Federal Preemption of Tort Claims Under FIFRA: The Erosion of a Defense

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With the growth of federal regulation in the last century, federal preemption of state law has been an evolving issue in the area of toxic torts litigation. The preemption doctrine occupies a particularly prominent place in the area of pesticide-related litigation as the judiciary has struggled to decide what, if any, tort claims are preempted by the Federal Insecticide Fungicide and Rodenticide Act of 1972 ("FIFRA"), the federal statute governing the sale and labeling of pesticides in the United States. In Etcheverry v. Tri-Ag Serv. Inc., 22 Cal. 4th 316, 93 Cal. Rptr.2d 36 (2000), a case heard by the Supreme Court of California, the Environmental Protection Agency ("EPA") took the position that federal preemption of pesticide-related tort claims is largely improper under FIFRA. The EPA's advocacy represented a major departure from the U.S. government's long silence with regard to federal preemption of tort claims and struck a huge blow to the pesticide industries' future ability to use preemption effectively as a defense. Although the Supreme Court of California did not agree with the EPA's position in Etcheverry, a significant number of other recent courts have adopted the EPA's position, holding that FIFRA does not preempt most or any state tort claims. These court decisions indicate that judicial support for a broad view of federal preemption under FIFRA is eroding.

This article analyzes the history and considers the future of federal preemption of state tort claims pursuant to FIFRA. The article urges finally that the courts are not clear about the extent to which Congress intended to preempt common law tort claims pursuant to FIFRA; that FIFRA should be interpreted narrowly to provide for little federal preemption; and that, at the very least, Congress should clarify this issue.

**INTRODUCTION**

With the growth of federal regulation in the last century, federal preemption of state law has been an evolving issue in the area of toxic torts litigation. The preemption doctrine occupies a
particularly prominent place in the area of pesticide-related litigation as the judiciary has struggled to decide what, if any, tort claims are preempted by the Federal Insecticide Fungicide and Rodenticide Act of 1972 ("FIFRA"), the federal statute governing the sale and labeling of pesticides in the United States. In *Etcheverry v. Tri-Ag Service, Inc.*, a case heard by the Supreme Court of California, the Environmental Protection Agency ("EPA") first took the position that federal preemption of pesticide-related tort claims is largely improper under FIFRA. The EPA's advocacy represented a major departure from the U.S. government's long silence with regard to federal preemption of tort claims and struck a huge blow to the pesticide industries' future ability to use preemption effectively as a defense.

Although the Supreme Court of California did not agree with the EPA's position in *Etcheverry*, several other courts have adopted the EPA's position, holding that FIFRA does not preempt state tort claims. These decisions indicate that judicial

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3. See infra notes 15–34 and accompanying text.
6. See generally EPA Etcheverry Brief, supra note 5.
7. See infra Parts III.B.2–3.
8. *Etcheverry*, 993 P.2d at 375. Numerous essays and articles have been written on the recent litigation in the California state courts concerning the preemption defense under FIFRA. See Lawrence S. Ebner, *California Supreme Court Repudiates Federal Government Position on Pesticide Tort Preemption*, PRODUCT LIABILITY L. AND STRATEGY, Apr. 2000, at 1; Lawrence S. Ebner, *The California Supreme Court Weighs In on FIFRA Preemption*, 15 TOXICS L. REP. 627 (2000); John H. Kazanjian & Kathleen Lennon, *Preemption Defense Cracks in Pesticide Exposure Cases*, N.Y. L.J., Mar. 8, 1999, at 9; *Public Citizen Files California Supreme Court Brief Supporting Crop Damage Plaintiff*, ANDREWS TOXIC CHEMS. LITIG. REP., Apr. 5, 1999, at 8; see also infra notes 25–34 and accompanying text for a discussion of an informational notice the EPA issued in 1996 on the subject. The court held instead that to the extent plaintiff's claims were even loosely related to the failure of the product label, which was approved by the EPA pursuant to federal law, they were preempted under FIFRA *Etcheverry*, 993 P.2d at 371–72.
support for a broad view of federal preemption\textsuperscript{10} under FIFRA is eroding.\textsuperscript{11}

This article analyzes the history and considers the future of federal preemption of state tort claims pursuant to FIFRA. Part I of the article discusses the legislative history of FIFRA and FIFRA's preemption provision. Part II of the article discusses the ideological basis for the doctrine of federal preemption, as well as the judiciary's general treatment of preemption in pesticide-related cases beginning in the 1970's at the time of FIFRA's major re-enactment.\textsuperscript{12} Part III discusses the current state of the case law, paying particular attention to a recent preemption decision by the United States Supreme Court and the EPA's arguments in \textit{Etcheverry}.\textsuperscript{13} Part IV of the article argues that the courts are not clear about the extent to which Congress intended to preempt common law tort claims pursuant to FIFRA,\textsuperscript{14} that FIFRA should be interpreted narrowly to provide for little federal preemption, and that Congress should clarify this issue.

\section*{I. FIFRA: Legislative Framework and Legislative History}

\subsection*{A. FIFRA Legislative Framework and Preemption Provision}

\textit{1. The Legislative Framework}—FIFRA is the federal statute regulating the sale and use of pesticides in the United States.\textsuperscript{15} Originally passed as a labeling statute in 1947,\textsuperscript{16} the statute has

\begin{footnotesize}
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\item[11.] \textit{See infra} Parts III.B.2–3.
\item[13.] \textit{See generally} EPA Etcheverry Brief, supra note 5.
\item[15.] 7 U.S.C. § 136 (2000). Throughout this article, the term pesticide will be used to include herbicides, fungicides, insecticides, and rodenticides used to kill, repel or control weeds, pests or vermin of any sort. The Federal Insecticide, Fungicide, and Rodenticide Act defines pesticide to mean any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest, and any substance or mixture of substances intended for use as a plant regulator, defoliant or desiccant, excepting substances which are considered new animal drugs, as that term is defined pursuant to federal regulations. 7 U.S.C. § 136(u) (2000).
\end{itemize}
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been strengthened to address concerns about health and the environment and has evolved into a comprehensive federal statute designed to give the EPA regulatory authority over the entire process of marketing and selling pesticides.1 FIFRA requires that before a pesticide may be sold in the United States, it must be registered with the EPA. A pesticide may be registered with the EPA for general use if the EPA determines that when used as expected, it will not generally cause "unreasonable adverse effects on the environment." The term "unreasonable adverse effects on the environment" is defined by the statute as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." The purpose of the EPA registration process is to balance risk versus utility; but the process does not guarantee a product's safety or efficacy. In fact, the EPA itself has stated that "no pesticide can be considered 'safe'." and


21. 7 U.S.C. § 136(bb). A pesticide may be registered with the EPA for restricted use if the pesticide, when applied normally in accordance with its directions for use, may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator. 7 U.S.C. § 136a(d)(1)(C).


In an introduction written to Rachel Carson's ground-breaking book, Silent Spring, former Vice President Al Gore concluded:

[FIFRA, the statute that regulates pesticides, fungicides, and rodenticides sets far looser standards than those that regulate food and drugs, and Congress intentionally made them more difficult to enforce. In setting safe levels of a pesticide, the government takes into account not only its toxicity but also the economic benefit it provides. This dubious process pits increased agricultural production (which might be obtained otherwise) against potential increases in cancer and neurological disease. Moreover, the process for removing a hazardous pesticide from the market generally takes five to ten years. New pesticides, even if they are very toxic, can win approval if they work just marginally better than existing ones. . . . The present system is a Faustian bargain—we get short-term gain at the expense of long-term tragedy . . . . Essentially, what we have inherited is a system of laws and loopholes, deadlines and delays, facades that barely disguise a wholesale failure of policy.
all pesticides are "associated with some risk of harm to human health or the environment." 24

Additionally, the EPA limited the purview of its own review under the statute in 1996. Prior to the filing of its brief amicus curiae in Etcheverry, the EPA issued Pesticide Registration (PR) Notice 96-4, a document written by EPA's general counsel, stating that it believed many courts had been mistaken about the agency's role in regulating the labeling of pesticides. 25 In the Notice, the EPA indicated that it does not evaluate a pesticide's efficacy prior to approval and that it waived such a review because it believed that state tort law would ensure the accuracy of statements regarding a product's efficacy. 26 The EPA stated:

This notice explains EPA procedures in approving pesticide labels. . . . EPA is issuing this notice at this time to correct a misunderstanding regarding the FIFRA label approval process and efficacy claims that is reflected in a series of court decisions concerning the preemptive effect of FIFRA . . . . EPA has acted under this authority to waive, by regulation, data requirements as to efficacy issues for all agricultural pesticide [sic] . . . . [A]griculture [sic] pesticides are 'effectively regulated by the marketplace,' and . . . waiving review of the efficacy of agricultural pesticides in the registration process would enable the Agency to focus of

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26. Id. at 1-2; see also infra notes 256-57 and accompanying text. Pursuant to FIFRA, the EPA is permitted to review pesticides for efficacy, but has chosen not to do so. See 7 U.S.C. § 136a(c)(5) (2000).
its 'primary mandate under FIFRA': investigating 'the health and safety aspects of pesticides.'

The EPA thus pointed to private legal action for damages as one factor that would ensure that pesticide manufacturers sold an efficacious product, noting that "pesticide producers are aware that they are potentially subject to damage suits by the user community if their products prove ineffective in actual use."

2. The Federal Preemption Provision Under FIFRA—Notably, FIFRA contains an express provision regarding federal preemption. This provision is contained in section 136v and is entitled "Authority of States." Subsection 136v(a) contains the following language: "A State may regulate the sale or use of any federally registered pesticide . . . but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter." Additionally, subsection 136v(b) reads: "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." Thus, section 136v appears to both preempt state authority and give the states some authority to regulate the sale and use of pesticides. While the U.S. Supreme Court has said that section 136v "acts to ensure that the States could continue to regulate use and sales" of pesticides, the Court has not spoken specifically as to whether section 136v preempts state common law tort claims. Not surprisingly, given the ambiguity inherent in the section, the lower courts have grappled with section 136v, trying to decide the extent to which Congress intended to preempt pesticide-related common law tort claims.
B. Legislative History

While the legislative history of FIFRA is not conclusive as to whether Congress intended to preempt\textsuperscript{35} common law tort claims under FIFRA, it does give some insight into the issue. Prior to FIFRA's passage in 1972, Congress held twenty-five days of hearings\textsuperscript{36} and issued reports from four different committees.\textsuperscript{37}

At the committee hearings, what was to become section 136v of FIFRA was extensively discussed.\textsuperscript{38} EPA's General Counsel testified on behalf of the administration, which drafted the bill that would become the 1972 Amendments to FIFRA:

I would like to emphasize that the States have played a major and continuing role in pesticide regulation.\ldots We wish to encourage and not supplant these efforts by providing that States may prohibit the use of a particular pesticide within their jurisdiction even if the pesticide is registered under the Federal authority. States thus are not precluded from imposing stricter standards or added requirements, but they may not permit any sale or use of a pesticide which is prohibited under the authority of the Act.\textsuperscript{39}

The EPA's General Counsel further testified that "[t]he bill does not affect tort liability."\textsuperscript{40} No member of Congress or any other person objected to this interpretation of the bill that would become FIFRA. These statements, while not absolutely dispositive on

\textsuperscript{40} Federal Pesticide Control Act of 1971: Hearings Before the House Comm. On Agric., 92nd Cong. at 42 (1971); see also EPA Etcheverry Brief, supra note 5, at 28.
the issue, do not appear to evince a congressional intent to eradicate all or even most common law tort actions under FIFRA.

Similarly, the committee reports issued prior to the passage of FIFRA do not seem to indicate that Congress intended to abrogate private tort actions under FIFRA. Rather, they indicate that Congress intended the states to continue to regulate the sale and use of pesticides. For example, the Report by the Senate Committee on Agriculture and Forestry noted that enforcement of FIFRA would be strengthened by "authorizing cooperation with States." Similarly, the Senate Commerce Committee Report also contained specific sections on state and local regulatory power. The section entitled "Authority of States" indicated that the intent of the bill was "to leave to the States and local governments the authority to impose stricter regulations on pesticides [sic] use than that [sic] required under the Act." The Senate Commerce Committee Report also contained a specific section entitled "Authority of Local Governments to Regulate the Use of Pesticides." This section noted that local governments should be given the authority to regulate the sale or use of a pesticide beyond the requirements imposed by state and federal authorities under the pending legislative scheme. While the Commerce Committee Report specifically noted that state and local governments would be preempted from imposing labeling or packaging requirements different from those required under FIFRA, it definitively allowed local governments to prohibit or entirely restrict the sale or use of a pesticide from a locality.


42. S. REP. NO. 92-838 (1972), reprinted in 1972 U.S.C.C.A.N. 3993, 3993; S. REP. NO. 92-970 (1972), reprinted in 1972 U.S.C.C.A.N. 3993, 4092. Committee reports also indicate that the main purpose of FIFRA was to more fully regulate pesticides to provide greater protection for man and the environment. See, e.g., S. REP. NO. 92-970, at 27 (1972).


44. S. REP. NO. 92-970, at 27, 44 (1972).

45. Id. at 44.

46. Id. at 27.

47. Id.

48. Id. at 27, 44.

49. Id. at 27. This Senate Commerce Committee Report can be contrasted with the Senate Agriculture and Forestry Committee Report which stated that local governments should not regulate pesticides in any manner. See Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 609-10 (1991) (citing S. REP. NO. 92-838, at 16 (1972)). In Wisconsin Public Intervenor, the U.S. Supreme Court indicated that these two committees, those with primary responsibility for FIFRA, never resolved their differences of opinion concerning whether the bill preempted local regulation of pesticides. Wisconsin Public Intervenor, 501 U.S. at 610.
Finally, as with any congressional action, one can presume that Congress knew the current state of the law.50 At the time of FIFRA’s passage, tort actions against pesticide producers were a commonplace occurrence.51 In this context, neither the Senate Commerce Committee Report nor any other congressional report indicates that the purpose of FIFRA was to eradicate all or even most common law tort actions.52 Instead, the committee reports, the committee hearings, and other legislative history together evidence a congressional willingness to allow states to continue to regulate pesticide use and sale—even to impose stricter requirements on such activities—as long as such regulation did not directly contravene federal labeling requirements.53

II. The Ideological Basis of Preemption and The History of Pesticide-Related Litigation

A. The Ideological Basis of the Preemption Doctrine

The doctrine of federal preemption is grounded in the Supremacy Clause of the U.S. Constitution,54 which provides that the laws of the United States, and hence federal law, "shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."55 The preemption doctrine thus allocates regulatory power between the federal and state governments, allowing federal law to trump state law when applicable.56 The U.S. Supreme Court has said that preemption can occur by express statutory command of Congress or by implication via the occupation doctrine or the conflict of interest doctrine.57 While these two theories of preemption have guided the United States Supreme Court to varying degrees, the Court has

50. EPA Etcheverry Brief, supra note 5, at 19–23 (citing Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 185 (1988) (court may presume that Congress is familiar with the relevant legal landscape when it acts)).
51. EPA Etcheverry Brief, supra note 5, at 20.
55. U.S. CONST. art. VI, cl. 2.
56. Martin, supra note 54, at 1233.
57. See Howarth, supra note 1, at 1310–11.
continuously viewed the intent of Congress as the "touchstone" for all preemption analysis. Indeed, the Court has said: "[c]onsideration of issues under the Supremacy Clause 'starts with the assumption that the historic police powers of the States [are] not to be superseded by ... Federal Act unless that [is] the clear and manifest purpose of Congress.'" The high Court has also repeatedly stated that there is a "strong presumption against preemption."

Pursuant to the occupation doctrine, preemption occurs where Congress has so pervasively dominated an area of law that there is no room left for state regulation. When Congress "occupies a field," the states are prohibited from regulating that area of law. Preemption by occupation can exist in two ways. There may be an express command of Congress, in which case a court may still have to decide exactly what is preempted. In other cases, the intent to occupy an area of regulation may be less clear and a court must decide whether federal preemption should be implied in the first instance and then decide the extent of federal preemption. Discerning the existence and the extent of federal preemption by occupation is a vexing process; indeed, one commentator has said that the occupation of the field doctrine poses two distinct difficulties: first determining what the field is, and then determining whether or not it is occupied. The more pervasive and comprehensive the legislative scheme, the more likely Congress intended to occupy the area of the law to the exclusion of state regulation.

Alternatively, federal preemption can result where state law conflicts with federal law. In such cases, Congress can expressly recognize the conflict or the potential for conflict and prohibit the conflicting state regulation. In other cases, it is impossible to

60. See, e.g., id. at 523.
61. See Howarth, supra note 1, at 1310.
62. See Howarth, supra note 1, at 1311.
63. See Howarth, supra note 1, at 1311.
64. See Wolfson, supra note 62, at 72.
65. Id. at 1312.
carry out the directives of both the state and federal law. In such a case, Congress is said to have impliedly preempted state regulation.\textsuperscript{69} In still other cases, preemption is even more subtle: although it is possible to comply with both state and federal law, a conflict exists between the purpose or the function of the federal scheme and the state regulation.\textsuperscript{70} In this case as well, Congress will also be said to have impliedly preempted state law by stating an overriding federal purpose that is different than the state's purpose in regulating.

While the Supreme Court has used the occupation doctrine and the conflict of interest doctrine to guide its analysis, the application of federal preemption doctrine to determine the existence and extent of preemption is largely a matter of the interpretation of congressional intent.\textsuperscript{71} As Justice Black noted: "no classification scheme is applied consistently: '[N]one of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.'\textsuperscript{72}

The shifting nature of this "formula," and hence the effect of the federal preemption doctrine to prohibit various forms of state regulation, can thus be attributed, at least in part, to the changing ideology of the U.S. Supreme Court as its members have changed and the Court's resulting collective view as to the matter being regulated has changed.\textsuperscript{73} Historically, the U.S. Supreme Court has been more willing to preempt state law in an area traditionally of federal concern, and less willing to preempt state law premised on an exercise of traditional police power.\textsuperscript{74}

While the U.S. Constitution reserves to the states all those powers not specifically given to the federal government,\textsuperscript{75} a state's regulatory power\textsuperscript{76} will vary, depending on the interpretation and

\begin{thebibliography}{99}
  \bibitem{69} Id.
  \bibitem{73} See Howarth, supra note 1, at 1313; Bratton, supra note 12, at 639–51.
  \bibitem{75} U.S. Const. amend. X.
  \bibitem{76} See The Federalist No. 45 (James Madison).
\end{thebibliography}
application of the federal preemption doctrine. In turn, the U.S. Supreme Court's interpretation and application of the federal preemption doctrine has depended on its view of federalism as well as the proper extent of state autonomy and power in the area under regulation.

B. Federal Preemption in Pesticide-Related Litigation

In 1972, at the time of FIFRA's re-enactment, great deference to state police power was the norm; courts often balanced state and federal interests, looking for an actual conflict of law before preempting state regulation. In the 1980's, deference to state regulation continued, as evidenced by Pacific Gas & Electric Co. and Silkwood v. Kerr-McGee Corp., two decisions in which the Supreme Court deferred to state regulation. In Pacific Gas & Electric Co., the U.S. Supreme Court upheld a state moratorium on the building of nuclear power plants, even where one of the primary objectives of the Atomic Energy Act was the promotion of nuclear power and where, through the Act, Congress had occupied the entire field of nuclear safety regulation. The Court held that California's regulation of nuclear power plants was an economic regulation, not a safety statute, and that Congress had left sufficient authority for the states to stop or slow the construction of a nuclear power plant for economic reasons.

Similarly, Silkwood v. Kerr-McGee Corp. involved the Atomic Energy Act, which gave the Nuclear Regulatory Commission exclusive authority to regulate safety matters in connection with nuclear power plants. Appellant was injured in a nuclear power accident and sued the plant owner pursuant to state tort law. The

77. Martin, supra note 54, at 1233.
78. See THE FEDERALIST No. 45 (James Madison).
80. See Bratton, supra note 12, at 639–41.
83. Pacific Gas, 461 U.S. at 221.
84. Id. at 210.
85. Id. at 222.
87. Silkwood, 464 U.S. at 239.
88. Id. at 239.
U.S. Supreme Court allowed a state law award of punitive damages to the injured worker, even where the corporate plant owner had complied with all of the Atomic Energy Act's safety directives. The Supreme Court held that the Act would only preempt punitive damage awards under state law where it would be physically impossible to comply with both the state and federal law, or where exposure to such damages would frustrate the purpose of the federal law.

Although the U.S. Supreme Court did not specifically face the preemption issue under FIFRA in the 1980's, two federal courts reached important decisions in Wilson v. Chevron Chemical Co. and in Ferebee v. Chevron Chemical Co., allowing awards of damages to plaintiffs in state failure to warn suits under FIFRA. In Ferebee, the U.S. Court of Appeals for the D.C. Circuit held that FIFRA did not preempt a damage award in a failure to warn case involving the pesticide Paraquat. Chevron, the defendant manufacturer, argued that because the EPA had approved the label on Paraquat, the court could not now award damages to a plaintiff based on the inadequacy of that label. The circuit court rejected Chevron's argument, reasoning that requiring the maker of the product to pay damages was not the type of "direct regulatory command" contemplated in FIFRA's prohibition against state-imposed additional labeling requirements. The court reasoned that a state could impose tort remedies and that this would not amount to a state regulation of the product label. If a pesticide manufacturer was faced with a damage award or multiple awards, it could then assess the viability of continuing to sell the product as labeled or could decide to alter its label to limit further liability. The court noted:

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89. Id.
90. Id. at 256.
93. See infra notes 94–109 and accompanying text.
94. Ferebee, 736 F.2d at 1540.
95. Id. at 1540.
96. Id. at 1541.
97. Id.
98. Id. The Ferebee court also noted that the purposes of FIFRA and of state tort law, while compatible, might be “distinct.”

FIFRA aims at ensuring that, from a cost-benefit point of view, [a pesticide] as labelled [sic] does not produce ‘unreasonable adverse effects on the environment.’ State tort law, in contrast, may have broader compensatory goals; conceivably, a label
Imposition of such a dual obligation upon a manufacturer is permissible under the Act. While FIFRA does not allow states directly to impose additional labelling [sic] requirements, the Act clearly allows states to impose more stringent constraints on the use of EPA-approved pesticides than those imposed by the EPA.\textsuperscript{99}

In \textit{Wilson v. Chevron}, the District Court for the Southern District of New York also considered the availability of a state law damage award under FIFRA and held that such actions were not preempted under FIFRA.\textsuperscript{100} In \textit{Wilson}, plaintiff's husband died as a result of dermal exposure to the herbicide "OPCL," manufactured by defendant Chevron.\textsuperscript{101} Plaintiff sought punitive damages against Chevron pursuant to state law.\textsuperscript{102} Plaintiff alleged that Chevron's warning label, even though approved by the EPA, was inadequate in that it did not warn that death could result from dermal exposure to the herbicide.\textsuperscript{103} Defendant moved for summary judgment, urging that FIFRA preempted plaintiff's action for failure to warn.\textsuperscript{104} The \textit{Wilson} court first noted that the burden of proving federal preemption rests squarely with the party seeking it.\textsuperscript{105} Relying on \textit{Silkwood},\textsuperscript{106} the court held that federal preemption would only occur where it would be "impossible to comply with both state and federal law" or where "state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."\textsuperscript{107} Where, as here, an award of punitive damages in a state tort action would further FIFRA's purposes of "protecting citizens from the hazards of modern pesticides," a state tort action would not in any way "stand as an obstacle to the accomplishment of FIFRA's purposes."\textsuperscript{108} Additionally, the \textit{Wilson
court noted it would not be impossible to comply with both state and federal law, and thus, plaintiff’s common law claim was not preempted on this basis either. 109

Decisions made in the post-Ferebee and Wilson era often held that FIFRA did not prohibit state common law tort actions even if they were related to a failure to warn. 110 These courts adopted the Ferebee court’s analysis, reasoning that a manufacturer could comply with FIFRA and still be subject to liability under state tort law for failure to warn. 111 The argument followed that, if, at some point, the manufacturer believed that it should change its label to avoid further tort liability, it was free to do so. 112

In 1991, the U.S. Supreme Court finally decided a case involving FIFRA preemption in Wisconsin Public Intervenor v. Mortier. 113 Although the opinion is instructive because it provides a glimpse into the Court’s view of the legislative history and the statutory language of FIFRA, the issue in the case was not federal preemption of tort claims generally, but rather, the validity of a local pesticide-related ordinance from the town of Casey, Wisconsin. 114 The ordinance required a town permit for applications of pesticides to public lands and for all aerial applications of pesticides. 115 A pesticide user brought a declaratory judgment action, claiming that the local ordinance was preempted by state and federal law. 116 As a general matter, the U.S. Supreme Court held that preemption by occupation does not exist under FIFRA 117 and that the local regulation at issue did not conflict with FIFRA so as to cause preemption. 118

The Court discussed extensively the issue of local versus state regulation of pesticides pursuant to FIFRA, 119 holding that the statutory language in FIFRA was “wholly inadequate” to convey an intent to expressly preempt local regulation of pesticides. 120 The Court also held that nothing in the legislative history indicated that Congress intended to preempt all local authority to regulate pesticides under FIFRA, and that thus the local regulation would not be preempted. 121
In so holding, the Supreme Court noted that the FIFRA preemption provision was silent as to the authority of a local government to regulate, but that "[t]he exclusion of political subdivisions cannot be inferred from the express authorization to the ‘State[s]’ because political subdivision are components of the very entity the statute empowers."\(^{122}\) The Supreme Court thus appears to limit the extent of federal preemption under FIFRA, at least as to local regulation.\(^{123}\) In so doing, however, the Court calls the local governments "political subdivisions" of the state governments that FIFRA "empowers."\(^{124}\) With this statement, the Court appears to agree that the state governments retain some significant authority to regulate under FIFRA.\(^{125}\)

In 1992, the U.S. Supreme Court issued its next important preemption decision, striking a huge blow to state regulatory power concerning the tobacco industry in *Cipollone v. Liggett Group, Inc.*\(^{126}\) *Cipollone* involved a female cigarette smoker named Rose Cipollone who sued Liggett Group in tort when she became ill from smoking cigarettes.\(^{127}\) The U.S. Supreme Court analyzed both the Public Health Cigarette Smoking Act of 1969 (the "1969 Act") and its predecessor statute, the Federal Cigarette Labeling and Advertising Act of 1965 (the "1965 Act") to determine whether either the 1969 Act or the 1965 Act preempted the common law tort claims of petitioner, the son of Rose Cipollone.\(^{128}\)

The 1965 Act included a preemption provision which stated: "No *statement* relating to smoking and health, other than the *statement* required by [this Act], shall be required on any cigarette package."\(^{129}\) The 1969 Act included a stronger provision: "No *requirement* or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the

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\(^{122}\) *Id.* at 608. The Court noted that political subdivisions of the state are properly treated as agencies for exercising state power. *Id.* The Court stated: "[p]roperly read, the statutory language tilts in favor of local regulation." *Id.* at 607.

\(^{123}\) *Id.* at 606–13.

\(^{124}\) *Id.* at 608.

\(^{125}\) *Id.; see supra* notes 123–24 and accompanying text.

\(^{126}\) *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). *Cipollone, Wisconsin Public Intervenor*, 501 U.S. at 614, and one other case to follow, *Medtronic v. Lohr, Inc.*, 518 U.S. 470 (1996), provide the current guidance on the preemption doctrine. This latter decision and its effect on pesticide related litigation is discussed in Part III of the article. *See infra Part III.A.*

\(^{127}\) *Cipollone*, 505 U.S. at 509.

\(^{128}\) *Id.* at 508–09.

packages of which are labeled in conformity with the provisions of this [Act].”

The U.S. Supreme Court noted that both the 1965 Act and the 1969 Act contained express preemption provisions, and held that where this is the case, it is not appropriate to infer congressional intent to preempt state law. The Court held further that the 1965 Act did not preempt petitioner’s common law claims because Congress had passed the Act mainly to create labeling uniformity and had only intended to supersede positive enactments of state and local governments, thus preserving state tort claims.

In contrast, the Court held that the broader language of the 1969 Act—specifically the fact that the 1969 Act barred “requirement[s] or prohibition[s] based on smoking and health”—indicated a congressional intent to ban all state requirements regarding advertising or promotion of cigarettes, including state common law claims if they could be said to impose such requirements. The Court thus held that the Public Health Cigarette Smoking Act of 1969 swept broadly to preempt all state tort actions that stemmed from a failure to warn of the dangers of cigarettes. The Court rejected petitioner’s argument that common law actions do not impose “requirements or prohibitions.” Rather, the Court noted that “regulation can be as effectively exerted through an award of damages as through some form of preventive relief,” and that “[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”

In the wake of this federal preemption analysis by the U.S. Supreme Court, many lower courts interpreting FIFRA’s preemption provision held that FIFRA, too, swept broadly, and that Congress had similarly intended to bar state tort actions that were at all related

131. Cipollone, 505 U.S. at 517. The Supreme Court has stated that an express preemption provision supports an inference that Congress did not intend to preempt other matters, but does not entirely foreclose implied preemption. Freightliner Corp. v. Myrick, 514 U.S. 283, 288 (1995).
132. Cipollone, 505 U.S. at 519.
133. Id. at 518–19.
137. Cipollone, 505 U.S. at 522; see infra notes 138–39 and accompanying text.
138. Cipollone, 505 U.S. at 521.
139. Id. (quoting San Diego Bldg. Trades Council v. Gammon, 359 U.S. 236, 247 (1959)).
140. Cipollone, 505 U.S. at 522.
to the labeling of a pesticide product pursuant to FIFRA.\textsuperscript{141} These courts rejected\textsuperscript{142} the \textit{Wilson}\textsuperscript{143} and \textit{Ferebee}\textsuperscript{144} decisions which had concluded that congressional intent to preempt common law claims related to pesticide labeling could not be inferred from FIFRA.\textsuperscript{145} Instead, many of the federal judicial circuits began to take a broad view of federal preemption under FIFRA.\textsuperscript{146}

Thus, for example in \textit{King v. E.I. Dupont Nemours & Co.},\textsuperscript{147} the plaintiffs claimed to have been harmed by chemical herbicides they had sprayed while working as employees of the State of Maine.\textsuperscript{148} Plaintiffs sued the defendants for negligence in that they failed to warn plaintiffs of the dangers of the pesticides with which plaintiffs worked.\textsuperscript{149} Plaintiffs also sued defendants in strict liability, alleging that defendants had sold products that were unreasonably dangerous because they lacked an adequate warning.\textsuperscript{150} The First Circuit held that in light of \textit{Cipollone}, FIFRA's language, barring states from imposing "any requirement" for labeling or packaging would sweep broadly to prohibit all of plaintiffs' state tort claims.\textsuperscript{151} The court held that because FIFRA "mandates the preemption of the establishment or enforcement or any common law duty that would impose a labeling requirement inconsistent with those established by the Act, or the EPA's regulations, Plaintiffs' common law failure to warn claims are preempted . . . ."\textsuperscript{152} The First Circuit summarily dismissed the reasoning of the \textit{Ferebee} court, which had

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\item\textsuperscript{141} See, e.g., \textit{King v. E.I. Dupont De Nemours & Co.}, 996 F.2d 1346 (1st Cir. 1993); \textit{Shaw v. Dow Brands, Inc.}, 994 F.2d 364 (7th Cir. 1993); \textit{Ark.-Platte & Gulf P'ship v. Van Waters & Rogers, Inc.}, 981 F.2d 1177 (10th Cir. 1993); \textit{Papas v. Upjohn Co.}, 926 F.2d 1019 (11th Cir. 1991). \textit{But see Burke v. Dow Chem. Co.}, 797 F. Supp. 1128, 1134-40 (E.D.N.Y. 1992) (holding that FIFRA is more akin to the 1965 Act in that it does not sweep broadly to preempt most common law claims and that the EPA sets the floor requirements for product safety); 7 U.S.C. § 136v (2000).
\item\textsuperscript{142} See infra notes 147-77 and accompanying text.
\item\textsuperscript{145} The argument that a manufacturer can change his label to avoid tort damages and still follow both state and federal law has been dismissed as "sophistry." \textit{MacDonald v. Monsanto Co.}, 27 F.3d 1021, 1025 (5th Cir. 1994). \textit{But see Ferebee}, 736 F.2d at 1540.
\item\textsuperscript{146} See infra notes 147-77 and accompanying text. See, e.g., \textit{King v. E.I. Dupont De Nemours & Co.}, 996 F.2d 1346 (1st Cir. 1993).
\item\textsuperscript{147} \textit{King}, 996 F.2d 1346.
\item\textsuperscript{148} Id.
\item\textsuperscript{149} Id.
\item\textsuperscript{150} Id.
\item\textsuperscript{151} Id. at 1349-51; \textit{see Cipollone}, 505 U.S. at 522.
\item\textsuperscript{152} \textit{King}, 996 F.2d at 1547.
\end{itemize}
held that FIFRA did not preempt common law claims,\textsuperscript{153} noting that that decision had been made prior to the U.S. Supreme Court’s decision in \textit{Cipollone}.\textsuperscript{154} The court next noted that it was not alone in reaching the conclusion that FIFRA barred state failure to warn claims,\textsuperscript{155} citing similar decisions in three other U.S. Courts of Appeal\textsuperscript{156} since the U.S. Supreme Court’s decision in \textit{Cipollone}.

In one of those decisions, \textit{Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.}, the U.S. Supreme Court\textsuperscript{158} remanded the Tenth Circuit’s earlier decision\textsuperscript{159} in light of the high court’s holding in \textit{Cipollone}.\textsuperscript{160} In its pre-\textit{Cipollone} ruling “\textit{Arkansas-Platte I},” the Tenth Circuit had held that common law actions based on failure to warn were impliedly preempted under FIFRA.\textsuperscript{161} On remand from the U.S. Supreme Court, the Tenth Circuit held that section 136v(b) of FIFRA was just as inclusive as the 1969 Act considered in \textit{Cipollone}.\textsuperscript{162} Relying on FIFRA’s statutory language and on \textit{Cipollone},\textsuperscript{163} the “\textit{Arkansas-Platte II}” court held that “[t]o the extent the state tort claims in this case require a showing that defendants’ labeling and packaging should have included additional, different, or alternatively stated warnings from those required under FIFRA, they would be expressly preempted.”\textsuperscript{164}

Similarly, in \textit{Papas v. Upjohn Co.}, (“\textit{Papas I}”),\textsuperscript{165} the U.S. Court of Appeals for the Eleventh Circuit held that plaintiff’s claims based on negligence, strict liability, and breach of implied warranty of merchantability were in reality claims of inadequate labeling as to the dangers of defendants’ product.\textsuperscript{166} The U.S. Supreme Court

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\textsuperscript{154} King, 996 F.2d at 1349; \textit{see generally} \textit{Cipollone}, 505 U.S. 504.
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\textsuperscript{155} King, 996 F.2d at 1349.
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\textsuperscript{156} The \textit{King} court noted that its decision to preempt state failure to warn claims was in accord with three other circuit court decisions: \textit{Ark.-Platte & Gulf P'ship v. Van Waters & Rogers, Inc.}, 981 F.2d 1177 (10th Cir. 1993); \textit{Papas v. Upjohn Co.}, 985 F.2d 516, 517, 520 (11th Cir. 1993); and \textit{Shaw v. Dow Brands, Inc.}, 994 F.2d 364 (7th Cir. 1993). \textit{King}, 996 F.2d at 1349–51.
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\textsuperscript{158} \textit{Ark.-Platte & Gulf P'ship v. Van Waters & Rogers, Inc.}, 506 U.S. 910 (1992).
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\textsuperscript{159} \textit{Ark.-Platte & Gulf P'ship v. Van Waters & Rogers, Inc.}, 959 F.2d 158 (10th Cir. 1992) (“\textit{Arkansas-Platte I}”).
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\textsuperscript{160} \textit{Cipollone}, 505 U.S. at 521.
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\textsuperscript{161} \textit{Arkansas-Platte I}, 959 F.2d at 162–63.
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\textsuperscript{162} \textit{Ark.-Platte & Gulf P'ship v. Van Waters & Rogers, Inc.}, 981 F.2d 1177, 1179 (10th Cir. 1993) (“\textit{Arkansas-Platte II}”).
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\textsuperscript{163} \textit{See generally} \textit{Cipollone}, 505 U.S. 504 (1992).
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\textsuperscript{164} \textit{Arkansas-Platte II}, 981 F.2d at 1179 (emphasis added).
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\textsuperscript{165} \textit{Papas v. Upjohn Co.}, 926 F.2d 1019 (11th Cir. 1991) (“\textit{Papas I}”).
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\textsuperscript{166} \textit{Papas I}, 926 F.2d at 1020.
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remanded the *Papas I* decision for consideration in light of its decision in *Cipollone.* On remand, the U.S. Court of Appeals for the Eleventh Circuit also decided that FIFRA expressly preempted all of plaintiff's claims to the extent they were based on labeling or packaging. The court also indicated that a claim of implied warranty of merchantability was a "requirement" imposed by state law and thus was preempted pursuant to FIFRA to the extent that it depended on inadequacies in labeling or packaging. Except as to the implied warranty of merchantability claim, the Eleventh Circuit did not, however, specifically indicate exactly which of plaintiff's claims were based on labeling or packaging, and thus which specific claims were preempted by FIFRA.

In *Shaw v. Dow Brands, Inc.*, another significant circuit court decision after *Cipollone*, the U.S. Court of Appeals for the Seventh Circuit held that FIFRA's preemption language was no less broad than that of the Public Health Cigarette Smoking Act of 1969. In *Shaw*, plaintiff was injured when he mixed a bathroom cleaner and a mildew stain remover, two products labeled with EPA approved labels. Plaintiff sued defendants in strict liability and negligence.

The court noted that FIFRA prohibited states from imposing "addition[al]" or "different" labeling requirements. Noting that an award of damages would have the effect of imposing "addition[al]" or "different" labeling requirements, the court held that FIFRA preempted plaintiff's strict liability and negligence claims based on a failure to warn.

Other courts in the early to mid-1990's, including most of the remaining federal circuits, also held that FIFRA preempted most common law tort actions. These courts reasoned that almost all

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171. *See supra* notes 126–39 and accompanying text.
173. *Id.*
174. *Id.* at 371.
175. *Id.* at 365, 371; *see also* Grenier v. Vermont Log Bldgs., Inc., 96 F.3d 559 (1st Cir. 1996) (holding that claim based on inadequate labeling of log preservative used in home was preempted by FIFRA); Taylor AG Indus. v. Pure-Gro, 54 F.3d 555 (9th Cir. 1995) (holding that negligent testing, breach of warranty and strict liability claims were all preempted under FIFRA); Bice v. Leslie's Pool Mart, Inc., 39 F.3d 887 (8th Cir. 1994) (finding preemption of failure to warn claim); MacDonald v. Monsanto Co., 27 F.3d 1021 (5th Cir. 1994) (holding that Congress intended FIFRA to preempt common law claims related to labeling).
176. *See, e.g.*, Grenier, 96 F.3d 559; Welchert v. Am. Cyanamid, Inc., 59 F.3d 69 (8th Cir. 1995) (preempting express warranty claims if based on statements required on product
state tort claims related to labeling in some manner and thus imposed additional requirements not permissible under FIFRA.  

III. THE NEW CASE LAW: THE PREEMPTION DOCTRINE BEGINS TO ERODE

A. The U.S. Supreme Court's Decision in Medtronic v. Lohr

In 1996, the U.S. Supreme Court decided Medtronic v. Lohr. Medtronic is significant because it involved a claim of federal pre-emption under the Medical Device Amendments of 1976 (the “MDA”), and because it involved an interpretation of the word "requirement" as contained in the MDA.

The MDA provides that certain medical devices that are potentially very harmful must undergo a rigorous federal approval process before they are placed on the market. Although the device at issue in Medtronic was potentially subject to such a process, the MDA provided two important exceptions to the premarket approval process (“PMA”): first, the MDA allowed pre-1976 devices to remain on the market until the required PMA was completed; and second, the MDA allowed new devices which were “substantially equivalent” to existing devices to be sold based on a much more limited approval process. Devices marketed under this limited form of review as “substantially equivalent” to existing devices

177. See, e.g., Grenier, 96 F.3d at 565 (preempting negligent design and negligent manufacturing claims where plaintiff did not explain how they were different than “disguised” mislabeling claims); Taylor, 54 F.3d 555 (preempting plaintiff’s negligent testing claim, implied warranty claims, and even express warranty claims, where all were based on product label); Bice, 39 F.3d 887.


179. Id.


181. 21 U.S.C. § 360e(d) (2); Medtronic, 518 U.S. at 477.

182. Medtronic, 518 U.S. at 478. The MDA required a manufacturer claiming that a new device was substantially similar to an existing device to submit a pre-market notification. Pursuant to this notification, the FDA would then determine if the device was substantially equivalent to an existing device. If so, the new device could be sold without further regulatory oversight. Id. Because the FDA could not move the new applications through the rigorous PMA process swiftly, the pre-market notification process “became the means by which most new medical devices . . . were approved for the market.” Id. at 479.
are subject to the requirements of section 360k of the MDA. Section 360k of the MDA provides:

State and local requirements respecting devices

(a) General rule

[N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—

(1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and

(2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

In this case, Medtronic took advantage of the "'substantially equivalent'" exception to market its product, a model 401 pacemaker lead. In 1990, petitioner Lohr had implanted a Medtronic pacemaker with a model 401 pacemaker lead. Petitioner suffered a "'complete heart block'" when the pacemaker lead failed on December 30, 1990. Petitioner Lohr and her husband sued Medtronic in negligence and strict liability and the manufacturer claimed that both claims were preempted by Section 360k of the MDA and regulations promulgated thereunder.

In addressing the petitioner's claims, the Court reviewed general preemption doctrine, noting that the Court would not find preemption in an area of traditional power of the states unless it was the "clear and manifest purpose of Congress" to preempt such powers. The Court again noted that congressional intent was the driving force in any preemption analysis.

While guided by the Cipollone decision, the U.S. Supreme Court held in a four justice plurality opinion that there were substantial differences between Cipollone and Medtronic, even though the statutes in both cases prohibited the states from

183. Id. at 478.
184. 21 U.S.C. § 360k (emphasis added).
185. Medtronic, 518 U.S. at 480 ("The lead is the portion of a pacemaker that transmits the heartbeat-steadying electrical signal from the 'pulse generator' to the heart itself.").
186. Id.
187. Id. at 481.
188. Id. Pursuant to Section 360k, defendant Medtronic moved for summary judgment. Id.
189. Id. at 485 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
190. Medtronic, 518 U.S. at 487.
191. Cipollone, 505 U.S. at 521.
imposing additional "requirement[s]" on manufacturers.\textsuperscript{192} The plurality held that, unlike in \textit{Cipollone}, the statute here only preempted state regulations to the extent that the FDA, the agency responsible for enforcing the MDA, had issued specific regulations for the device at issue—regulations that the FDA had not yet issued in this case.\textsuperscript{193}

The Court further distinguished \textit{Cipollone} in that there the statute was very specific. It targeted only requirements "'based on smoking and health'" and then only those related to the "'advertising or promotion of any cigarettes.'"\textsuperscript{194} In that context, the Medtronic Court reasoned, giving the word "'requirement'" a broad meaning only resulted in a narrow preemptive effect.\textsuperscript{195} In contrast here the word "requirement," if interpreted broadly, would include all common law claims and would "deprive the States of any role in protecting consumers from the dangers inherent in many medical devices."\textsuperscript{196} Additionally, the Medtronic Court noted that one of the congressional purposes of the MDA had been to reign in an industry in need of more, not less, oversight,\textsuperscript{197} and that a broad interpretation of the MDA's preemptive scope would not further this legislative goal.\textsuperscript{198} In this context, and lacking any legislative history to support a broad view of federal preemption under the MDA, the Court held that Congress had meant to preserve "at least some common-law claims" with the enactment of the MDA.\textsuperscript{199}

Finally, the Medtronic Court discussed the fact that this case differed from \textit{Cipollone} in that there, preemption resulted from the very enactment of the federal statute.\textsuperscript{200} In contrast here, Congress had given the administering agency, the Food and Drug Administration (FDA), a role in determining the extent of federal preemption.\textsuperscript{201} Thus, pursuant to the MDA, federal preemption would only occur if the FDA had promulgated a specific federal requirement as to the device at issue.\textsuperscript{202} The Supreme Court noted that the FDA had not yet passed specific regulations concerning

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\item 192. \textit{Medtronic}, 518 U.S. at 487–91.
\item 193. \textit{Id.} at 487.
\item 194. \textit{Id.} at 488.
\item 195. \textit{Id.} at 488.
\item 196. \textit{Id.} at 489.
\item 197. \textit{Id.} at 491.
\item 198. \textit{Id.}
\item 199. \textit{Id.}
\item 200. \textit{Id.} at 495–96.
\item 201. \textit{Id.}
\item 202. \textit{Id.} at 496.
\end{itemize}
the pacemaker at issue, but rather the applicable federal regulations were general in nature. Absent specific regulations as to the product, the Court held that Florida common law duties would “parallel” federal requirements and that they were not preempted as “requirement[s] which [were] . . . different from, or in addition to, any requirement applicable under [the MDA].”

Hence, Medtronic stands for the proposition that, at least under the MDA, where the federal government has not issued regulations specific to the product or claim at issue, state tort claims in the unregulated area will not be preempted. Additionally, Medtronic stands for the broader proposition that “the use of the term ‘requirement’ in FIFRA is not dispositive” as to congressional intent to preempt state tort claims in an area of the law. Rather, where a federal law bans additional “requirement[s]” by states, the full import of such a ban must be interpreted in the relevant statutory context.

The statute at issue in both Cipollone and Medtronic preempted states from imposing additional “requirement[s]”: “yet the Supreme Court determined that state common-law tort actions were preempted only in the former case and not in the latter.”

B. Recent Case Developments Regarding FIFRA Preemption

In the wake of Medtronic, the lower courts have understandably become less certain in their approach to the word “requirement” as contained within FIFRA. Developments in the case law, as well as the EPA’s position in Etcheverry, discussed in Part III.B.1. below, indicate that the groundswell of case law supporting a broad FIFRA preemption defense may be slowing.

1. The EPA’s Main Arguments in Etcheverry—In Etcheverry, the EPA argued for the first time that it would be appropriate for a court to adopt a very narrow view of FIFRA preemption. Pursuant to this

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203. Id. at 498.
205. Id. at 496 (discussing 21 U.S.C. § 360k(a)).
207. See EPA Etcheverry Brief, supra note 5, at 12.
208. Cipollone, 505 U.S. at 521; Medtronic, 518 U.S. 470.
209. Brown, 985 P.2d at 852; see EPA Etcheverry Brief, supra note 5, at 12.
210. See supra note 208 and accompanying text; infra notes 234–28 and accompanying text.
211. EPA Etcheverry Brief, supra note 5.
212. Kazanjian, supra note 8.
213. See EPA Etcheverry Brief, supra note 5.
view, FIFRA would not preempt most state tort claims. The EPA asserted that as in all cases of preemption, there exists a presumption against preemption of state regulation, and that against this backdrop, the statute must be considered in its statutory and regulatory context. The original purpose of FIFRA, the EPA asserted, was to make the statute a comprehensive regulatory regime aimed at protecting humans and the environment and at creating some uniformity in labeling. This congressional purpose, the EPA posited, favored a reading of the statute that would be less likely to cause federal preemption of state tort claims. Indeed, the EPA argued in Etcheverry, just as was argued in Medtronic, that the allowance of more, not less tort claims, would better further FIFRA's goals.

Moreover, the EPA urged, neither the plain text of FIFRA nor the legislative history evince a congressional intent to abrogate all or most tort claims. The EPA thus noted that the word "'requirements' appears seventy-five times in [the text of the statute] and each time refers only to positive law enactments, not tort remedies. Citing the rule of statutory construction that "identical words used in different parts of the same act are intended to have the same meaning," the EPA urged that Congress must have meant only to preempt positive law enactments when it used the word "requirements" in the FIFRA preemption provision.

Similarly, the EPA argued that FIFRA's legislative history also supports a narrow interpretation of the Act's preemption provision such that most tort claims are not preempted. In all of the extensive legislative history on the Act, the EPA noted, there is no reference to the preemption of state tort claims. The EPA urged

214. Id.
215. Id. at 8.
216. Id. at 8–12.
217. Id. at 33–35.
218. Id.
219. Id. In Brown, the court similarly stated that “[t]he broader purpose of FIFRA is to protect public health, not to shield manufacturers from tort liability.” Brown v. Chas. H. Lilly Co., 985 P.2d 846, 853 (1999).
220. See EPA Etcheverry Brief, supra note 5, at 12–19.
221. See id. at 19–32.
222. Id. at 14.
223. Id. at 14–16.
224. Id. at 14 (quoting Sullivan v. Stroop, 496 U.S. 478, 484 (1990)).
226. See EPA Etcheverry Brief, supra note 5, at 19–32.
227. See id.
228. See id. at 19.
that it is difficult to believe, as it was in Medtronic, that Congress would have eliminated most or all of the pesticide industry’s tort liability without a word—especially in an industry that it had determined was in need of more, not less, stringent oversight.229

As further evidence of congressional intent in line with a more limited view of preemption, the EPA noted that Congress provided for no private right of action under FIFRA.290 This, the EPA maintained, is also evidence that Congress intended the existing legal recourse for plaintiffs injured by pesticides to remain in place.231

Finally, the EPA asserted that, while it believed its arguments against broad FIFRA preemption should be heeded,232 at the very least, FIFRA does not and could not preempt those actions based on the efficacy of the product in that the EPA itself does not even regulate this aspect of pesticide registration.233 Rather, the EPA has said that as to efficacy claims—it relies on state tort claims to control manufacturers’ conduct in this area.234

2. Significant State Court Decisions—In a number of recent cases, state courts have relied on Medtronic and/or the EPA’s arguments in Etcheverry to limit the preemption defense in pesticide-related cases.235 These decisions indicate that at the state level, the preemption defense under FIFRA appears to be eroding.236

The preemption defense was first curtailed by Montana’s highest court in Sleath v. West Mont Home Health Services, Inc. in December 2000.237 The Montana Supreme Court held—in what has been called a “major ruling”238—that plaintiff employees exposed to the pesticide Dursban in the workplace were not precluded from asserting failure to warn claims against the pesticide manufacturer,

229. Id. at 19 n.25. It is worth noting that as to labeling, FIFRA really does not create the type of rote uniformity that the Public Health Cigarette Smoking Act of 1969 did in Cipollone. See Cox v. Velsicol Chem. Corp., 704 F. Supp. 85, 86 (E.D. Pa. 1989). Rather, under FIFRA, manufacturers submit proposed product labels every time they plan to market a new product. Thus, uniformity does not exist under FIFRA for all different products as it did under Cipollone. See supra notes 126-39 and accompanying text.
230. EPA Etcheverry Brief, supra note 5, at 6.
231. Id. at 9.
233. See EPA Etcheverry Brief, supra note 5, at 35–44; PR NOTICE 96-4 (1996); see supra notes 25–28 and accompanying text.
234. See EPA Etcheverry Brief, supra note 5, at 44; supra notes 25–28 and accompanying text.
235. See infra notes 237–87 and accompanying text.
236. See infra notes 237–87 and accompanying text.
237. Sleath, 16 P.3d 1042.
even where the manufacturer had labeled the product in accord with federal law. In so holding, the Supreme Court of Montana relied on the U.S. Supreme Court's decision in Medtronic and on the EPA's arguments in Etcheverry to find that Congress had not intended to preempt state tort claims under FIFRA. The court noted that the legislative history bore no evidence of such an intent, even though “three House and Senate committees devoted 25 days to hearings on proposed pesticide legislation” and “thousands of pages of transcripts of the hearings and floor debates” exist. Moreover, the Montana high court noted that the EPA's interpretation of FIFRA should be accorded great weight as the interpretation of the agency entrusted with the enforcement of FIFRA. The Montana Supreme Court recognized the general presumption against preemption and held that Congress had not manifested the requisite “clear and manifest intent” to preempt state tort law. Rather, Congress had only intended for FIFRA to preempt direct regulation of pesticide labeling. Reasoning in this manner, the court held that not only did FIFRA not preempt all or most common law damage actions, but that FIFRA could not be read to preempt any common law damage actions.

On the same day as its holding in Sleath, the Supreme Court of Montana also revisited an earlier decision it had made in McAlpine v. Rhone-Poulenc Ag. Co., in which the court had addressed FIFRA preemption in a farmer's failure to warn suit. Remarkably, the court overruled its earlier holding. Changing their position on the issue of FIFRA preemption, six out of seven of the judges sitting on the Montana high court joined in an opinion that relied

239. See Sleath, 16 P.3d at 1053.
240. Id. at 1052.
241. Id.
244. Id.
245. Id. at 1052; see also Dow Chem. Co. v. Ebling, 753 N.E.2d 633 (Ind. 2001) (holding that plaintiffs' claim against pesticide applicator for failure to communicate information on pesticide label as approved by EPA was not preempted).
on *Sleath* to hold that Congress had not intended FIFRA to extinguish common law tort claims. The court went on to find that because FIFRA does *not* preempt state common law actions, the parties could refer to the product label in future proceedings before the court.

In another remarkable and recent decision, *Geye v. American Cyanamid Co.*, a Texas appellate court held that plaintiffs' claims for breach of express and implied warranties and for strict liability were not preempted by FIFRA. In *Geye*, plaintiffs sued American Cyanamid Company after they mixed together two of defendants' products, applied the mixture to their crops, and their crops suffered damage. The plaintiffs alleged that the label specifically allowed such mixing and that advertisements marketed the products for this use. The defendants urged that plaintiffs' claims were too closely tied to the product label and product advertising to survive FIFRA preemption.

The Texas court reviewed some of the pertinent case law in which other courts had held that FIFRA preempted similar claims. However, the court noted that pursuant to *Pesticide Regulation Notice 96-4*, the EPA had waived data requirements as to efficacy issues surrounding pesticides. As the EPA had urged in *Etchevery*, the Texas Supreme Court thus agreed with the lower court that "agriculture [sic] pesticides are 'effectively regulated by the marketplace.' The court went on to hold that because plaintiffs' claims were based on the efficacy of defendants' products, an area in which the EPA does not regulate, they were not preempted by FIFRA.


250. *Id.* at 1060.


252. *Id.* at 23.

253. *Id.*

254. *Id.; see also Geye*, 32 S.W.3d at 917.


256. *Id.* at 28–29; *see supra* notes 25–28 and accompanying text.

257. EPA Etchevery Brief, *supra* note 5, at 37–43.


259. *American Cyanamid*, 79 S.W.3d at 29; *see also* Walker v. Am. Cyanamid Co., 948 P.2d 1123 (Idaho 1997) (holding that express warranty claims are not preempted); Kawamata Farms, Inc., v. United Agri Products, 948 P.2d 1055 (Haw. 1997) (holding that claims for negligence, strict liability and express warranty are not preempted).
In yet another important FIFRA preemption decision, a mid-level appellate court in Oregon relied on *Medtronic* to hold that plaintiff's personal injury claims for failure to warn and breach of warranty were not preempted by FIFRA. In *Brown v. Chas. H. Lilly Company*, plaintiffs suffered personal injury and sued for breach of warranty and failure to warn in connection with defendants' product, "Weed and Feed." The Oregon appellate court reviewed holdings from a variety of cases involving FIFRA preemption, noting that many had held that FIFRA preempted common law claims that were in any way related to labeling requirements. Significantly, the court noted that most of these prior cases had been decided before the U.S. Supreme Court decided *Medtronic*. The court relied on *Medtronic* to reiterate the presumption against preemption and the purpose of Congress to be the "touchstone" in any preemption analysis. The court then held that "[n]othing in the general purposes of FIFRA suggests that Congress intended to preempt states from imposing liability for harm caused by the use of pesticides registered under federal law . . . ." Instead, the Oregon court noted that the "broader purpose of FIFRA is to protect public health, not to shield manufacturers from tort liability." Thus, as in *Medtronic*, the court held that the general tort obligations imposed here—to warn of the dangers of using potentially dangerous products—"pose no threat to the regulatory requirements imposed by federal law."

Similarly, two New York mid-level appellate courts have also begun to chip away at the preemption defense, holding that general tort obligations can exist alongside the regulatory requirements of FIFRA. In an important ruling in New York's Appellate Division, Second Department, the state appellate court analyzed the claim of an employee's son against his mother's employer for failing to warn of the dangers of ethylene oxide, a chemical used by the employer and registered by the EPA under FIFRA. The label warned

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262. Id. at 847.
263. See id. at 849–50.
264. See id. at 851.
265. Id. at 852 (quoting *Medtronic*, 518 U.S. at 470, 485).
266. Id. at 852.
267. Id. at 853.
268. Id.
that the gas should not be inhaled; should not come into contact with eyes, skin or clothing; and should be used with adequate ventilation.\footnote{271} While pregnant with plaintiff, plaintiff's mother worked in a factory where she put caps on bottles containing the chemical.\footnote{272} Plaintiff's mother claimed that she was not given any protective gear, that the ventilation was not adequate, and that thus plaintiff was born with physical deformities.\footnote{273}

New York's Second Department held that plaintiff's claim for failure to warn was not preempted by FIFRA.\footnote{274} In so holding, the New York appellate court distinguished plaintiff's failure-to-warn claim from others in which it had ruled that the generic failure of a manufacturer to warn a consumer of danger from use of a pesticide product was preempted under FIFRA.\footnote{275} The court boldly stated that "[t]here are failures to warn and failures to warn."\footnote{276} The New York court held that this was not the type of state-imposed obligation to warn typically preempted under FIFRA.\footnote{277} Rather, this case involved a different type of warning: an employer's warning to "caution and protect a workplace employee and, in turn, her fetus, from the dangers of exposure to the raw material itself, when the employee handles [the product] before it is packaged for sale and distribution by the defendant."\footnote{278}

And finally, the issue of FIFRA preemption of state common law actions continues to surface in California.\footnote{279} In \textit{Arnold v. Dow Chemical Co.}, parents sued pesticide makers and distributors, claiming that their children were harmed by pesticides sprayed in and around the family home.\footnote{280} The plaintiffs alleged that the pesticide called "Mr. Scott's Do-It-Yourself Pest Control" was defectively designed as it "failed to perform as safely as an ordinary user would..."
Federal Preemption of Tort Claims Under FIFRA

expect when used in [a] reasonably foreseeable manner.' The California appellate court held that plaintiffs' claims were not akin to the failure to warn claims typically preempted under FIFRA. Rather, plaintiffs had properly stated claims for defective design when they alleged that the product would not perform safely when used in a reasonably foreseeable manner. The court also noted that although the courts were split on whether claims for breach of implied warranties of fitness and merchantability were preempted by FIFRA, this court did not believe that such claims would "create a labeling requirement different from or in addition to those mandated by FIFRA;" and that thus they were not preempted by federal law. In so holding, the court noted that if FIFRA were to preempt plaintiffs' common law claims, plaintiffs would have "absolutely no recourse for their injuries, since no private right of action exists under FIFRA."

Additionally, the Arnold court discussed the California Supreme Court's decision in Etcheverry, noting the California high court's ruling that failure to warn claims are preempted by FIFRA, but stating that "plaintiffs who believe they have been injured as a result of exposure to pesticides must proceed under state common law theories of recovery." In the context of plaintiffs' design defect claims, the court thus cautioned: "should preemption be the rule and should every action be considered a failure-to-warn claim, plaintiffs will never recover for injuries they have suffered."

3. Significant Federal Court Decisions—As in the state courts, there are recent significant federal court decisions that indicate a reliance on Medtronic and/or the EPA's position in Etcheverry and thus a change in many federal courts' treatment of tort claims under FIFRA. For example, in a case of first impression, the U.S. Court of Appeals for the Third Circuit held in Hawkins v. Leslie's Pool Mart, Inc. in 1999 that a state claim for negligent failure

281. Id. at 727 (quoting complaint).
282. Id. at 726.
283. Id. at 726–27.
284. Id. at 726, 740.
285. Id. at 726.
286. Id. at 731.
287. Id.; see also Jeffrey Winograd, California Court Allows Pesticide Lawsuit to Proceed, PESTICIDE AND TOXIC CHEM. NEWS, Sept. 3, 2001, at 1.
289. EPA Etcheverry Brief, supra note 5, at 5.
to package in a manner designed to protect against decomposition of the product did not seek to impose a different packaging requirement as contravened by FIFRA.\textsuperscript{292}

In reaching this holding,\textsuperscript{293} the \textit{Hawkins} court explained that \textit{Medtronic} stands for the proposition that only where the administering agency has "'weighed the competing interests ... [and] reached an unambiguous conclusion about how those competing considerations should be resolved in a particular cases [sic] ... and implemented that conclusion via a specific mandate' are general common-law claims preempted."\textsuperscript{294} The court held that whereas here plaintiff's \textit{labeling} claims related to a specific label required by the EPA and thus \textit{were} preempted by federal law,\textsuperscript{295} plaintiff's \textit{packaging} claims did not relate to any specific EPA regulation.\textsuperscript{296} Plaintiff urged, and the \textit{Hawkins} court agreed, that here, as in \textit{Medtronic}, the EPA had not issued specific regulations as to the packaging of the product.\textsuperscript{297} Thus, a state tort claim based on inadequate \textit{packaging} could not be said to impose a requirement in "'addition to, or different from''\textsuperscript{298} federal regulations."

The \textit{Hawkins} holding has been described as "a message to corporations that defend against product liability suits involving ... [FIFRA]: Federal preemption is not as invincible as it may seem."\textsuperscript{300} The decision represents the Third Circuit's attempt to apply \textit{Medtronic}\textsuperscript{301} to make a distinction between claims not

\textsuperscript{292} \textit{Hawkins}, 184 F.3d 244.
\textsuperscript{293} In making its decision, the Third Circuit first noted that there exists a presumption against preemption and that as in any preemption analysis, the intent of Congress controls. \textit{Hawkins}, 184 F.3d at 248, 253.
\textsuperscript{294} \textit{Hawkins}, 184 F.3d at 254 (citing \textit{Medtronic}, 518 U.S. at 501); see also \textit{Waering v. BASF Corp.}, 146 F. Supp. 2d 675, 681 (M.D. Pa. 2001) (employing \textit{Medtronic} to deny preemption under Hazardous Materials and Transportation Authorization Act).
\textsuperscript{295} \textit{Hawkins}, 184 F.3d at 252.
\textsuperscript{296} Id. at 253.
\textsuperscript{297} Id. at 248, 253-54.
\textsuperscript{298} 7 U.S.C. § 136v(b) (2000).
\textsuperscript{299} \textit{Hawkins}, 184 F.3d at 248, 253-54; see also \textit{Brienza}, supra note 291, at 56; see supra notes 292-97 and accompanying text.
\textsuperscript{300} \textit{Brienza}, supra note 291 at 1-2.
\textsuperscript{301} See generally \textit{Medtronic}, 518 U.S. 470.
preempted and those preempted under FIFRA.\textsuperscript{302} It illustrates the difficulties faced by the judiciary in this area and one court's attempt to carve out an area of state tort law not preempted by FIFRA.

In another recent case, \textit{Johnson v. Monsanto Chemical Co.},\textsuperscript{303} the Federal District Court for the Northern District of New York also attempted to carve out some exceptions to FIFRA preemption.\textsuperscript{304} The decision is interesting in that it represents a court's distinct effort to define the limits of the preemption doctrine concerning manufacturing defect and design claims.\textsuperscript{305}

The \textit{Johnson} court held that plaintiffs injured by defendant's chemical product could maintain claims for breach of express warranty.\textsuperscript{306} Additionally, the court held that plaintiffs could maintain claims for strict liability and for negligent design and testing, as long as the claims were not based on the defendant's failure to warn under FIFRA.\textsuperscript{307} However, the court also held that plaintiffs' implied warranty claims were all preempted because they were clearly based on the inadequacy of the labels involved.\textsuperscript{308}

In making its decision, the Northern District of New York noted that while "claims for negligent testing, manufacturing and formulating . . . are not preempted,"\textsuperscript{309} “[c]laims of misdesign or mismanufacture which the Court regards as thinly veiled labeling or failure to warn claims will not stand.”\textsuperscript{310} The court did not believe that plaintiff's claims were merely veiled failure to warn claims preempted by FIFRA.\textsuperscript{311} Rather, the court held that plaintiff's manufacturing defect claim, alleging that the pesticide product was "in a dangerous, defective and unsafe condition" when in defendant's possession, was based on "design defect" and not failure to warn.\textsuperscript{312} Under these circumstances, where a plaintiff

\begin{itemize}
  \item \textsuperscript{302} \textit{See Hawkins}, 184 F.3d at 248, 253–54.
  \item \textsuperscript{303} \textit{Id.}
  \item \textsuperscript{304} \textit{Johnson v. Monsanto Chem. Co.}, 129 F. Supp. 2d 189 (N.D.N.Y. 2001).
  \item \textsuperscript{305} \textit{Id.}
  \item \textsuperscript{306} \textit{Id.} at 194. Similarly, the Northern District of New York has stated that a claim for negligence in the application of a pesticide would not be preempted by FIFRA. \textit{Jack v. Orkin Exterminating Co.}, No. 97-CV-7012 (JG), 2001 WL 25641 (E.D.N.Y. Jan. 5, 2001).
  \item \textsuperscript{307} \textit{Johnson}, 129 F. Supp. 2d at 194–95.
  \item \textsuperscript{308} \textit{Id.} at 194.
  \item \textsuperscript{309} \textit{Worm v. Am. Cyanamid Co.}, 5 F.3d 744, 747 (4th Cir. 1993); \textit{see also Lowe v. Sporicidin Int'l}, 47 F.3d 124 (4th Cir. 1995) (reaffirming the analysis in \textit{Worm}).
  \item \textsuperscript{310} \textit{Johnson}, 129 F. Supp. 2d at 195; \textit{see also Grenier v. Vt. Log Bldgs., Inc.}, 96 F.3d 559, 565–66 (1st Cir. 1996).
  \item \textsuperscript{311} \textit{Johnson}, 129 F. Supp. 2d at 197.
  \item \textsuperscript{312} \textit{Id.}
\end{itemize}
has truly alleged a design defect claim, the Johnson court held that federal law will not preempt such a claim.\textsuperscript{313}

In contrast, in Kimmel v. DowElanco,\textsuperscript{314} the district court reluctantly held that all of plaintiff's tort claims were preempted because each of them "essentially boils down to a claim that the [defendant's] product labels, which have been approved by the EPA in accordance with FIFRA, [are inaccurate or inappropriate.]"\textsuperscript{315} In doing so, however, the Kimmel court indicated its dissatisfaction with this result in light of Medtronic and the EPA's arguments in Etcheverry.\textsuperscript{316} The court openly questioned existing Ninth Circuit law, which it believed had required the court to dismiss plaintiff's state tort claims.\textsuperscript{317} The court thus discussed Taylor AG Industries v. Pure-Gro,\textsuperscript{318} the prior Ninth Circuit case in which plaintiff sued for damages he sustained using defendant's pesticide products.\textsuperscript{319} The Taylor court noted that there, the court had cast all of plaintiff's claims as failure to warn claims and dismissed them pursuant to FIFRA.\textsuperscript{320}

In so holding, the court urged plaintiff to appeal:

[T]he Court feels obligated to briefly point out some arguments that might support the Ninth Circuit's reconsideration of whether Taylor should continue to be the rule in this circuit.

First, as noted, the EPA itself has taken the position that FIFRA does not and should not preempt all state tort actions. The EPA takes this position based on its interpretations of FIFRA's language and Congress's intent. Because the EPA is the agency charged with administering FIFRA, its interpretations should receive great deference.

Second, since Taylor was decided, the EPA has indicated that it has exercised its statutory option to waive certain data re-
requirments under FIFRA. As the EPA argues in its amicus brief to the California Supreme Court, the fact that the EPA has waived consideration of certain matters should alter the preemption analysis.  

Bound by *Taylor*, the *Kimmel* court thus held that FIFRA preempted plaintiff's strict liability claims, plaintiff's negligent design and testing claims and all of plaintiff's warranty claims.  

Five years after *Taylor* and in the wake of *Kimmel*, the Ninth Circuit recently reached an intriguing decision in *Ruiz-Guzman v. Amvac Chemical Corp.*. In that case, plaintiffs were employees at an orchard that used a pesticide called Phosdrin, manufactured by defendant Amvac Chemical Corporation and distributed by defendant Wilbur-Ellis Company. Plaintiffs alleged that they were harmed by exposure to the pesticide and they brought actions for defective design. The Ninth Circuit held that pursuant to an opinion of the Supreme Court of Washington on the matter, a manufacturer of a product could be strictly liable for injuries caused by the product if it was not "reasonably safe as designed." Under Washington law, a plaintiff seeking to show that a product is not "reasonably safe as designed" must do so under the "'risk-utility' test" or the "'consumer expectation' test." While the Ninth Circuit thus held that FIFRA would preempt any claim that would "require the manufacturer to change the product label in order to avoid liability," the circuit court held FIFRA would not preempt a design defect claim under the "'risk utility' test." However, without any further explanation, the Ninth Circuit also held that plaintiff's claim of design defect based on Washington law's "'consumer expectation' test" would not survive FIFRA preemption.

321. *Kimmel*, 64 F. Supp. 2d at 944 (citations omitted).
322. Id. at 944; see *Taylor*, 54 F.3d at 561–64; see supra note 313 and accompanying text.
325. Id. Plaintiffs also brought claims for "negligent failure to train." The Washington high court affirmed the lower court's grant of summary judgment on these claims because plaintiffs had not adequately linked their exposures to the pesticide to the alleged problematic training. *Id.*
326. *Id.*
327. *Id.*
328. *Id.*
329. *Id.* at *1–2*. The Supreme Court of Washington held that a manufacturer could escape liability in tort for a product that was an "'unavoidably unsafe product,'" if it could
C. Summary

The above-described recent federal cases, like their state counterparts, demonstrate a change in the judiciary's view of federal preemption under FIFRA and indicate that the FIFRA preemption defense appears to be eroding. The cases present a stark contrast to the cases of the early 1990's—wherein many courts held that FIFRA preempted most common law tort actions—and aptly demonstrate that, at a minimum, the judiciary has tended to sway and bend on the issue of federal preemption under FIFRA.

IV. CONGRESS SHOULD CLARIFY THE EXTENT OF THE INTENDED PREEMPTION UNDER FIFRA AND FIFRA SHOULD BE INTERPRETED NARROWLY

A. FIFRA's Preemption Provision Should Be Interpreted Narrowly

FIFRA should be interpreted narrowly so that it does not preempt state tort actions. Such an interpretation would be in line with the requisite presumption against federal preemption of state law and the actual text of the statute which does not expressly preempt state tort actions. Allowing a narrow interpretation so that the Act does not shield pesticide users and makers from tort liability will economically motivate pesticide makers and users to increase the safety of pesticide products. Such an interpretation would thus be in keeping with a major purpose of Congress in passing FIFRA: to make pesticide use and sale safer for humans and the environment. Moreover, interpreting FIFRA to preempt

show factually that "its utility greatly outweighs the risks posed by its use." Id. (quoting Ruiz-Guzman v. Amvac Chem Corp., 7 P.3d 795, 804 (Wash. 2000).

330. See supra Part III.B.3.
331. See supra Part III.B.2.
332. See supra notes 140-77 and accompanying text.
333. See supra notes 140-77 and accompanying text, and Parts III.B.2-3.
337. Brown, 985 P.2d at 853; see supra notes 15–21 and accompanying text.
little or no state tort action would also be in line with the viewpoint of the agency charged with its primary enforcement—the EPA. 338

B. Congress Should Clarify FIFRA's Preemption Provision

FIFRA's preemption provision cries out for legislative clarification. 339 Beginning in the 1980's, the courts were clear that section 136v of FIFRA was not intended to preempt state common law actions. 340 The pendulum swung the other way in the 1990's with decisions like Papas 341 and Arkansas-Platte 342 in which the courts held that most pesticide claims, if even remotely related to the labeling of the product, were preempted by FIFRA. 343 The tide appears to be changing again as some courts have begun to hold that FIFRA does not preempt state tort actions 344 or have tried to carve out exceptions to FIFRA preemption. 345 In any event, vastly different approaches to FIFRA preemption have been taken by the judiciary over the years. 346 Such inconsistent application will only frustrate the purposes of FIFRA—to create national uniformity of standards and to protect humans and the environment. 347 Congress should step in to clarify the intended preemptive effect of FIFRA and to halt the judiciary's inconsistent application of this important Act. 348

C. Conclusion

FIFRA is a comprehensive statute designed to make pesticide use safer for humans and the environment. FIFRA contains a federal preemption provision which specifically prohibits states from

338. See supra Part III.B.1.
340. See supra notes 91–112 and accompanying text.
343. See supra notes 158–77 and accompanying text.
345. See supra Parts III.B.2–3.
347. See supra notes 15–22 and accompanying text.
348. See supra notes 158–77 and accompanying text; supra Parts III.B.2–3.
imposing "additional" or "different" labeling requirements, but it is unclear exactly whether Congress intended to preempt all or any state tort actions with this provision.

In interpreting FIFRA's provision on state authority, which prohibits a state imposition of additional or different labeling requirements, the majority of courts have held that state tort law actions are preempted to varying degrees. These courts have reasoned that while the statute gives states some power to regulate pesticide sale and use, imposing state tort law remedies on pesticide manufacturers amounts to imposing additional labeling requirements in contravention of FIFRA's mandate to refrain from doing so.

Recent developments in the case law and a change in the EPA's position on FIFRA preemption call these past decisions into question. In *Etcheverry*, the EPA—the federal agency administering FIFRA—urged that FIFRA does not preempt state tort actions at all. The EPA posited that neither the legislative history nor the plain text of the Act called for FIFRA to preempt state tort actions. And in *Medtronic*, the Supreme Court held that the barring of additional "requirements" by states pursuant to the Medical Device Amendments Act did not preempt state tort actions. Additionally, the U.S. Supreme Court held in *Medtronic* that state actions are not preempted where the federal government has not chosen to regulate the conduct at issue with specific regulations. In the wake of the U.S. Supreme Court's decision in *Medtronic* in 1996, and on the basis of the EPA's position in *Etcheverry* in 2000, many courts have decided that allowing certain tort actions to stand does not amount to imposing additional requirements on pesticide makers and have begun to limit or eliminate federal preemption under FIFRA.

Whether these more recent decisions are an indication that the groundswell for a narrow interpretation of FIFRA has begun remains to be seen. At the very least, these court decisions—so vastly different from earlier decisions in this area of the law—indicate that clarification of FIFRA's preemption provision is needed. Whether this clarification will come from the U.S. Supreme Court or from Congress remains to be seen.