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## The Federal Insecticide, Fungicide and Rodenticide Act: Preemption and Toxic Tort Law

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# THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT: PREEMPTION AND TOXIC TORT LAW

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## INTRODUCTION

THE widespread use of pesticides over the past several decades has thrust many environmental issues to the forefront of public awareness. Increased attention to the effects of chemicals on the world around us has generated an unprecedented amount of legislation and, more recently, toxic tort litigation. Courts must reconcile the concepts of tort liability and compensation, traditionally based on state law, with the potential preemptive effect of federal statutes. The authors explore these problems of judicial decision-making and statutory interpretation in the context of the most comprehensive federal law governing pesticides.

### I. PREEMPTION DOCTRINE

Under the Supremacy Clause of the Constitution, federal law may preempt the enforcement of a state regulation.<sup>1</sup> The Supremacy Clause states:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treatise 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.<sup>2</sup>

In a series of cases spanning many years, the Supreme Court has defined the circumstances under which federal preemption of state law is mandated.<sup>3</sup> A court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."<sup>4</sup> Preemp-

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1. *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-99 (1984).

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

3. *See generally* Louisiana Pub. Serv. Comm'n v. FFC, 476 U.S. 355, 368-69 (1986); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984), *cert. denied*, 476 U.S. 1104 (1986); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 203-04 (1983).

4. *Rice V. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). *See Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

tion can result, therefore, when Congress expresses a clear intent to preempt state law within the federal statute itself.<sup>5</sup>

State law may be preempted by implication in any one of the following circumstances:<sup>6</sup>

(1) when Congress has legislated comprehensively and has occupied an entire field of regulation;<sup>7</sup>

(2) when state law is found to be an obstacle to the accomplishment and execution of Congress' full objectives;<sup>8</sup>

(3) when state law "interferes with the methods by which the federal statute was designed to reach this goal";<sup>9</sup>

(4) when compliance with both federal and state law is, in effect, physically impossible;<sup>10</sup> and

(5) when there is an outright or actual conflict between federal and state law or where there is implicit in federal law a barrier to state regulation.<sup>11</sup>

State law preemption is also subject to regulations promulgated by federal agencies<sup>12</sup> when the latter act within their congressionally created authority.<sup>13</sup>

Finally, federal law may preempt any state law whether it is statutory or based on common law.<sup>14</sup> The underlying reason for this principle is best illustrated by the maxim that what a state "may not do directly

5. See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, *reh'g denied*, 431 U.S. 925 (1977).

6. See, e.g., *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 368-69; *Silkwood*, 464 U.S. at 248.

7. See *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 712-16 (1985). In an earlier case, Justice Blackmun wrote that Congress' intent to supersede state law may be inferred when

[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."

*Fidelity Fed Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

8. See *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

9. See *International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987); *Michigan Canners & Freezers Ass'n, Inc. v. Agricultural Mktg. & Bargaining Bd.*, 467 U.S. 461, 477 (1984).

10. *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

11. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368 (1986) (citing *Free v. Bland*, 369 U.S. 663, 666 (1962); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983)).

12. See *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369; *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 591, 699 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 153-54 (1982).

13. See *Louisiana Pub. Serv. Comm'n*, 476 U.S. at 369.

14. See *Consolidated Rail Corp. v. City of Dover*, 450 F. Supp. 966, 972 (D. Del. 1978).

through enforcement of its ordinance, it may not do indirectly by means of a common law claim."<sup>15</sup>

## II. PESTICIDE REGULATION

Federal regulation of pesticides began when Congress enacted the Insecticide Act of 1910,<sup>16</sup> which prevented the manufacture, sale or transportation of adulterated or misbranded insecticides and fungicides, and authorized the regulation of sales of these products.<sup>17</sup> As technology yielded new plant materials and synthetic chemicals, pesticides began to pervade the economy and the atmosphere, and as a result, many states increased the scope of their regulations.<sup>18</sup> In 1946, the Council of State governments developed the Uniform Insecticide, Fungicide and Rodenticide Act for the states to consider, and Congress began hearings on comprehensive federal legislation.<sup>19</sup> Congress passed the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)<sup>20</sup> in 1947 in order to expand the protection afforded by the 1910 Act,<sup>21</sup> to provide greater control of pesticide registration<sup>22</sup> and to protect consumers from harmful pesticides and deceptive labeling.<sup>23</sup>

FIFRA prohibited interstate commerce of unregistered pesticides<sup>24</sup> and allowed a manufacturer to register the product only if it was used as directed or in accordance with commonly recognized practice, and if the pesticide was not injurious to man, vertebrate animals or desirable vegetation.<sup>25</sup> FIFRA did not prohibit the misuse of any registered pesticide<sup>26</sup> nor did it regulate pesticides moving solely within a state's boundaries.<sup>27</sup> The Act, however, did require:

1. The registration of economic poisons or chemical pesticides prior to their sale or movement in interstate or foreign commerce.
2. The prominent display of poison warnings on labels of highly toxic pesticides.

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15. *Id.*; *International Paper Co. v. Ouellette*, 479 U.S. 481, 495-97 (1987).

16. S. REP. NO. 838, 92nd Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3993, 3999; see also *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 804 (M.D. Fla. 1989); *Papas v. Upjohn Co.*, No. 88-116-CIV-J-14 (M.D. Fla. Aug. 2, 1989).

17. S. REP. NO. 838, 92nd Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3999.

18. *Id.*

19. *Id.*

20. H.R. REP. NO. 1237, 80th Cong., 1st Sess., reprinted in 1947 U.S. CODE CONG. & ADMIN. NEWS 170; 7 U.S.C. §§ 135-135k.

21. S. REP. NO. 838, 92nd Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS at 3999-4000; see also *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 804 (M.D. Fla. 1989).

22. S. REP. NO. 838, 92nd Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS at 3993, 3998, 3999.

23. *Id.* at 3993, 3996-97, 3999.

24. *Id.* at 3993, 3996, 3999.

25. *Id.* at 3993, 3996-97, 3999.

26. *Id.* at 3993, 3996.

27. *Id.* at 3993, 3996, 3998.

3. The coloring or discoloring of dangerous white powdered insecticides to prevent their being mistaken for foodstuffs.
4. The inclusion of warning statements on the label to prevent injury to people, animals and plants.
5. The inclusion of instructions for use to provide adequate protection for the public; and
6. That information be furnished to the administrator of the Act with respect to the delivery, movement, or holding of pesticides.<sup>28</sup>

While FIFRA vested in the Secretary of the United States Department of Agriculture authority over the regulation, registration and labeling of "economic poisons and devices,"<sup>29</sup> it limited the federal government's role in regulating the *manufacture* and *sale* of pesticides. Those functions remained governed by the states.<sup>30</sup> The 1947 Act was therefore only designed to work in harmony with the insecticide and fungicide regulations already in place in the states.<sup>31</sup>

In the 1950s, pesticide regulations were further expanded by the Miller amendment to the Food and Drug Act<sup>32</sup> which allowed the Administration to set tolerance limits for residues on food and required manufacturers to provide detailed data regarding their products' efficacy, toxicity and persistence in the environment.<sup>33</sup> FIFRA was also amended to include nematocide, desiccants and defoliant under the general category of "economic poisons."<sup>34</sup>

Concern in the 1960s over the proliferation of pesticides led to the creation of a Presidential Scientific Advisory Committee, which recommended increased monitoring of pesticide residues as well as expanded educational programs and federal research into pesticide hazards.<sup>35</sup> Based upon these recommendations, FIFRA was amended in 1964 to: (1) eliminate "protest registrations", (2) authorize each pesticide to carry a license identification number, and (3) expedite suspension proceedings.<sup>36</sup>

During that decade, the Departments of Agriculture, Interior and Health, Education and Welfare also reached an agreement to cooperate in implementing pesticide licensing and regulation procedures.<sup>37</sup> Several House and Senate committees reviewed scientific data and issued reports on pesticides as well as on FIFRA's administrative deficiencies.<sup>38</sup> The

28. *Id.* at 3999.

29. *Id.*

30. S. REP. NO. 838, 92nd Cong., 2d. Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4021, 4113-19; *National Agric. Chems. Ass'n v. Rominger*, 500 F. Supp. 465, 468 (E.D. Cal. 1980).

31. *Id.* at 3999.

32. *Id.*

33. *Id.* at 3999, 4000.

34. *Id.* at 4000.

35. *Id.*

36. *Id.* at 4000-01.

37. *Id.* at 4001.

38. *Id.*

Department of Health, Education and Welfare also appointed a commission to study FIFRA's deficiencies. This commission made several recommendations on pesticide use which were considered by all agencies involved in regulation and research.<sup>39</sup>

In December of 1970, President Nixon transferred the pesticide and pure food regulatory staffs of the Departments of Agriculture, Interior and Health, Education and Welfare to the newly-created Environmental Protection Agency (EPA) in order to centralize and strengthen enforcement of the existing regulations.<sup>40</sup>

FIFRA was completely revised in 1972 when Congress adopted the Federal Environmental Pesticide Control Act<sup>41</sup> as a comprehensive scheme for the registration and labeling of pesticides.<sup>42</sup> By transferring enforcement authority to the EPA, Congress constructed the 1972 FIFRA to regulate the use of pesticides to protect man and the environment and to extend federal pesticide regulations to actions entirely within a single state.<sup>43</sup> To accomplish these goals, the new FIFRA prohibits the sale, distribution, shipment or receipt of any pesticide which is not registered with the EPA.<sup>44</sup> FIFRA also directs the EPA to register a pesticide only if the agency determines that "it will perform its intended function without unreasonable adverse effects on man or the environment, taking into account the economic, social and environmental costs and benefits of the use of a pesticide."<sup>45</sup>

Legislative history illustrates the federal government's intent to make FIFRA a comprehensive and preemptive statute. In February 1971, the President submitted a recommendation, in the form of an Administration bill, to amend FIFRA.<sup>46</sup> In the environmental message, which was included in the Senate Report on the proposed 1972 Act, the President stated that:

Currently, Federal controls over pesticides consist of the registration and labeling requirements of the Federal Insecticide, Fungicide and

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39. *Id.*

40. *Id.*

41. Public Law 92-516, 92nd Cong., H.R. 10729, October 21, 1972 as amended by Public Law 94-140, 94th Cong. H.R. 8841, Nov. 28, 1975; Public Law 95-396, 95th Cong. § 1678, September 30, 1978, 86 Stat. 973-99; 7 U.S.C. §§ 136-136y (1988); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 804 (M.D. Fla. 1989); W. Hazeltine, *THE LEGISLATIVE HISTORY AND MEANING OF THE FEDERAL INSECTICIDE, FUNGICIDE & RODENTICIDE ACT AS AMENDED*, 1972, National Agricultural Library.

42. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 992 (1984); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 406 (E.D. Mich. 1987); *Kennan*, 717 F. Supp. at 804.

43. S. REP. NO. 838, 92nd Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3993.

44. 7 U.S.C. §§ 136-136y (1988).

45. 7 U.S.C. § 136a(c)(5)(c) (1988); S. REP. NO. 838, 92nd Cong. 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3993; *Fitzgerald*, 681 F. Supp. at 406.

46. S. REP. NO. 838, 92nd Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 4001, 4023. This bill was a composite of H.R. 4152 and S. 745, which were introduced by Congressman Poage and Belcher and Senator Packwood, respectively. See W. HAZELTINE, *supra* note 41, at 1-1-1-3.

Rodenticide Act. The administrative processes contained in the law are inordinately cumbersome and time consuming, and there is not authority to deal with the actual use of pesticides. The labels approved under the Act specify uses to which pesticides may be put, but there is no way to insure that the label will be read or obeyed. The comprehensive strengthening of our pesticide control laws is needed.<sup>47</sup>

After both the House and Senate accepted a compromise bill,<sup>48</sup> the President signed it into law on October 21, 1972.<sup>49</sup>

During the debate over the 1972 FIFRA modifications, the Senate Committee on Commerce recommended some 65 amendments to the House bill.<sup>50</sup> However, the Senate Committee on Agriculture and Forestry produced a supplemental report which rejected most of those amendments.<sup>51</sup> Several amendments specifically dealt with the preemptive ability of the federal government.

One of the proposals offered by the Senate Commerce Committee would have permitted local governments to continue regulating pesticides to meet their own specific needs.<sup>52</sup> While local governments would still be precluded from imposing requirements as to pesticide labeling, packaging and composition, the Committee argued that they would be able to "prohibit or restrain sale or use. . . within their jurisdiction."<sup>53</sup> The Committee on Agriculture rejected this proposal on the ground that it would place an "extreme burden on interstate commerce"<sup>54</sup> and that "regulation by the federal government and the 50 states should be sufficient and should preempt the field"<sup>55</sup> of sale and use of a pesticide.

The Agriculture Committee bill contained a provision allowing for a state to register pesticides formulated for distribution and use solely within its own territory to meet specific state needs. However, the registration was subject to the certification by the Administrator based on a finding that the state was capable of exercising adequate controls.<sup>56</sup> The Commerce Committee countered with an amendment that would have permitted state certification only if the state is "capable of preventing unreasonable adverse effects on the environment by adopting procedures

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47. S. REP. NO. 970, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4092, 4093-94.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. S. REP. NO. 838, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4002, 4008.

53. S. REP. NO. 970, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4111.

54. S. REP. NO. 838, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4066; S. REP. NO. 970, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4066.

55. S. REP. NO. 838, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4026.

56. S. REP. NO. 838, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4113.

similar to those contained in this act." State registrations would be for periods of 90 days.<sup>57</sup> The recommended amendment also addressed the issue of "local emergency needs" as opposed to "specific local needs."<sup>58</sup> The various purposes of the amendment were to convert the state into agents for the EPA in registering a pesticide to be used solely within that state, to assure that EPA criteria are met, and to ensure protection of the environment through a federal registration and renewal process.<sup>59</sup> The Agriculture Committee rejected this amendment because the Committee believed that it would deny the states the right to register pesticides (with EPA approval) to meet peculiar state needs. This decision came after some states, most notably Hawaii, Michigan and Washington, advised the Committee of the serious economic problems<sup>60</sup> the amendment posed.

The Committee on Commerce also "strongly recommended" a provision which would have permitted private citizens to bring suits to enjoin violations of, *inter alia*, registration or labeling requirements.<sup>61</sup> The Committee reasoned that citizen suits could be a useful tool in the enforcement of pesticide laws because "threat of citizen suits [regarding pesticide] misuse [w]ould be a powerful deterrent."<sup>62</sup> The Agriculture and Forestry Committee also rejected this amendment, stating that the executive branch is the sole administrator of the nation's laws.<sup>63</sup> Further, the Committee noted that the amendment would encourage unfounded claims and harassing suits by "professional litigants" which would adversely affect the administration of the law.<sup>64</sup> However, the Committee stated that citizens would be entitled to initiate cancellation proceedings, obtain judicial review of actions or practices with which they disagree and would be able to intervene in proceedings, all as means of recourse, but should be restricted from bringing suits seeking injunctions.<sup>65</sup>

H.R. 10729, as finally enacted, reorganized FIFRA into 27 sections.<sup>66</sup> Section 24, entitled "Authority of States," reflects Congress' intent "to leave to the States the authority to impose stricter regulation on pesticide

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57. *Id.* at 4113-14; S. REP. NO. 838, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4070-71.

58. *Id.*

59. *Id.*

60. *Id.* at 4070.

61. S. REP. NO. 838, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS, 4025, 4060-61; S. REP. NO. 970, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4106-07.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* In a parenthetical, the EPA commented that it would not "object to an authorization of citizen suits alleging violations only against users and producers." S. REP. NO. 838, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4061.

66. S. REP. NO. 970, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 4116.



'use' than that required under the Act."<sup>67</sup> Section 24(a) gives states and local governments the authority to regulate the sale or use of any pesticide or device in the state, but only if and to the extent that the regulation does not permit any sale or use prohibited by this Act.<sup>68</sup> Section 24(b) preempts any state or local government from imposing or continuing in effect any labeling and packaging requirements in addition to or different from those required pursuant to the Act.<sup>69</sup>

Section 24(c) cloaks the Administrator with authority to certify a state for the purposes of registering pesticides that are ready for distribution and use within that state in order to meet special local emergency needs. Section 24(c) is limited by language which permits certification only if the state seeking it is capable of exercising adequate controls in accordance with the purposes of this Act and if registration for such use has not previously been denied, disapproved, or cancelled by the Administrator.<sup>70</sup> Section 24(c), moreover, authorizes distribution and use only within a state's boundaries and is not to be effective for more than 90 days if the distribution and use is not approved by the Administrator within that period.<sup>71</sup>

The Administration bill contained no provision for state registration.<sup>72</sup> Most of FIFRA's section 24(c) was added after the House passed H.R. 10729 and section 24(b).<sup>73</sup> Section 24(b) was added to avoid the problems of conflicting state labeling requirements.<sup>74</sup> This suggests that subsection (c) was meant to control and interpret subsection (b) as allowing state registration.<sup>75</sup> The testimony of Senator Quarles before the House Agriculture Committee corroborates this interpretation:

I would like to emphasize that the States have played a major and continuing role in pesticides regulation. To date, 48 States have programs covering the registration and/or use of pesticides. 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 this Act. (2/22/71, p. 8)<sup>76</sup>

While on the one hand the House Committee on Agriculture recognized the need for state registration, the Committee, on the other hand, stated in its report that:

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67. *Id.* at 4128.

68. *Id.* at 4128.

69. *Id.*

70. *Id.*

71. *Id.*

72. *See* W. HAZELTINE, *supra* note 41, at Chapter XXVII-4.

73. *See id.* at Chapter XXVII-3.

74. *See id.*

75. *See id.*

76. *Id.* at XXVII-4.

State authority to change Federal labeling and packaging is *completely* preempted, and State authority to further regulate "general use" pesticides is partially preempted. (emphasis added) (9/25/71, p. 1-2)<sup>77</sup>

That report also states:

In dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program, the Committee has adopted language which is intended to completely preempt State authority in regard to labeling and packaging. With regard to this Federal preemption of labeling and packaging, EPA may, where appropriate, in setting labeling and packaging requirements, give consideration to regional, State, and local needs. The Committee also intends for the Federal law to preempt the States from restricting or licensing any "general use" pesticide. The States would also be precluded from adopting programs which are less stringent than the Federal standards. In the case of "restricted use" pesticides the States are left free to impose whatever restrictions they may wish (other than labeling and packaging). The States could also completely prohibit the use of these "restricted use" pesticides within their jurisdictions.<sup>78</sup>

Section 24 was ultimately codified as 7 U.S.C. section 136(v).<sup>79</sup>

It is clear from the Conference Committee Report that Congress intended to give the states a role in certain aspects of the pesticide registra-

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77. *Id.* at XXVII-6.

78. *Id.* at XXVII-7.

79. Section 24 states:

(a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) 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.

(c)(1) A State may provide registration for additional uses of federally registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this subchapter and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator. . .

(2) A registration issued by a State under this subsection shall not be effective for more than ninety days if disapproved by the Administrator within that period. . .

(3) In no instance may a State issue a registration for a food or feed use unless there exists a tolerance or exemption under the Federal Food, Drug, and Cosmetic Act that permits the residues of the pesticide on the food or feed. If the Administrator determines that a registration issued by a State is inconsistent with the Federal Food, Drug, and Cosmetic Act, or the use of, a pesticide under a registration issued by a State constitutes an imminent hazard, the Administrator may immediately disapprove the registration.

(4) If the Administrator finds, in accordance with standards set forth in regulations issued under section 136w of this title, that a State is not capable of exercising adequate controls to assure that State registration under this section will be in accord with the purposes of this subchapter or has failed to exercise adequate controls, the Administrator may suspend the authority of the State to register pesticides until such time as the Administrator is satisfied that the State can and will exercise adequate controls. . .

tion process. A great deal of discretion is given to the states to provide registration of pesticides to meet special local needs but subject to disapproval by the administration.<sup>80</sup> The EPA is also given primary authority for removing its certification of the states pursuant to section 24.<sup>81</sup> Additionally, penalties for violation of the Act are not to be imposed until states are given an opportunity to comply. States may register pesticides moving only in intrastate commerce under federal law before the EPA will prohibit their distribution.<sup>82</sup>

It is equally clear that Congress intended to implement an integrated program in which the states would be allowed to regulate the sale and use of pesticides as long as they complied with FIFRA, and the federal government would exclusively regulate label and packaging requirements. The issue paper submitted by the EPA regarding the Act and H.R. 10729 noted that one of the Act's "key provisions" was to

[e]stablish a coordinated Federal-State administrative system to carry out the new program. The States are given prime responsibility for the certification and supervision of pesticide applicators. The Federal Government sets the program standards the States must meet. *State authority to change Federal labeling and packaging is completely preempted*, and State authority to further regulate "general use" pesticides is partially preempted.<sup>83</sup>

FIFRA's most recent amendments were thus specifically designed to:

- (1) Prohibit the use of any pesticide in a manner inconsistent with its labeling;
- (2) require pesticides to be classified for general or restricted use;
- (3) extend the Act to all pesticides by including those distributed entirely within a single state;
- (4) strengthen enforcement by:
  - a. requiring all pesticide-producing establishments to register, maintain and submit production and sales volume information;
  - b. authorizing entry of pesticide-producing establishments for inspection and sampling;
  - c. authorizing stop sale, use or removal orders and seizure;
  - d. providing for civil and increased criminal penalties;
  - e. authorizing cooperation with states;
  - f. improving procedures governing registration and cancellation actions by considering scientific studies and holding public hearings at the outset;
- (5) give applicants for registration proprietary rights in their test data;
- (6) authorize administrators to establish pesticide packaging stan-

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80. See 7 U.S.C. § 136(v)(c)(1) (1988); see also W. HAZELTINE, *supra* note 41, at Chapter XXVII.

81. See W. HAZELTINE, *supra* note 41, at Chapter XXVII-1.

82. *Id.* at XXVII-2.

83. *Id.* at Chapter I-9 (emphasis added).

dards, regulate pesticide and container disposal, issue experimental use permits and conduct research on pesticides and alternatives and monitor their use and presence in the environment;

(7) provide for certification of applicators by the states under a program approved by the Administrator of the EPA.<sup>84</sup>

As a prerequisite to registration, i.e. to comply with FIFRA, manufacturers must submit to the EPA: (1) considerable scientific data regarding toxicity and efficacy; (2) confidential trade secrets regarding pesticide ingredients; and (3) proposed labeling.<sup>85</sup>

Pesticides registered with the EPA must bear labels containing EPA-approved warnings which indicate that the product is adequate to protect health and the environment.<sup>86</sup> The labels may not contain language that has not been approved by the EPA.<sup>87</sup> In accordance with the regulations promulgated under FIFRA, the EPA not only specifies the particular warning language which is required,<sup>88</sup> but also governs the registration and classification procedures,<sup>89</sup> registration standards,<sup>90</sup> labeling requirements,<sup>91</sup> requirements for the submission of toxicological data,<sup>92</sup> tolerance levels for pesticides in food,<sup>93</sup> and even laboratory standards for any studies conducted to support applications for marketing permits for pesticide products regulated by the EPA.<sup>94</sup>

### III. TOXIC TORT LAW

A toxic tort plaintiff may bring a claim against a manufacturer or seller of an alleged harm-producing product under several legal theories such as negligence, strict liability, breach of warranty, fraud and nuisance.<sup>95</sup> Irrespective of which theory is employed, a plaintiff has the burden of proving by a preponderance of the evidence that he was exposed to the defendant's chemical product in a manner (i.e., ingestion, dermal absorption, inhalation or injection), to a degree, and for a duration which may be considered toxic. In addition, a plaintiff must prove that the chemical proximately caused or substantially contributed to his injury.<sup>96</sup>

Over the past ten years, strict liability has emerged as the favorite theory of recover. Replacing the traditional liability-based-on-fault theory

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84. See S. REP. NO. 838, 92nd Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3993-94.

85. *Id.*

86. 7 U.S.C. § 136(q)(1)(G) (1988).

87. 40 C.F.R. § 156.10(a)(6)(i) (1988).

88. 40 C.F.R. § 156.10(a)(1) (1988).

89. 40 C.F.R. §§ 152.40-152.55 (1988); 40 C.F.R. §§ 152.160-152.175 (1988).

90. 40 C.F.R. §§ 155.23-155.34 (1988).

91. 40 C.F.R. § 156.10 (1988).

92. 40 C.F.R. §§ 158.20-158.740 (1988).

93. 40 C.F.R. §§ 185.100-185.6300 (1988).

94. 40 C.F.R. §§ 160.1-160.130 (1988).

95. G.Z. NOTHSTEIN, TOXIC TORTS: LITIGATION OF HAZARDOUS SUBSTANCE CASES, §§ 11.02-11.25 (1984).

96. See generally *id.* at § 11.08.

of negligence with the concept of "defectiveness," strict liability focuses on the nature of the product rather than on the defendant.<sup>97</sup> The Restatement (Second) of Torts (1965) provides the most comprehensive and widely accepted formulation of the strict liability theory.<sup>98</sup>

The elements which a plaintiff in a product liability case must prove are: (1) that a product to which he was exposed was in a defective condition when it left the possession or control of the seller; (2) that the product was unreasonably dangerous to the user or consumer; (3) that the defect was a proximate cause of or a substantial factor in the plaintiff's injuries or damages; (4) that the seller engaged in the business of selling such a product; and (5) that the product was one which the seller expected to and did reach the user or consumer without substantial change in its condition when it was sold to the plaintiff.<sup>99</sup>

An "unreasonably dangerous defective condition," the benchmark of strict liability, may manifest itself in the product's manufacture, design and/or warning.<sup>100</sup> FIFRA preemption cases mostly involve warning defects by the manufacturer. In this context, a plaintiff must prove: (1) that the manufacturer knew or should have known of the product's inherent risk; (2) that there was either no warning or an inadequate warning; (3) that the absence of adequate warnings rendered the product defective and unreasonably dangerous; and (4) that the absence of adequate warnings was the proximate cause of plaintiff's injury.<sup>101</sup> The Restatement (Second) recognizes that

[i]n order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning, on the

97. *E.g.*, *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963); *see generally* G.Z. NOTHSTEIN, *supra* note 95 at § 11.12 (in failure-to-warn cases, the issue is whether the product is sold without warnings, regardless of whether defendant knew or should have known that the product was dangerous).

98. RESTATEMENT (SECOND) OF TORTS § 402A (1965); *see also* J.S. ALLEE, PRODUCT LIABILITY, § 2.01; AM. LAW OF PROD. LIAB. 3d §§ 16:8-16:9, 16:67 (1987). Section 402A of the RESTATEMENT, entitled "Special Liability of Seller of Product for Physical Harm to User or Consumer," states:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if:
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

99. AM. LAW OF PROD. LIAB. 3d § 16.42 (1987); G.Z. NOTHSTEIN, *supra* note 95, at § 11.12.

100. AM. LAW OF PROD. LIAB. 3d §§ 16:1-17:47 (1987); Model Uniform Product Liability Act [hereinafter MUPLA], 44 Fed Reg. 62721, § 104.

101. AM. LAW OF PROD. LIAB. 3d § 32:2, 34:27 (1987); J.S. ALLEE, PRODUCT LIABILITY § 4.02(1) (1989); RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

container, as to its use. . . a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.<sup>102</sup>

The adequacy of a product's warning may be assessed in many ways. Most courts look at whether the labeled product was more dangerous when it left the manufacturer/seller's hands than an ordinary purchaser would expect. An ordinary purchaser is usually defined as a person with knowledge common to the community.<sup>103</sup> Some courts ignore the seller's perspective and look at whether a reasonable, ordinary and prudent manufacturer would have marketed the product with such a warning.<sup>104</sup>

Since absence of a warning constitutes a design defect, nearly all courts employ a version of the classic risk utility analysis which considers: (1) the usefulness and desirability of the product to the user and to society as a whole; (2) the safety aspects of the product, i.e., the likelihood that it will cause injury, and the probable seriousness of such injury; (3) the availability of a safer substitute product that will meet the same needs; (4) the manufacturer's ability to eliminate the danger without impairing the usefulness of the product or making it too expensive to maintain its utility; (5) the user's ability to avoid danger by exercising care in using the product; (6) the user's understanding of the product's inherent dangers and their avoidability, in light of the knowledge of the general public, or in light of the existence of suitable instructions or warnings; and (7) the feasibility for the manufacturer to spread the loss by increasing the price of the product or by carrying liability insurance.<sup>105</sup> If a product fails the consumer expectation test, several courts, after the plaintiff shows that the design proximately caused the injury, have invoked a standard that shifts the burden to the defendant to prove that the benefits of the challenged design outweigh its inherent risks.<sup>106</sup>

Because the balancing between risk and utility is generally done through the EPA registration process, it is often argued that a product with an EPA-approved label is not defective as a matter of law. This argument, however, is not fool-proof and a manufacturer can still be liable for a defective product if it has actual or constructive knowledge of the product's inherent risks.<sup>107</sup> A manufacturer must also keep abreast of scientific knowledge, discoveries and advances, and provide an adequate warning if it knows or has reason to know that the product is dan-

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102. RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965).

103. *Id.*; see also AM. LAW OF PROD. LIAB. 3d §§ 17:25-17:29 (1987); J.S. ALLEE, PRODUCT LIABILITY § 4.02(3) (1989).

104. AM. LAW OF PROD. LIAB. 3d § 17:32 (1987).

105. *Id.* § 17:34.

106. See *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 432, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237-38 (1978).

107. AM. LAW OF PROD. LIAB. 3d §§ 34:8, 33:3-33:5 (1987); J.S. ALLEE, PRODUCT LIABILITY § 4.02(1) (1989).

gerous.<sup>108</sup> This requirement can also serve as a valid defense in a product liability suit. The manufacturer can argue that the technology and scientific knowledge at the time the product was made was not advanced enough to detect an inherent danger in the product and that it was therefore justified in not affixing a warning label to it. The defense recognizes that the manufacturer can only follow the standard of scientific, medical and technological achievement in existence at the time of manufacture and sale.<sup>109</sup> Manufacturer-defendants often argue that registration under FIFRA represents the federal government's endorsement that the product in question complies with the state of the art and is *per se* not defective.

Defendants have sometimes tried to fend off a claim by arguing that their products are "unavoidably unsafe products" and that when correctly manufactured and accompanied by proper directions and warnings, those products are neither unreasonably defective nor dangerous.<sup>110</sup> Therefore,

[t]he seller of such products, again with the qualification that they are properly prepared and marketed, and proper warning is given, where the situation calls for it, is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.<sup>111</sup>

The "unavoidably unsafe products" theory can be interpreted as a public policy designed to encourage swift production and marketing of products which prevent disease and save human life, although such products may also carry with them the risk of future danger.<sup>112</sup> It is no surprise that the courts generally do not impose strict liability on sellers and have allowed the "unavoidably unsafe products" theory for prescription drugs, vaccines, blood and medical devices.<sup>113</sup>

#### IV. FIFRA PREEMPTION

Cases addressing the extent to which FIFRA preempts state law tort claims can generally be grouped according to their holdings which have been (a) that FIFRA does not preempt state law; (b) that FIFRA expressly preempts state law; or (c) that FIFRA impliedly preempts state law. The cases are explored in the sections that follow.

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108. AM. LAW OF PROD. LIAB. 3d § 33:3, 32:64 (1987); RESTATEMENT (SECOND) OF TORTS § 402A comment j (1965); J.S. Allee, Product Liability § 8.08 (1) (1989).

109. AM. LAW OF PROD. LIAB. 3d § 32:64 (1987); J.S. ALLEE, PRODUCT LIABILITY § 808 (1) (1989); see also *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 746 (Tex. 1980).

110. Comment k of section 402A of the RESTATEMENT (SECOND) OF TORTS defines "unavoidably unsafe products" as products, which in the present state of human knowledge, are incapable of being made safe for their intended and ordinary use.

111. *Id.* § 402A comment k.

112. AM. LAW OF PROD. LIAB. 3d § 17:36 (1987).

113. *Id.*

A. *FIFRA Does Not Preempt State Law*

The earliest reported case which addressed FIFRA's preemptive power over state common law tort actions was *Ferebee v. Chevron Chemical Co.*<sup>114</sup> Defendant Chevron argued that since its product, paraquat, was sold in the United States only when accompanied by an EPA-approved label, (1) a jury was required to find that label adequate and; (2) federal law preempts state common law actions based on inadequate warnings.<sup>115</sup> The Circuit Court dismissed Chevron's first contention, stating that "[t]he fact that EPA has determined that Chevron's label is adequate for purposes of FIFRA does not compel a jury to find that the label is also adequate for purposes of state tort law as well."<sup>116</sup> The court reasoned that the EPA might have assigned a lesser value to, among other things, the health risks associated with the use of paraquat than would a jury.<sup>117</sup>

The court then addressed Chevron's contention that because state tort actions based on the inadequacy of EPA-approved labels have in fact a regulatory aim, i.e., to assure that adequate labels are used,<sup>118</sup> section 136v(b) of FIFRA, which preempts state law, is the applicable part of the statute.<sup>119</sup> While Judge Mikva, writing for the court, conceded that tort actions can constitute regulation, he held that damage actions "can have both regulatory and compensatory aims."<sup>120</sup>

However, the ultimate holding that FIFRA does not preempt state common law tort claims was based on allegations of inadequate warnings.<sup>121</sup> The court justified its position on the theory that damage awards based on state law do not mandate a manufacturer to alter a product's defective labels.<sup>122</sup> FIFRA, moreover, expressly allows the states to impose their own constraints on the sale and use of EPA-approved pesticides.<sup>123</sup>

*Ferebee's* narrow holding was that while FIFRA does not explicitly preempt state damage actions, it does preclude states from directly order-

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114. 736 F.2d 1529 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984).

115. *Id.* at 1539.

116. *Id.* at 1540 (emphasis in original).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* (emphasis in original). The court added that "tort recovery in a case such as this one may also promote legitimate regulatory aims." *Id.* at 1541.

121. *Id.* at 1543.

122. *Id.* at 1541.

123. *Id.*; citing 7 U.S.C. § 136v(a). See also S. REP. NO. 838, 92nd Cong., 2d Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 3993, 4021. ("Generally, the intent of the provision is to leave to the States the authority to impose stricter regulation on pesticides use than that required under the Act."); S. REP. NO. 970, 92nd Cong., 2nd Sess., reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 4092, 4128 (same); see generally *Nat'l Agric'l Chem. Ass'n v. Rominger*, 500 F. Supp. 465 (E.D. Cal. 1980) (state may require additional data on EPA registered pesticides).



ing changes in EPA-approved labels.<sup>124</sup> In addressing Chevron's claim that FIFRA impliedly preempted state tort law,<sup>125</sup> the court found that compliance with both federal and state law was not impossible. Chevron could continue using the EPA-approved label and simultaneously pay damages to successful tort plaintiffs.<sup>126</sup> The court rejected the argument that state damage actions stand as an obstacle to the accomplishment of FIFRA's purposes,<sup>127</sup> and stated that:

Such a conflict would exist only if FIFRA were viewed not as a regulatory statute aimed at protecting citizens from the hazards of modern pesticides, but rather as an affirmative subsidization of the pesticide industry that commanded states to accept the use of EPA-registered pesticides. That interpretation of FIFRA, however, is precluded by both the explicit savings clause at 7 U.S.C. § 136v(b) [sic] and by the entire legislative history of the Act.<sup>128</sup>

The circuit court concluded that since Congress explicitly authorized the states to regulate pesticide use, the states could require that at least some of the injuries resulting from pesticide exposure be redressed under state law.<sup>129</sup> Applying this to the facts in *Ferebee*, the court held that "if [Chevron] chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries."<sup>130</sup> What actions can a manufacturer of pesticides take after having successfully been sued under state law and held liable for damages? The court in *Ferebee* suggested that a manufacturer can: (1) petition the EPA to alter its label; (2) choose not to continue selling its product in the state in which the damages award is made; or (3) distribute additional information about its product.<sup>131</sup>

Since *Ferebee*, several other decisions also concluded that FIFRA neither expressly nor impliedly preempts state tort law.<sup>132</sup> While these decisions have closely followed *Ferebee's* reasoning, they have added important language of their own. In *Cox v. Velsicol Chemical Corp.*, for example, the federal district court relied heavily on the fact that the manufacturers play a "significant role" in FIFRA's regulatory scheme.<sup>133</sup> The defendants in the *Cox* case relied on cases which held that there was preemption of state law under the Federal Cigarette Labeling and Adver-

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124. *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) (emphasis in original).

125. *Id.* at 1542-43.

126. *Id.* at 1542.

127. *Id.*

128. *Id.* at 1542-43.

129. *Id.* at 1541, 1543.

130. *Id.* at 1541.

131. *See id.* at 1543. This list of options has been referred to in subsequent decisions as "the choice of reaction analysis."

132. *See Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988); *Wilson v. Chevron Chem. Co.*, No. 83 Civ. 762 (S.D.N.Y. Dec. 17, 1986).

133. *See Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85, 86 (E.D. Pa. 1989).

tising Act (FCLAA)<sup>134</sup> in an attempt to convince the court of FIFRA's preempting powers. The court, however, rejected the "misplaced analogy" and noted that the FCLAA prescribes the exact label or warning to be placed on each package of cigarettes, while under FIFRA, a pesticide manufacturer submits a label for EPA approval.<sup>135</sup> Since each pesticide manufacturer drafts its own warning label, it is possible that "two manufacturers of the same product may use different labels, provided only that they obtain prior EPA approval."<sup>136</sup>

The analogy with FCLAA preemption was also criticized in *Roberts v. Dow Chemical Co.*<sup>137</sup> The *Roberts* court rejected the defendant's contention that FIFRA impliedly preempts state law,<sup>138</sup> and held that since Congress allowed the states to regulate the use of pesticides in section 136v(a) of the Act, "it appears that FIFRA regulations are not so comprehensive as to occupy the entire field."<sup>139</sup>

The court also rejected Dow's assertion that an EPA-approved label precluded the finding of strict liability because an adequate warning fulfilled the duty of a manufacturer who markets an allegedly "unavoidably unsafe product."<sup>140</sup> *Roberts* agreed with the conclusion of *Ferebee* that even if a pesticide's label meets FIFRA's requirements, it "does not compel a jury to find that the label is also adequate for purposes of state tort law as well. The purposes of FIFRA and those of state tort law may be quite distinct."<sup>141</sup>

Although *Cox* and *Roberts* relied heavily on *Ferebee* in rejecting federal preemption,<sup>142</sup> they have each added some new insight into the non-preemption school of thought.

### B. FIFRA Expressly Preempts State Law

A growing number of cases decided after *Ferebee* have held that FIFRA does preempt state tort law, and more particularly, that section 136v(b) expressly preempts state tort law claims based on allegations of

134. 15 U.S.C. §§ 1331 *et seq.*

135. *See Cox*, 704 F. Supp. at 86.

136. *Cox*, 704 F. Supp. 85, 86 (E.D. Pa. 1989) (quoting *Palmer v. Liggett Gp., Inc.*, 825 F.2d 620, 629 n. 13 (1st Cir. 1987)). *Palmer* was ruling on a preemption motion based on the FCLAA. In *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283, 1289 (W.D. Mo. 1989), discussed more fully below, the court referred to these differences between FIFRA and the FCLAA as a "distinction without significance."

137. 702 F. Supp. 195, 198-99 (N.D. Ill. 1988).

138. *Id.* at 199.

139. *Id.*

140. *Id.*

141. *Id.* (quoting *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1540 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) (emphasis in original)). In light of *Roberts*' rejection of preemption, it is logical that Judge Rovner held that a label approved under FIFRA does not preclude the finding of strict liability under theories other than failure to warn when an unavoidably unsafe product is involved. What is surprising is that the cases which have found that FIFRA preempts state law do not reach this next logical step.

142. The court in *Wilson v. Chevron Chem. Co.*, No. 83 Civ. 762 (S.D.N.Y. Dec. 17, 1986) found that compliance with FIFRA does not preempt punitive damages.

inadequate warnings.<sup>143</sup>

In *Fitzgerald v. Mallinckrodt, Inc.*,<sup>144</sup> the court found that the plain language of section 136v(b) was sufficiently clear to find that Congress intended to preempt state law.<sup>145</sup> Judge Suhrheinrich wrote that Congress' expressly stated intent to preempt any state law in FIFRA differed from typical federal statutes where "divining whether Congress intended to preempt state law [was] a difficult, haphazard process."<sup>146</sup>

After carefully considering and comparing *Ferebee* and *Palmer v. Liggett Group, Inc.*,<sup>147</sup> two United States Circuit Court of Appeals decisions, the *Fitzgerald* court found the reasoning of *Palmer* more persuasive.<sup>148</sup> In *Palmer*, the court held that the FCLAA preempts state common law claims.<sup>149</sup> The court acknowledged *Ferebee's* narrow holding that FIFRA expressly preempted the states only from directly imposing additional labeling requirements,<sup>150</sup> but questioned the reasoning in the case that actions based on the inadequacy of EPA-approved labels have a regulatory effect. The *Fitzgerald* court found that such actions are "not equivalent to a direct regulatory command that [the manufacturer] change its label."<sup>151</sup> In rejecting *Ferebee*, the court found support in *Palmer* which made a similar argument when discussing FCLAA.<sup>152</sup> *Palmer* pointed out that the FCLAA's preemption clause "expressly prohibits 'state law' not merely 'statutory law' from imposing any 'requirement or prohibition' different from the Act's warning label."<sup>153</sup> The court stated that:

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143. See, e.g., *Herr, et al. v. Carolina Log Builders, Inc., et al.*, slip op. EV 85-262-C through EV 85-268-C (S.D. Ind. Sept. 22, 1989); *Papas v. Upjohn Co.*, No. 88-116-Civ-J-14 (M.D. Fla., Aug. 2, 1989), appeal pending; *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla. 1989); *Wixson, et al. v. Sonford Products Corp., et al.*, Nos. 24,847; 24,502; 24,846 (Chancery Court, Rankin County, Miss., May 1, 1989); *Bolduc v. Chemed*, No. 43-94-55 (Super. Ct., Orange County, Cal., April 10, 1989); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987). Both *Papas* and *Kennan* were decided by Judge Susan Black. Since the decisions are virtually identical, the authors have cited only to the published decision, *Kennan*. All citations to *Kennan* are equally applicable to *Papas*.

144. 681 F. Supp. 404 (E.D. Mich. 1987).

145. *Id.* at 406. "[T]he language of the statute appears to clearly indicate Congressional intent to preempt state labeling requirements. . . ." *Id.*

146. *Id.*

147. 825 F.2d 620 (1st Cir. 1987).

148. *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. at 407.

149. *Palmer*, 825 F.2d at 626.

150. *Id.*

151. *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 407 (E.D. Mich. 1987) (quoting *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1541 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984)).

152. *Fitzgerald*, 681 F. Supp. at 407.

153. *Palmer v. Liggett Gp., Inc.*, 825 F.2d 620, 627 (1st Cir. 1987). The FCLAA states:

- (a) No statement relating to smoking and health, other than the statement required by section 1333 of this title, shall be required on any cigarette package.
- (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any ciga-

If a manufacturer's warning that complies with the Act is found inadequate under a state tort theory, the damages awarded and verdict rendered against it can be viewed as state regulation: the decision effectively compels the manufacturer to alter its warning to conform to different state law requirements as "promulgated" by a jury's findings.<sup>154</sup>

The First Circuit thus rejected the district court's finding that an award of damages under state law "would have only an indirect effect on defendants' labeling and advertising practices."<sup>155</sup> The First Circuit also rejected the plaintiffs' assertion that "monetary damages awarded would not [necessarily] compel a manufacturer to change its label [because], 'the choice of how to react is left to the manufacturer.'" <sup>156</sup> The court compared this choice of reaction to "the free choice of coming up for air after being under water."<sup>157</sup> The *Palmer* court believed that to minimize its exposure to continued liability, a manufacturer would necessarily change its label.<sup>158</sup> Therefore, the ability to award damages for inadequately labeled products "arrogates to a single jury the regulatory power explicitly denied to all fifty states' legislative bodies."<sup>159</sup>

In deciding to follow *Palmer* rather than *Ferebee*, the *Fitzgerald* court noted that FIFRA's preemption clause prohibits the imposition by a state of "any requirement for labeling or packaging."<sup>160</sup> This parallels the FCLAA's preemption language.<sup>161</sup> The court concluded that "[a]llowing recovery under state tort law where Congress has preempted state law would effectively authorize the state to do through the back door exactly what it cannot through the front."<sup>162</sup>

Two years later, Judge Black, who considered both the *Ferebee* and *Fitzgerald* cases when deciding *Kennan v. Dow Chemical Co.*,<sup>163</sup> agreed that jury verdicts constitute "back door" labeling regulations.<sup>164</sup> She disagreed with *Ferebee*, stating that the court "must reject any argument holding that a state court jury verdict would merely leave to the manu-

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rettes the packages of which are labeled in conformity with the provisions of this chapter.

15 U.S.C. § 1334, quoted in *Palmer*, 825 F.2d at 624.

154. *Fitzgerald*, 681 F. Supp. at 407 (E.D. Mich. 1987) (quoting *Palmer*, 825 F.2d at 627).

155. *Palmer v. Liggett Gp., Inc.*, 633 F. Supp. 1171, 1177 (D. Mass. 1986), *rev'd*, 825 F.2d 620 (1st Cir. 1987). The First Circuit said that "the regulatory effect of the *Palmer's* claim is direct, and must be preempted by the Act." *Palmer*, 825 F.2d at 628.

156. *Palmer*, 825 F.2d at 627.

157. *Id.*

158. *See id.* at 628.

159. *Id.*

160. *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 407 (E.D. Mich. 1987) (quoting 7 U.S.C. § 136v(b)). *See supra* note 134 for the FCLAA's preemption language.

161. *See Palmer v. Liggett Gp., Inc.* 825 F.2d 620, 624 (1st Cir. 1987).

162. *Id.*

163. 717 F. Supp. 799, 805-06 (M.D. Fla. 1989).

164. *Id.* at 806.

facturer the 'choice of how to react' to such jury verdict,"<sup>165</sup> and questioned its precedential value by pointing out that the United States Supreme Court had also rejected the "choice of reaction analysis"<sup>166</sup> in *International Paper Co. v. Ouellette*.<sup>167</sup>

*Ouellette* involved an action against a paper mill located in the state of New York that discharged effluents into Lake Champlain pursuant to a permit issued by the EPA under Section 125, *et seq.* of the Clean Water Act (CWA).<sup>168</sup> The plaintiffs were residents of Vermont who owned property on the Vermont shore of the lake. They alleged that the discharge constituted common law nuisance under Vermont law.<sup>169</sup> The paper mill raised a preemption defense based on the prohibition of the CWA against state regulation of out-of-state sources of effluents.<sup>170</sup> The U.S. Supreme Court upheld the preemption defense on the ground that a jury verdict based on the Vermont law would subject the discharger to the threat of legal and equitable penalties.<sup>171</sup> The Court was convinced that "[s]uch penalties would compel the source to adopt different control standards and a different compliance schedule from those approved by the EPA."<sup>172</sup> Furthermore, the Court wrote that a recovery by the plaintiffs would force the defendant to "at a minimum. . . change its methods of doing business and controlling pollution to avoid the threat of ongoing liability."<sup>173</sup> The Court refused to impose this fate on the defendant and to allow the affected state to "do indirectly what [it] could not do directly—regulate the conduct of out-of-state sources."<sup>174</sup>

The Supreme Court was not so much concerned with the adverse effect a monetary award against the defendant would have but, rather, was more interested in upholding what it deemed to be the congressional intent of the Act.<sup>175</sup> Since the CWA did not contain express language preempting state law, the Court focused on the goals and policies of the Act.<sup>176</sup> After having fully examined the statute, Justice Powell concluded that if various states were allowed to impose separate discharge

165. *Id.*

166. *Id.*

167. 479 U.S. 481 (1987). Eighteen years prior to deciding *Ouellette*, the Supreme Court acknowledged the regulatory power of jury verdicts based on tort law: "Regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959).

168. *Ouellette*, 479 U.S. 481; See Note, *International Paper Co. v. Ouellette: Uneasy Resolution of which State's Law to Apply in Interstate Water Pollution Disputes*, 1 FORDHAM ENVTL. L. REP. 119 (1989).

169. *Ouellette* at 484.

170. *Id.*

171. *Id.* at 495.

172. *Id.*

173. *Id.*

174. *Id.*

175. See *id.* at 492-94.

176. See *id.* at 493-94.

standards on a single point source, "the inevitable result would be a serious interference with the achievement of the 'full purposes and objectives of Congress.'"<sup>177</sup>

After considering *Ferebee*, *Fitzgerald* and *Ouellette*, Judge Black agreed with Justice Powell that a state court jury verdict would be tantamount to regulating the content of a pesticide label already approved by the EPA.<sup>178</sup> The court therefore dismissed the plaintiffs' state law claims because "FIFRA expressly preempts state law regulation of pesticide labeling."<sup>179</sup>

### C. FIFRA Impliedly Preempts States Law

*Fitzgerald*, *Kennan* and other cases holding that FIFRA expressly preempts state tort law did not address the issue of implied preemption. The only presently reported case holding that FIFRA impliedly preempts state tort law is *Fisher v. Chevron Chemical Co.*<sup>180</sup> *Fisher* represents a middle ground between *Ferebee* and the *Kennan/Fitzgerald* school of thought. The court in *Fisher* felt that while there was no express preemption based on Congress' occupation of the field, state law claims were impliedly preempted because of the existing conflict between the purposes of FIFRA and state law.<sup>181</sup>

The district court immediately rejected the notion of express preemption and found that section 136v(b) showed only a congressional attempt to preempt state labeling regulations.<sup>182</sup> The court, however, stated that FIFRA did not expressly reflect an intent to preempt tort claims based on state law.<sup>183</sup> The court relied on the general presumption against preemption<sup>184</sup> and Congress' failure to expressly refer to tort law in section 136v(b).<sup>185</sup>

The court also considered the defendant's claim that FIFRA impliedly preempted state law in the area of pesticides since Congress occupied that field.<sup>186</sup> The *Fisher* court concluded that in enacting FIFRA, Con-

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177. *Id.* (quoting *Hillsborough County, Fla. v. Automated Medical Labs., Inc.*, 471 U.S. 707, 713 (1985)).

178. *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 806-07 (M.D. Fla. 1989).

179. *Id.* at 807.

180. 716 F. Supp. 1283 (W.D. Mo. 1989).

181. *See id.* at 1287.

182. *See id.* at 1286; *see also* 7 U.S.C. § 136(a).

183. *Id.* (emphasis in original).

184. *Id.* at 1287; *see also* *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

185. *Id.* *Ferebee* had also noted FIFRA's failure to explicitly preempt state damage actions. *Ferebee* at 1542. *Kennan* and *Fitzgerald* read the prohibition in § 136v(b) against "any" state requirements for labeling or packaging as a reference to both state common and statutory law. *See Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 806-07 (M.D. Fla. 1989); *Fitzgerald*, 681 F. Supp. 404, 407 (E.D. Mich. 1987).

186. *See Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283, 1287 (W.D. Mo. 1989). The Supreme Court has delineated the basis for finding implied preemption based on Congress' intent to comprehensively legislate so as to occupy an entire field of regulation. *See supra* n. 79. For an analysis of implied preemption based on Congress' intent to

gress intended to occupy the field of regulating pesticide labeling.<sup>187</sup> State regulation of the sale and use of pesticides, however, was not preempted and states could impose regulations more stringent than mandated under federal law.<sup>188</sup> Because of this reservation of authority by the states, *Fisher* found that "the scheme created by FIFRA is not 'so pervasive' or the federal interest is not 'so dominant' as to demonstrate an intent to preempt all state law claims."<sup>189</sup>

The *Fisher* court then examined the possibility that state tort law was only impliedly preempted to the extent it actually conflicted with FIFRA.<sup>190</sup> In order to determine whether or not a conflict existed, the court examined FIFRA's goals and the effect of the state law on these purposes.<sup>191</sup> Judge Bartlett wrote:

The principal purpose of FIFRA is to protect consumers by keeping unhealthy or unsafe pesticides off the market and by preventing deceptive labeling. Congress sought to achieve this goal by regulating the sale, use and labeling of pesticides. As to FIFRA's labeling provisions, Congress has stated in 136v(b) that its goal will be undermined by state law requirements which add to or differ from federal labeling regulations.<sup>192</sup>

In arguing against implied preemption, the plaintiffs in *Fisher* relied heavily on passages in *Ferebee* where the court discussed the regulatory aim of FIFRA and the effect of state tort remedies.<sup>193</sup> The defendants in *Fisher* not surprisingly relied on *Fitzgerald*.<sup>194</sup> The court was persuaded by the reasoning presented in *Fitzgerald* and *Palmer* that state law tort recoveries based on the defendant's failure to adequately warn of the danger of pesticides would abrogate Congress' intent to provide uniform regulations for the labeling of pesticides.<sup>195</sup>

The court also addressed the attempt by the *Roberts* court<sup>196</sup> to distin-

occupy the field of cigarette labeling, see *Cipollone v. Liggett Corp.*, 789 F.2d 181, 186 (3d Cir.), cert. denied, 479 U.S. 1043 (1987).

187. *Fisher*, 716 F. Supp. at 1287 (emphasis in original).

188. *Id.*

189. *Id.* (citing *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195, 199 (N.D. Ill. 1988)).

190. *Fisher*, 716 F. Supp. at 1287.

191. *Id.* (citing *Cipollone v. Liggett Corp.*, 789 F.2d 181, 187 (3d Cir.), cert. denied, 479 U.S. 1043 (1987)).

192. *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283, 1287 (W.D. Mo. 1989) (citations omitted).

193. *Id.* at 1288.

194. *Id.* *Fisher* was decided prior to *Kennan*.

195. *Fisher*, 716 F. Supp. at 1289 (citing *Fitzgerald v. Mallinckrodt, Inc., Inc.*, 681 F. Supp. 404, 407 (E.D. Mich. 1987)). It should be remembered that while the *Fitzgerald* court expressed the opinion that tort recoveries interfere with Congress' plan to create uniform regulations under the auspices of the EPA, its decision found express preemption and did not address the issue of implied preemption. The *Fisher* court wrote that "the *Fitzgerald* court's reasoning is persuasive while *Ferebee* seems to be justifying weakly a result."

196. The very fact that Congress mandated the precise wording required in a label, rather than merely establish the "minimum requirements" standard often found in label-

guish the FCLAA cases from FIFRA.<sup>197</sup> It held that the fact that Congress on the one hand requires a specific warning to be placed on every package of cigarettes and on the other hand prescribes that pesticide manufacturers submit proposed warnings to the EPA, is "a distinction without significance"<sup>198</sup> since both FIFRA and FCLAA expressly prohibit states from regulating any aspects of labeling.

Having rejected both the *Ferebee* and *Roberts* cases, the court in *Fisher* found that FIFRA impliedly preempted state tort law claims for the inadequate labeling of pesticides because the state laws are in conflict with FIFRA's purpose.<sup>199</sup>

### CONCLUSION

The cases decided thus far that have discussed FIFRA's preemptive power over state tort law have reached three distinct conclusions and have spawned their respective progeny.

Currently there is a case pending in the 11th Circuit entitled *Papas v. Upjohn Co.*<sup>200</sup> which raises the issue of the preemption power of FIFRA. The decision will have an important impact on the three different schools of thought and on the future of FIFRA preemption. If the appellate court overturns *Papas*, then two circuits will be in accord that preemption does not apply. If the court affirms, however, there will be a split in the circuits which may set the stage for Supreme Court determination.

It is the authors' view that preemption of state law, at least in the area of alleged warning defects, is consistent with FIFRA's stated purposes. FIFRA provides a comprehensive regulatory scheme which balances the goals of effective and cost efficient pest control with the need to protect humankind and the environment. The statute makes pesticide manufacturers accountable to one central authority, which requires them to submit toxicity and efficacy studies, ingredient statements and proposed labels. Manufacturers may not market products unless the EPA approves of the form and content of their labels. FIFRA moreover empowers the administration of the EPA to enforce its regulations.

We believe Congress legislated comprehensively in the area of pesticide design, manufacturing and marketing and, therefore, state tort law claims which have the effect of further regulating these products should not be allowed.

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ing acts distinguishes the [Cigarette] Act from cases relied upon by the court and the Palmers as persuasive authority. *Roberts v. Dow Chem. Co.*, 702 F. Supp. 195 (N.D. Ill. 1988) (quoting *Palmer v. Liggett Gp., Inc.*, 825 F.2d 620, 623, n. 5). See, e.g., *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984) (involving FIFRA minimum labeling standards).

197. *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283, 1289 (W.D. Mo. 1989).

198. *Id.*

199. See *id.*

200. Case No. 88-116-Civ-J-14 (M.D. Fla., Aug. 2, 1989).



