFRA), the *Cipollone* test requires the court to determine whether the relevant statutory provisions reliably indicate Congressional intent with regard to preempting state authority and to interpret the express language.[185]

Applying the first prong of the test announced in *Worm* to FIFRA, the court said that Congress specified areas where states have authority to act, which included areas of "sale or use" and "registration for additional uses" of federally registered pesticides.[186] The *Worm* court stated that Congress also set out the areas where states cannot act, which included labeling and packaging.[187] If there was no difference in the authority granted to states between sections (a) and (b), then section

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[176]*See* Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); Reutzal v. Spartan Chem Co., 903 F. Supp. 1272, 1281 (N.D. Iowa 1995); Wright v. Dow Chem. U.S.A., 845 F. Supp. 503, 508 (M.D.Tenn. 1993).

[177]See Arkansas-Platte & Gulf P'ship v. Van Waters & Rogers, Inc., 959 F.2d 158, 161 (10th Cir. 1991); Papas v. Upjohn Co., 926 F.2d 1019, 1024 (11th Cir. 1991); Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1542 (D.C. Cir. 1984).

[178]*Ferebee*, 736 F.2d at 1542.

[179]*Arkansas-Platte & Gulf P'ship*, 959 F.2d at 160.

[180]7 U.S.C. § 136v (1988).

[181]*See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517-18 (1992); Burke v. Dow Chem. Co., 797 F.Supp. 1128, 1136 (E.D.N.Y. 1992); Kennan v. Dow Chem. Co., 717 F. Supp. 799, 804-05 (M.D. Fla. 1989).

[182]Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 605-06 (1991).

[183]*Cipollone*, 505 U.S. at 517-18.

[184]5 F.3d 744 (4th Cir. 1993).

[185]*Id.* at 747.

[186]7 U.S.C. § 136v(a) (1988).

[187]7 U.S.C. § 136v(b) (1988).

(b) would be mere surplusage.[188] Some courts have also asserted that because both section 1334(b) of the 1969 Cigarette Labeling Act and section 136v(b) of FIFRA contain similar preemptive language, they have the same effect; thus a common law action that would not survive the 1969 Act could not survive under FIFRA either.[189] Logically, it seems the inclusion of the express preemptive provision in FIFRA indicates Congressional intent to preempt the area in question, specifically pesticide labeling.[190]

A. Opposition to FIFRA Preemption

Opponents of FIFRA preemption argue that *Cipollone* is distinguishable from FIFRA preemption cases.[191] They base their arguments on statutory construction differences in the 1969 Act and FIFRA, as well as overall policy considerations.

1. Statutory Construction Arguments

In arguing against FIFRA preemption, opponents distinguish the actual preemptive language of the 1969 Act from FIFRA.[192] The *Cipollone* plurality based its holdings in part on changes in language between the 1965 and 1969 Acts.[193] They stated that Congressional intent to expand the preemptive scope of section 1334(b) was demonstrated by broadening the language from "statement" in 1965 to "requirements or prohibitions" in 1969.[194]

FIFRA, on the other hand, contains a savings provision granting states authority to regulate the "sale or use" of pesticides.[195] Because FIFRA expressly grants states at least some authority, courts must be more careful in determining how far the reach of preemption extends. Reading sections (a) and (b) of 136v, opponents argue that Congress did not intend to preempt state common law tort actions; under such a conclusion, FIFRA would allow states to ban a pesticide, but not allow them to compensate injured plaintiffs for insufficient warnings.[196] It is difficult to see why Congress would give states the

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[188]*Mortier*, 501 U.S. at 613.

[189]Arkansas-Platte & Gulf P'ship v. Van Waters & Rogers, 981 F.2d 1177, 1179 (10th Cir. 1993).

[190]*See Cipollone*, 505 U.S. at 517-18.

[191]Sandi L. Pellikaan, *FIFRA Preemption of Common-Law Tort Claims after Cipollone*, 25 ENVTL. L. 531, 538 (1995).

[192]*Id.*

[193]*Cipollone*, 505 U.S. at 520.

[194]*Id.*

[195]7 U.S.C. § 136v(a) (1988).

[196]Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1542-43 (D.C. Cir. 1984); *see also*

right to ban a pesticide and then tell them they cannot protect injured consumers.

2. Policy Arguments

Both the 1969 Act and FIFRA clearly have a goal to create uniformity within their respective scope of regulation. However, opponents say because the 1969 Act is stricter than FIFRA, there is a marked difference in the approach each takes to achieve this uniformity.[197] Under the 1969 Act, Congress mandated the exact wording of every cigarette package,[198] thus requiring the same warning for two different packages and even two different brands. FIFRA's requirements are less stringent, allowing the exact same pesticide produced by different manufacturers to have differently worded labels.[199] Opponents contend that because Congress did not intend complete uniformity under FIFRA to the same extent as the 1969 Act, granting state tort damages would not destroy any goal of uniform pesticide regulation in the same way it would in the completely uniform field of cigarette labeling.[200] Opponents argue that allowing common law actions will not result in non-uniformity because no single type of warning is required under FIFRA.[201]

The amendment process for a pesticide label also gives opponents reason to distinguish the standard of uniformity between *Cipollone* and FIFRA.[202] A pesticide manufacturer is free to change a label at any time as long as the new language does not specifically violate FIFRA,[203] enabling the manufacturer to amend the label to avoid future liability if initially held liable under a state cause of action. As stated before, this is not the case with cigarette labels, which must have identical warning language on every package, without any room for modification.[204] This argument suggests that while uniform labeling is a goal of the 1969 Act for cigarette labels, it is not a goal of FIFRA.

In addition, opponents point to the general principle that compliance with regulations is not a defense to liability in a common

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Pellikaan, *supra* note 189, at 541-42.

[197] *Ferebee*, 736 F.2d at 1542; *see also* Pellikaan, *supra*, note 189, at 541-42

[198] 15 U.S.C. § 1331(a) (West Supp. 1995).

[199] *See* 15 U.S.C. §§1331-40 (1969); 7 U.S.C. §§136-136y (1988).

[200] Stephen D. Otero, Note, *The Case Against FIFRA Preemption: Reconciling Cipollone's Preemption Approach with Both the Supremacy Clause and Basic Notions of Federalism*, 36 WM. & MARY L. REV. 783, 832 (1995).

[201] *Id.*

[202] 7 U.S.C. § 136a(f)(1) (1994).

[203] *Id.*

[204] *See supra* note 197, and accompanying text.

law damage action.[205] In fact, a number of grounds justify the maintenance of two remedial systems (regulatory and common law) that require the manufacturer to conform to the most stringent applicable standard.[206] First, there may be a time lapse between discovering risks of pesticide usage and creating remedial regulations for relief of these harms.[207] In this situation, the possibility of common law damage actions creates incentive for manufacturers to control risks from the beginning until regulations are enacted.[208] Common law damage actions also help correct inadequacies in regulatory oversight and enforcement that may occur when agencies lack necessary resources to perform their responsibilities.[209] Another important justification is that common law damage actions provide compensation to the injured plaintiff whereas regulation generally does not.[210]

B. Justification of FIFRA Preemption

Proponents of FIFRA preemption rely on the same bases for their position as their opponents-statutory construction and policy. However, the policy arguments for preemption are much stronger than both the statutory arguments in favor of preemption, as well as both the statutory and policy arguments against preemption.

1. Statutory Construction Arguments

To begin, the fact that the 1969 Cigarette Labeling Act involved in *Cipollone* and FIFRA are not exactly alike is undisputed. However, one the one similarity that is obvious is that both statutes prohibit additional "requirements" from being imposed by the states.[211] Although opponents of FIFRA preemption have concluded that the reach of FIFRA must be less that the reach of the 1969 Act, the focus should not be on comparing the statutes. Because the preemption clause in FIFRA requires a focus on the express intent of Congress,[212] the provision itself and the policy behind it must be examined to determine the extent of its preemption.

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[205] ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 83-84 (Reporters Study 1991).

[206] *Id.* at 84-85.

[207] *Id.* at 85.

[208] *Id*

[209] *Id.* at 86.

[210] *Id.*

[211] *Compare* 15 U.S.C. § 1334(b) (1969), *with* 7 U.S.C. § 136v(b) (1988).

[212] Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517 (1992).

2. Policy Arguments

The underlying premise of a failure to warn claim encompasses the idea that additional warnings should have been given.[213] Under common law tort principles, a manufacturer has a duty to warn consumers of a product's inherent dangers, exercising reasonable care to warn users of foreseeable dangers when the user is unlikely to be aware of them.[214] Manufacturers who fail to warn of these dangers market their product in an "unreasonably dangerous condition," subjecting themselves to strict liability.[215]

Under closely related contract principles, the manufacturer must issue a specific disclaimer[216] to escape the assumption of implied warranty of merchantability and fitness for the product's intended use.[217] Many courts hold that a manufacturer breaches this warranty if it does not warn consumers of foreseeable hazards.[218] In addition, manufacturers are bound by their specific warranties, such as labels, creating liability for harm resulting from inaccurate representations.[219]

Considering this, any common law damages action would conflict with FIFRA's preemption clause because it would result in "requirements" by a "state," which are preempted by section 136v(b) of FIFRA.[220] FIFRA undoubtedly preempts any requirements different from or in addition to its requirements,[221] and common law failure to warn actions clearly fall under this category. Damage awards are equivalent to statutory commands by states because of tort liability's coercive effect and therefore should be treated as any other form of state regulation.[222] The threat of damage awards puts conditions on manufacturers by essentially telling the manufacturer that if it does not comply, the result will be strict liability in tort or breach of warranty in contract.

Furthermore, Congress' goal was to create a single, comprehensive regulatory scheme, evidenced by the use of the heading

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[213]*See* RESTATEMENT (SECOND) OF TORTS § 388 (1965).

[214]*Id.*

[215]See RESTATEMENT (SECOND) OF TORTS § 402A (1965).

[216]*See* U.C.C. § 2-316 (1978).

[217]*See* U.C.C. §§ 2-314, 2-315, 2-316 (1978).

[218]*See* Jones v. Hittle Service, Inc., 549 P.2d 1383, 1391-92 (Kan. 1976); Gardner v. Q.H.S., Inc., 448 F.2d 238, 243 (4th Cir. 1971).

[219]*See* U.C.C. § 2-313 (1978).

[220]7 U.S.C. §136v(b) (1988). However, the Supreme Court has decided contractual commitments should not be regarded as a requirement. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 506 (1992) (holding that cigarette manufacturers are still liable for breach of "express" warranty because they voluntarily assumed responsibility).

[221]7 U.S.C. §136v(b) (1988).

[222]Ausness, *supra* note 65, at 270. (citing Worm v. American Cyanamid, 970 F.2d 1301, 1307 (4th Cir. 1992)).

"Uniformity" for the preemptive section of FIFRA.[223] This title would certainly conflict with a goal promoting various, differentiating state enactments in addition to federal law. As previously discussed, Supreme Court dicta in *Mortier* supports the proposition that FIFRA preemption exists in the areas of labeling and packaging.[224]

Necessity dictated the congressional intent to preempt state common law tort actions when Congress enacted a comprehensive regulatory program to make this area uniform.[225] Congress and the EPA have created a formal process where labels of pesticides have to survive great scrutiny for approval.[226] Congress must have intended that the EPA would be the only one to assess the warnings on such pesticides.[227] Otherwise, as previously discussed, the idea of uniformity and the separate section 136v(b) in FIFRA would be surplusage.[228] FIFRA litigation would result in different decisions depending on state boundaries. This would create the very same non-uniformity that Congress tried to eliminate in enacting FIFRA.

Although FIFRA requires no specific uniform warning, pesticide manufacturers still have very little leeway because of the stringent guidelines they must follow.[229] As discussed above, labels must meet numerous, specific requirements approval.[230] Because pesticides vary, their labels' exact warning must be unique to them. Yet, because of the guidelines they must follow, the labels' substance is the same.

Essentially, because the regulations make pesticide labels as uniform as possible given each pesticide's individual characteristics, FIFRA closely resembles the regulations in *Cipollone* in the important aspects.[231] The only difference is that slight concessions must be made for pesticides because as products they are not as uniform as cigarettes. Therefore, it should be expected that the less-uniform nature of these products dictate a law that is slightly less uniform than, but still substantively similar to, the regulations in *Cipollone*.

In addition, opponents sometimes fail to realize exactly what they are arguing against. FIFRA does not seek to preempt all causes of

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[223]7 U.S.C. § 136v(b) (1988).

[224]Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 613-14 (1991).

[225]*Papas*, 926 F.2d at 1025.

[226]*See* 40 C.F.R. §156.10 (1998).

[227]Timothy J. Kuester, Comment, *FIFRA as an Affirmative Defense: Pre-emption of Common-Law Tort Claims of Inadequate Labeling*, 40 U. KAN. L. REV. 1119, 1140 (1992).

[228]*Mortier*, 501 U.S. at 613.

[229]40 C.F.R. §156.10 (1998).

[230]*See id.*

[231]*See* Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); 7 U.S.C. §§ 136-136y (1988 & Supp. II 1990).

action.[232] Such a proposition has never been advanced. The only area FIFRA effectively preempts is common law failure to warn actions based on inadequate labeling.[233] Plaintiffs may continue to freely pursue many other causes of action, such as the duty to warn apart from the label[234] and design defect,[235] without any interference by the doctrine of federal preemption.

On the other hand, numerous considerations weigh against the justifications for the proposition of a dual remedial system, discussed above. First, dual remedial systems are expensive to maintain because they require two different sectors to make determinations regarding the same product and its hazards.[236] It is definitely much more efficient for one system alone to do this work.

When causation proves difficult to determine, regulatory agencies can assess risk and create remedies better than common law schemes because of their specialized knowledge.[237] If left to common law actions, inconsistent jury verdicts may cause manufacturer's duties to vary depending on what state the product is sold.[238] As discussed thoroughly before, Congress intended to prevent this non-uniformity by enacting FIFRA.

Another problem with dual remedial systems is over-deterrence.[239] For example, if a regulation is lenient, courts can still sanction manufacturers who produce unsafe products even when manufacturers complied with the regulation.[240] On the other hand, a court cannot excuse a manufacturer who fails to comply with an overly stringent regulation.[241] Therefore, in a dual remedial system the stricter regulations will eventually win out, because manufacturers will follow them to safely hedge against liability.[242] This could possibly increase all regulations to an unreasonably high level with which manufacturers will have to comply to avoid liability.[243] Over-deterrence can actually decrease safety because consumers will choose to ignore the excessive

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[232]*Mortier*, 501 U.S. at 613-14.

[233]*Id.* at 614.

[234]*See* Burke v. Dow Chem. Co., 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992).

[235]*See* Kevin McElroy et al., *The Federal Insecticide, Fungicide, and Rodenticide Act: Preemption and Toxic Tort Law*, 2 FORDHAM ENVTL. L. REP. 29, 39-42 (1990).

[236]ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 89 (Reporters Study 1991).

[237]*Id.* at 87.

[238]*Id.*

[239]*Id.*

[240]*Id.* at 87-88.

[241]*Id.* at 89.

[242]ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE 89 (Reporters Study 1991).

[243]*Id.* at 88-89.

and confusing warnings rather than try to sort through them.[244]

As shown, the justifications for FIFRA preemption exceed in number and in quality the opponents' arguments against preemption. FIFRA's similarity to the preemption provision in *Cipollone*, along with congressional intent and the serious ramifications of having dual remedial systems, shows that there is clear preemption in the area of common law failure to warn causes of action by FIFRA.

VI. CONCLUSION

After the *Cipollone* decision, it appeared that courts had finally come to an understanding that FIFRA did preempt common law failure to warn claims. Opponents of FIFRA preemption advanced persuasive arguments as to how regulations at issue in *Cipollone* are distinguishable from FIFRA, making the *Cipollone* analysis inapplicable. However, the proponents of FIFRA preemption had even stronger arguments. In focusing on congressional intent, FIFRA's language alone is enough to show its intended preemptive effect, even without comparing it with *Cipollone*. Some opponents will still insist that the more recent decision against preemption by the Supreme Court in *Medtronic* will impact the trend of allowing federal preemption of FIFRA. However, the language and congressional intent in *Medtronic* are very different from FIFRA, making it difficult to apply the same analysis to pesticide litigation. If forced to compare, the FIFRA statute clearly resembles the statute involved in *Cipollone* more than it resembles *Medtronic*. Until the Supreme Court decides the preemption issue specifically for pesticides, courts should apply a *Cipollone* analysis to FIFRA preemption cases rather than a *Medtronic* analysis. By doing this, it will be obvious that FIFRA intended to preempt all common law failure to warn claims.

[244] *See* Lars Noah, *The Imperative to Warn: Disentangling the "Right to Know" from the "Need to Know" About Product Hazards*, 11 YALE J. ON REG. 293, 374-77, 381 (1994).