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***Ciba-Geigy Corporation v. Alter: Federal
Preemption, FIFRA, and Compensatory
Damages in Arkansas***

by

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Ciba-Geigy Corporation v. Alter: Federal Preemption, FIFRA, and Compensatory Damages in Arkansas

I. INTRODUCTION

Concern by plaintiffs about federal intrusion into the state's historic police powers is not a new phenomenon. The past few years have seen a preemption explosion in which federal law has superseded some state common law actions in areas as diverse as cigarette labeling, air traffic safety and nuclear power.¹ Now, when plaintiffs seek compensatory damages from pesticide manufacturers, they may discover that federal law supersedes yet another area of the common law that was a sanctuary of the state.

The theory of federal preemption of state law comes from the Supremacy Clause of the United States Constitution, which provides that federal laws "shall be the supreme [l]aw of the [l]and; . . . any [t]hing in the . . . [l]aws of any [s]tate to the [c]ontrary notwithstanding."² The United States Supreme Court has interpreted that clause to mean that a state law which conflicts with a federal law is invalid, and therefore, the federal law "preempts" the state law.³ Thus began the debate over what is a conflict sufficient to require preemption.

A debate over the preemptive effect of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)⁴ on state common law claims has continued for several years, particularly with respect to tort claims. Some courts held that state tort claims were not preempted at all,⁵ while

1. See *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992)(federal airline regulation); *Cipollone v. Liggett Group*, 112 S. Ct. 2608 (1992)(federal cigarette regulation); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 204 (1983)(federal nuclear regulation).

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

3. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819); see also, e.g., *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n.*, 461 U.S. 190, 204 (1983); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

4. 7 U.S.C. §§ 136a-136y (1988 & Supp. V 1993).

5. *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984); *Thornton v. Fondren Green Apartments*, 788 F. Supp. 928 (S.D. Tex. 1992); *Montana Pole & Treating Plant v. I.F. Laucks*, 775 F. Supp. 1339 (D. Mont. 1991); *Stewart v. Ortho*

others held that FIFRA impliedly preempted some state product liability claims.⁶ All agreed that the express language of the statute alone did not preempt state tort claims. Nevertheless, the split of authority⁷ with respect to implied preemption remained.

In *Ciba-Geigy Corporation v. Alter*,⁸ the Arkansas Supreme Court addressed the issue of whether FIFRA preempts Arkansas state common law claims. The claims in that case were against a manufacturer of a product registered with the Environmental Protection Agency (EPA) in accordance with FIFRA. The court concluded that FIFRA did not preempt any Arkansas common law claims.⁹ Since that decision, the United States Supreme Court and several lower courts have issued decisions which call into question the validity of that holding, the primary one being the Supreme Court's recent holding in *Cipollone v. Liggett Group, Incorporated*.¹⁰

In *Cipollone*, the Court addressed the preemption doctrine as it applied to the Federal Cigarette Labeling and Advertising Act.¹¹ In a plurality opinion, the Court held that when an express provision of a statute directly addresses the issue of preemption, that provision will control

Consumer Prods., No. CIV.A.87.4252, 1990 WL 36129 (E.D. La. Mar. 26, 1990); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345 (S.D. Ind. 1990); *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85 (E.D. Pa. 1989); *Wilson v. Chevron Chem. Co.*, No. CIV.A.83.762, 1986 WL 14925 (S.D. N.Y. Dec. 17, 1986).

6. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992); *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991); *Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991); *Hurt v. Dow Chem. Co.*, 759 F. Supp. 556 (E.D. Mo. 1990); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla. 1989); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989); *Watson v. Orkin Exterminating Co.*, 1988 WL 235673 (D. Md. 1988); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987); *Yowell v. Chevron Chem. Co.*, 836 S.W.2d 62 (Mo. Ct. App. 1992); *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992).

7. *See, e.g.*, *Chemical Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941, 948 (9th Cir. 1992)(refusing to pass on the issue of express preemption but noting a great split of authority in this area of the law).

8. 834 S.W.2d 136 (Ark. 1992).

9. *Id.* at 145.

10. 112 S. Ct. 2608 (1992).

11. 15 U.S.C. §§ 1331-39 (1965)(amended by Public Health Cigarette Smoking Act of 1969, 15 U.S.C. §§ 1331-40).

the extent to which state law is preempted.¹² This note will address the effect of the *Cipollone* decision on the holding of the Arkansas Supreme Court in *Alter*.¹³

II. STATEMENT OF THE CASE

Mr. Alter was a farmer in Arkansas County, Arkansas who used a herbicide named Dual 8E on his corn crop.¹⁴ The EPA had approved the labeling¹⁵ for the product, and the chemical itself was registered with the EPA, as FIFRA requires.¹⁶ In addition to the warnings on the label, the manufacturer, Ciba-Geigy Corporation, had made other representations for the product¹⁷ through advertisements¹⁸ and at a meeting between area farmers and company representatives which Alter attended.¹⁹ Alter purchased Dual 8E and applied it to his corn crop.²⁰ During application, a heavy rainfall took place. As a result of the combination of the herbicide and the rainfall, a substantial portion of Alter's corn crop was destroyed.²¹ Alter brought claims

12. *Cipollone*, 112 S. Ct. at 2618.

13. *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136, 145 (Ark. 1992).

14. *Id.* at 139.

15. The labeling was printed material in the box the product was contained in at the time of purchase, and said on page five:

FAILURE TO FOLLOW ALL PRECAUTIONS ON THIS LABEL
MAY RESULT IN POOR WEED CONTROL, CROP INJURY, OR IL-
LEGAL RESIDUES.

Further warnings were in labeling materials found in the box in which the pesticide was contained upon purchase and read as follows, at page six:

Precaution: Injury may occur following the use of Dual 8E under abnormally high soil moisture conditions during early development of the crop.

See id. at 138.

16. *Id.* at 141.

17. These advertisements and representations had absolutely nothing to do with the labeling requirements of FIFRA. These were simply a method used by the manufacturers to sell their product. *Id.* at 138.

18. Advertising was in materials distributed to farmers by Ciba-Geigy and stated that Dual 8E was "the longer lasting grass herbicide." Other such materials said "Crop injury? You don't have to worry when you use Dual. Gives you peace of mind. That's worth alot." *See id.*

19. Alter testified in the trial court that the salesmen told him that the product was a cheaper way of controlling weeds for a longer period of time and that it was safe for application to a corn crop. The salesmen did not tell him that a heavy rainfall could destroy his crop. *Id.*

20. *Id.*

21. *Id.* at 139.

against Ciba-Geigy predicated on the Arkansas common law.²² He based his claims on theories of strict liability, negligence, breach of warranty, and misrepresentation.²³ The strict liability and negligence claims alleged failure to warn due to inadequate labeling.²⁴

Ciba-Geigy argued that FIFRA preempted Alter's inadequate labeling claims because "by imposing certain labeling requirements on pesticide manufacturers, Congress intended . . . to preempt state common law tort claims based on the alleged inadequacy of the labels."²⁵ The court addressed this argument by noting that preemption comes in one of two forms—express or implied.²⁶ The court stated that when preemption is not stated expressly in the statute it may be implied when "the scope of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the state to act."²⁷ The court said it may also be implied when either "compliance with state and federal law is physically impossible, . . . [or] the state law stands as an obstacle" to congressional objectives.²⁸

On the issue of express preemption, the Arkansas Supreme Court noted that no case law existed which supported the proposition that FIFRA expressly preempted state common law claims.²⁹ Consequently, the court concluded that no express preemption had occurred through the language of FIFRA.³⁰ The court proceeded to implied preemption analysis.

In its implied preemption analysis, the court first pointed out that FIFRA's allowance of state sale and use regulation³¹ indicated that Congress never intended com-

22. *Id.* at 140.

23. *Id.*

24. *Id.*

25. *Id.* at 141.

26. *Id.* at 142.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. 7 U.S.C. § 136v(a) (1988).

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.

plete federal regulation of the pesticide labeling field.³² Instead, the court held that Congress had intended for FIFRA to set only minimum standards for pesticide labeling, which the states were free to raise.³³ In making the determination of whether state law actually conflicts with federal law, the court decided to accept the "choice of reaction" theory,³⁴ despite criticisms of that particular theory by other courts.³⁵ This theory says that the company has a choice of paying damages or changing its label; the state is making no additional requirement either way.³⁶ The court accepted that theory by relying on a provision in FIFRA which allows a company to petition the EPA to change a label.³⁷ The availability to the manufacturer of a procedure to change label content was evidence to the court that Congress had not impliedly preempted state common law claims because it was possible to comply with both FIFRA and the Arkansas common law. The court said that if a jury renders a verdict against the manufacturer for inadequate

Id. (emphasis added).

32. Note that FIFRA also says that its primary enforcement power belongs to the states themselves, which means that Congress left a great deal of responsibility to the states. 7 U.S.C. § 136w-1 (1988).

33. *Alter*, 834 S.W.2d at 142-44.

34. This note discusses the "choice of reaction" theory more fully in the text accompanying notes 67-74, *infra*. The D.C. Circuit Court of Appeals originally propounded the theory in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984). That court found that an adverse jury determination would not render compliance with both FIFRA and state common law impossible because the manufacturer could utilize a cost/benefit analysis to determine if it would be cheaper to petition the EPA for a label change or to keep paying damages to injured consumers. Thus, according to the theory the manufacturer could make an informed choice between the two alternatives and react accordingly. The Arkansas Supreme Court expressed reservations about the theory but accepted its methodology in the end. *See Alter*, 834 S.W.2d at 144.

35. The major criticism of the "choice of reaction" approach is that a jury verdict adverse to the manufacturer effectively compels that manufacturer to change the warning so that it conforms with state law. In other words, certain courts believe that the fundamental flaw in the theory is that there is no real choice because manufacturers will not choose the unacceptable alternative of continuing to pay large tort awards to plaintiffs. *See, e.g., Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992); *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991).

36. *See supra* note 33 and accompanying text.

37. *See* 7 U.S.C. § 136a(c)(5)(B) (1988)(stating that the EPA must give prior approval to any label change); 40 C.F.R. § 156.10(a)(1)(vii) (1993)(stating the same thing); *see also Alter*, 834 S.W.2d at 144.

labeling, FIFRA permits that manufacturer to change those warnings so that they also comply with state law.³⁸

The court also rejected the manufacturer's argument that an adverse jury award would, in effect, stand as an obstacle to an alleged congressional intent for uniform labeling of pesticides.³⁹ The court noted that "the EPA requirements permit labeling variations even among products containing the same active ingredient."⁴⁰ Thus, the court stated that this argument "belies the truth."⁴¹

In summary, the court decided that FIFRA did not expressly preempt Arkansas common law damage actions based on pesticide labeling because no prior court had ever reached such a conclusion. The court then noted FIFRA's reservation to the state of sale and use regulation. Because of this reservation and FIFRA's allowance of a manufacturer's ability to change its label, the court concluded that there was no implied preemption. Therefore, the court allowed Arkansas common law claims which were based on a perceived inadequacy in the EPA-approved label.

III. HISTORICAL DEVELOPMENT OF PREEMPTION

In *McCulloch v. Maryland*, the United States Supreme Court held that there were certain instances where Congress, pursuant to its enumerated national powers, could pass laws which became the supreme law of the land and

38. *Alter*, 834 S.W.2d at 144.

39. *Id.*

40. *Id.* (quoting *Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500 (W.D. Mo. 1991)). See also *infra* text accompanying notes 51-60; 7 U.S.C. § 136(q)(1)(G) (1988)(stating that the EPA should determine that the label, submitted by the manufacturer, is "adequate to protect [the public] health and the environment"); 7 U.S.C. § 136(q)(1)(E) (1988)(stating that the EPA is to ensure that the label will be put on the container in a conspicuous fashion, so that persons will see it and understand it "under customary conditions of purchase and use"); 40 C.F.R. §§ 156.10(i)(1)(i), 156.10(h) (1993)(stating that the EPA should determine that the labeling contains warnings and directions for use that are "adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment"). Thus, there is no express requirement that like products be labeled in like fashion. The result of each individual manufacturer submitting his own label has been that there is little uniformity in labeling of pesticides. *Alter*, 834 S.W.2d at 144.

41. *Alter*, 834 S.W.2d at 144.

overrode contrary state law.⁴² Since that decision, certain principles have evolved which control preemption analysis. These general rules of federal preemption are the judiciary's attempt to effectuate congressional intent.⁴³ The intent of Congress is always the touchstone in preemption analysis, and a presumption exists that Congress did not intend to take away the traditional functions of the individual states.⁴⁴ Thus, a clear indication of congressional intent is imperative for a court to determine whether Congress intended to take away powers that are normally reserved to the states.⁴⁵ An express statement in the statute may express an intent to preempt.⁴⁶ Moreover, certain situations exist where there is an implied intent to preempt. One of these situations occurs when the federal statute pervasively regulates the field it covers.⁴⁷ The rationale is that Congress has so extensively regulated the area of concern that it has left no room for the states to regulate.

The other situation in which a court will find implied preemption is where the state law in question actually conflicts with federal law.⁴⁸ A conflict can occur if it is impossible for a person to comply with both the state and the federal law because they are directly contrary to each other⁴⁹ or if the state law thwarts the intent of Congress.⁵⁰ In either situation, a court will determine that the congressional intent to preempt is implied, so that the congressional objectives of the statute may be attained.

42. 17 U.S. (4 Wheat.) 316 (1819).

43. *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992).

44. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

45. *Id.*

46. *Morales*, 112 S. Ct. 2031, 2036 (1992). The court noted that "[p]re-emption may be either express or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Id.* (citing *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95 (1983)).

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

48. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

49. *Silkwood*, 464 U.S. at 248; *Florida Lime & Avocado Growers, Inc.*, 373 U.S. at 142-43.

50. *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 204 (1983); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

It is against this backdrop that this note examines FIFRA. Congress originally passed FIFRA in 1947 as purely a licensing and labeling statute.⁵¹ It "was designed to work in harmony with the uniform state insecticide, fungicide and rodenticide act which was adopted in many States."⁵² This original version of FIFRA only prohibited interstate commerce in unregistered pesticides.⁵³ However, Congress responded to public health and environmental concerns in 1972 by amending FIFRA to become a comprehensive regulatory statute. The amended FIFRA allowed the Administrator of the EPA (Administrator) to control the registration and labeling of pesticides.⁵⁴ At that time, Congress enacted the following provision:

§ 136v. Authority of 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.⁵⁵

51. 61 Stat. 163 (1947), *as amended*, 7 U.S.C. §§ 136-136y (1988 & Supp. V 1993); *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984); Fitzgerald v. Malinckrodt, Inc., 681 F. Supp. 404, 406 (E.D. Mich. 1987).

52. Worm v. American Cyanamid Co., 970 F.2d 1301, 1305 (4th Cir. 1992)(quoting from S. REP. NO. 838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 3999).

53. S. REP. NO. 838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993. To register a product the manufacturer only had to show that common use of the product would not be "injurious to man, vertebrate animals, or desirable vegetation," and FIFRA did not prohibit misuse of registered pesticides or even regulate those pesticides used only in intrastate commerce. *Id.* at 3993.

54. 7 U.S.C. § 136a(c)(5) (1972).

55. 7 U.S.C. § 136v(a)-(b) (1972); Congress amended this language in 1988 to add the heading "In general" to subsection (a) and "Uniformity" to subsection (b), so that it now reads as follows:

§ 136v. Authority of States

(a) In general

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.

Current regulations provide that if the Administrator determines that a given pesticide will perform its stated function without unreasonable interference with the environment the EPA must register the pesticide.⁵⁶ During the registration determination, the manufacturer also submits a proposed label for EPA approval.⁵⁷ There is really no uniformity of pesticide labeling because each manufacturer makes its own label. So long as the Administrator finds that the label is "adequate to protect [the public] health and the environment"⁵⁸ and that placement of the label is conspicuous and understandable "under customary conditions of purchase and use"⁵⁹ the EPA approves the label.⁶⁰

As the Arkansas Supreme Court stated in *Alter*, no prior cases had held that the preemption provision in FIFRA expressly preempted state common law damage actions.⁶¹ Also, the United States Supreme Court had previously held in *Wisconsin Public Intervenor v. Mortier* that Congress did not pervasively regulate the entire field of pesticides because of FIFRA's reservation of sale and use regulation to the states.⁶² On the other hand, some federal courts had found a congressional intent to pervasively regulate the "sub-field" of pesticide labeling. This led them to a finding of implied preemption. Such a finding is not con-

(b) Uniformity

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.

7 U.S.C. § 136v(a)-(b) (1988).

56. 7 U.S.C. § 136a(c)(5)(C) (1988).

57. *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 406 (E.D. Mich. 1987).

58. 7 U.S.C. § 136(q)(1)(G) (1988).

59. *Id.* § 136(q)(1)(E).

60. *See* 40 C.F.R. §§ 156.10(i)(1)(i), 156.10(h) (1991)(spelling out registration requirements of EPA and stating that the EPA may not allow sale of pesticide unless it has determined that the labeling contains warnings and directions for use that are "adequate to protect the public from fraud and from personal injury, and to prevent unreasonable adverse effects on the environment"); *see also* 7 U.S.C.a(c)(5)(B) (1988)(stating that EPA must give prior approval to any label change); 40 C.F.R. §§ 156.10(a)(1)(vii), 156.10(a)(1)(vii) (1991)(stating the same thing).

61. *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136, 142 (Ark. 1992).

62. *See Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2483 (1992)(stating that the language in FIFRA which prohibits additional or different requirements "would be pure surplusage if Congress had intended to occupy the entire field of pesticide regulation").

trary to FIFRA because the statute only reserves the regulation of the sale and use of pesticides to the states.⁶³ In addition, some courts had found a conflict when a state jury finds a warning inadequate in spite of the EPA's prior approval of that warning.⁶⁴ This led to a finding of implied preemption because of the inherent "conflict" between the jury verdict and the EPA-approved label.⁶⁵

The first court to decide a case involving FIFRA's possible preemption of a state common law claim was the Court of Appeals for the District of Columbia Circuit in *Ferebee v. Chevron Chemical Company*.⁶⁶ The court addressed a claim that Chevron, a pesticide manufacturer, had provided inadequate warnings on the label of one of its products.⁶⁷ After determining that the specific language did not expressly preempt state claims, the court held that Chevron's compliance with FIFRA and EPA labeling requirements did not immunize it from state remedies based on the inadequacy of the labeling.⁶⁸

The court said that state common law tort claims "have broader compensatory goals" than the labeling requirements in FIFRA.⁶⁹ It further noted that such claims did not have a regulatory effect within the meaning of FIFRA because they did not require a manufacturer to change its label.⁷⁰ The manufacturer could choose not to sell in Maryland or could continue "to use the EPA-approved label and . . . simultaneously [pay] damages to successful tort plaintiffs."⁷¹ The court held that the availability of this choice avoided any conflict with congressional intent. This

63. See *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992); *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991).

64. *Id.* But see *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984) (favoring an allowance of compensation of the victim of inadequate labeling by the manufacturer).

65. *Arkansas-Platte & Gulf Partnership*, 959 F.2d 158; *Papas*, 926 F.2d 1019.

66. 736 F.2d 1529 (D.C. Cir. 1984).

67. *Id.* at 1532-33.

68. *Id.* at 1540-43.

69. *Id.* at 1540.

70. *Id.* at 1541.

71. *Id.*

theory has been called the "choice of reaction" theory.⁷² Many courts, including the Arkansas Supreme Court in *Alter*, have accepted this theory when confronted with similar cases.⁷³

The Eleventh Circuit Court of Appeals rejected the *Ferebee* decision in *Papas v. Upjohn Company*.⁷⁴ In *Papas*, the court held that Congress had impliedly preempted all state common law claims based on the inadequacy of the EPA-approved labeling.⁷⁵ The court found that the language of FIFRA showed an implied congressional intent to completely regulate the sub-field of pesticide labeling and that state jury compensation on claims of label inadequacy would impede that intent.⁷⁶ That decision was soon followed in *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Incorporated*.⁷⁷ The Tenth Circuit agreed with the analysis of the Eleventh Circuit in *Papas*.⁷⁸ This approach became the other accepted method among the federal judiciary for applying FIFRA in cases involving state claims against pesticide manufacturers.⁷⁹ However, the holding of the United States Supreme Court in *Cipollone* made it clear that this approach was incorrect.

In *Cipollone*, the plaintiff claimed that her long-term use of cigarettes had caused her cancer.⁸⁰ She made state

72. See, e.g., *Arkansas-Platte & Gulf Partnership*, 959 F.2d at 162 (referring to this theory as the "choice of reaction" analysis).

73. See, e.g., *Thornton v. Fondren Green Apartments*, 788 F. Supp. 928 (S.D. Tex. 1992); *Montana Pole & Treating Plant v. I.F. Laucks and Co.*, 775 F. Supp. 1339 (D. Mont. 1991); *Stewart v. Ortho Consumer Prods.*, No. CIV.A.87.4252, 1990 WL 36129 (E.D. La. Mar. 26, 1990); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F. Supp. 1345 (S.D. Ind. 1990); *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85 (E.D. Pa. 1989); *Wilson v. Chevron Chem. Co.*, No. CIV.A.83.762, 1986 WL 14925 (S.D. N.Y. Dec. 17, 1986); *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992).

74. 926 F.2d 1019 (11th Cir. 1991).

75. *Id.* at 1024-25.

76. *Id.*

77. 959 F.2d 158 (10th Cir. 1992).

78. *Id.* at 161-62.

79. See, e.g., *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992); *Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991); *Hurt v. Dow Chem. Co.*, 759 F. Supp. 556 (E.D. Mo. 1990); *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799 (M.D. Fla. 1989); *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989); *Watson v. Orkin Exterminating Co.*, 1988 WL 235673 (D. Md. 1988); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404 (E.D. Mich. 1987).

80. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2613 (1992).

law claims against a group of cigarette manufacturers based on five theories of recovery: design defect, failure to warn, breach of an express warranty, fraudulent misrepresentation, and conspiracy to defraud the public.⁸¹ The manufacturers argued that the Federal Cigarette Labeling and Advertising Act of 1969 preempted her state law claims.⁸²

Although the result was a plurality opinion, all of the Justices agreed on the test for determining whether preemption had occurred. The Court decided that an express statement of preemption in the statute is controlling, and that there is no need to look for implied intent in such a case.⁸³ The Court suggested a narrow application of this test because of the presumption against disturbing the historic police powers of the states.⁸⁴ It also interpreted the "requirement or prohibition" language of the Cigarette Labeling and Advertising Act⁸⁵ to include state common law claims.⁸⁶ This holding seemingly rejected the "choice of reaction" analysis that the D.C. Circuit had utilized in *Ferebee* because a jury verdict against a manufacturer in a state common law claim was considered a state "requirement or prohibition." According to the Court, the Federal Cigarette Labeling and Advertising Act expressly preempted such a "requirement or prohibition."⁸⁷

The *Cipollone* Court stated a new test for cases involving the federal preemption question. Before the *Cipollone*

81. *Id.*

82. *Id.*; see also 15 U.S.C. §§ 1331-40 (1965, Supp. I 1969 & Supp. II 1984).

83. *Cipollone*, 112 S. Ct. at 2618 (stating that an express provision provides a "reliable indicium of congressional intent with respect to state authority")(citing *Malone v. White Motor Corp.*, 435 U.S. 497, 505 (1978)).

84. *Cipollone*, 112 S. Ct. at 2618.

85. See Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, 84 Stat. 87, as amended by 15 U.S.C. §§ 1331-40. Subsection 5(b) of the 1969 act contained the preemption provision the Court examined in *Cipollone* and stated:

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

Id.

86. See *Cipollone*, 112 S. Ct. at 2620, where Justice Stevens states that "[t]he phrase '[n]o requirement or prohibition' sweeps broadly and suggests no distinction between positive enactments and common law."

87. *Id.*

decision, a court would continue its preemption inquiry even if a statute had a provision which expressly defined the scope of the statute's preemptive effect.⁸⁸ The inquiry continued so that a determination could be made as to whether there was implied preemption.⁸⁹ After the *Cipollone* holding, when the statute in question contains a provision which expressly addresses the preemption issue, there is no need to look for implied preemption.⁹⁰ The express provision will be the limit of the preemptive reach of the statute. However, this holding has not answered every question for those with claims based on products labeled in conformity with FIFRA. FIFRA's provision which bans additional or different state "requirements" on labeling of pesticides is very similar to the preemptive language of the Cigarette Labeling and Advertising Act. Thus, the issues of applicability of the "plain language" test and of the meaning of state "requirements" under FIFRA remain.

IV. ANALYSIS

The preemption analysis in *Cipollone* raises questions about whether the same analysis is applicable to FIFRA's supposed preemption of state common law damage actions. One central question is whether the *Cipollone* holding has any application outside of the Federal Cigarette Labeling and Advertising Act.⁹¹ If it does, the question remains whether the state imposed "requirement or prohibition" that was preempted in *Cipollone* is the same as the state

88. See, e.g., *supra* text accompanying notes 14-41; see also, e.g., *Natural Resources Defense Council v. Envtl. Protection Agency*, 725 F.2d 761, 768 (D.C. Cir. 1984)(stating that inquiry into statutory meaning cannot cease at the bounds of a statute's 'plain' words").

89. See *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). The Court noted that, even in cases where the express language is unambiguous, courts often look to legislative history to decide if Congress has shown some "clearly expressed" legislative intent that is contrary to the plain language and that would tend to rebut "the strong presumption that Congress expresses its intent through the language it chooses." *Id.* *Cipollone* rejects that type of approach in determining congressional intent to preempt. *Cipollone*, 112 S. Ct. at 2620.

90. See *supra* note 83 and accompanying text.

91. See, e.g., *Couture v. Dow Chem. U.S.A.*, 804 F. Supp. 1298, 1301 (D. Mont. 1992).

"requirements" prohibited in FIFRA.⁹² If these two clauses are indistinguishable, the question of which state law claims FIFRA preempts remains. Finally, the *Cipollone* decision calls into question the analysis of the Arkansas Supreme Court in *Alter* because *Alter* was based on implied preemption analysis and the "choice of reaction" theory.⁹³

A. The Applicability of *Cipollone* Outside the Cigarette Labeling and Advertising Act

Since the *Cipollone* decision, the debate among courts applying the new test has concerned two distinct arguments. Some jurisdictions have found that there is no new test because the United States Supreme Court employed the usual preemption analysis, with all of the same categories. In addition, the Court looked to the legislative history of the Cigarette Labeling and Advertising Act, even though the statute contained an express preemption provision. These considerations persuaded some courts that *Cipollone* did not announce a new test for any statute other than the Cigarette Labeling and Advertising Act.⁹⁴ Also, some courts have held that there is no real significance in the decision outside the context of cigarette labeling and advertising because the Supreme Court used the specific legislative history of that Act to come to its conclusions.⁹⁵

The debate over whether *Cipollone* has had an effect on state common law tort claims outside the context of ciga-

92. See, e.g., *King v. E.I. Dupont De Nemours and Co.*, 996 F.2d 1346 (1st Cir. 1993); *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128 (E.D. N.Y. 1992).

93. See *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136, 144 (Ark. 1992).

94. See, e.g., *MacDonald v. Monsanto Co.*, 813 F. Supp. 1258, 1261 (E.D. Tex. 1993)(stating that "the Tenth Circuit . . . failed to take into account the significant differences between the statutes the Supreme Court interpreted in *Cipollone* and FIFRA"); *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128 (E.D. N.Y. 1992)(stating that the "requirements" language was much more restrictive in FIFRA because of the language and history of the act); *Feldman v. Lederle Lab.*, 592 A.2d 1176, 1192 (N.J. 1991)(interpreting preemptive scope of the Food and Drug Act before *Cipollone*, where the court said that state common law claims could be preempted if it was stated explicitly, so there was no doubt about intent); *Yowell v. Chevron Chem. Co.*, 836 S.W.2d 62 (Mo. App. S.D. 1992)(finding *Cipollone* to be inapplicable, but still finding implied preemption of state law claims under FIFRA); *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931, 934 (Nev. 1992)(using implied preemption analysis on FIFRA claims after the *Cipollone* decision).

95. See, e.g., *Couture*, 804 F. Supp. at 1301; *Burke*, 797 F. Supp. at 1137.

rettes is based on apparent inconsistencies in the opinion. The Court announced a "plain language" test for a statute with an express preemption provision and said there was no reason to look past the express language in such a provision.⁹⁶ Nevertheless, it proceeded to analyze the legislative history.⁹⁷ Such analysis has normally been reserved for implied preemption searches.⁹⁸ The Court arguably acted inconsistently by looking to the legislative history of the statute after announcing a plain language analysis because the statutes at issue in *Cipollone* had express provisions dealing with preemption.⁹⁹

Because the Court used the legislative history and not just the express language, some lower courts concluded that the test stated in *Cipollone* was confined to that case.¹⁰⁰ Arguably, the Court searched for evidence of implied intent rather than relying solely on the text of the preemption provision. Therefore, these courts have seen no need to abandon pre-*Cipollone* decisions which found no preemption of state common law claims.¹⁰¹ The history of FIFRA shows that a major concern in enacting the relevant language was the environment¹⁰² and not the protection of the individual. This history, upon a cursory examination, would seem to have little in common with the purpose of the Cigarette Labeling and Advertising Act, which Congress enacted out of

96. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992).

97. *Id.* at 2618-22.

98. See *supra* text accompanying notes 31-41.

99. See *Cipollone*, 112 S. Ct. at 2616-17.

100. See *infra* note 102 and accompanying text; see also *supra* note 94 and accompanying text.

101. See *supra* note 73 and accompanying text.

102. The purpose of the 1972 amendments to FIFRA, which completely changed the original FIFRA that had been enacted in 1947, was to protect the environment and public health. H.R. REP. NO. 939, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 3474, 3476-77. This was geared more toward prevention of health problems than to compensation, as Congress's allowance of only injunctive relief when a manufacturer violated FIFRA shows. S. REP. NO. 838, 92d Cong., 2d Sess. 32252-53 (1972), reprinted in 1972 U.S.C.C.A.N. 3993, 4125. Another example of this is the more recent decision of Congress to require the EPA to issue regulations to prevent exposure of agricultural workers to health hazards of pesticides. H.R. REP. NO. 939, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 3474, 3515. Congressional passage at this late date indicates that Congress is only now exhibiting an awareness of the health consequences of human exposure to pesticides.

consumer concern.¹⁰³ Thus, a court determining the preemption issue in FIFRA might not rely on *Cipollone*.

It is likely, however, that *Cipollone's* holding is not confined to cigarette labeling and advertising. First, the purpose of the Court's venture into the legislative history of the Federal Cigarette Labeling and Advertising Act was to determine the exact meaning that Congress had given to the "requirement or prohibition" language of the express preemption provision.¹⁰⁴ A court can apply the "plain language" test to any federal statute, regardless of its legislative history. The test itself is not dependent upon the idiosyncrasies of the Federal Cigarette Labeling and Advertising Act. Second, the Court said not only was the plain language of the statute to be determinative, but also the same language was to be construed very narrowly.¹⁰⁵ This exhibited consistency with previous case law which held that there is a presumption against preempting state law; Congress must clearly express an intent to rebut that presumption.¹⁰⁶ For those two reasons, a court should use the preemption analysis of *Cipollone* to determine the extent of FIFRA's preemption.

B. Judicial Interpretation of *Cipollone's* Effect on FIFRA

Under *Cipollone's* plain language test, the fact that FIFRA has an express preemption provision informs a court that the plain language of that provision controls. This test will have far-reaching effects on courts that engaged in implied preemption analysis in their determination of FIFRA's scope of preemption because their analysis proceeded past the express language of its preemption provision.¹⁰⁷ Since the *Cipollone* holding, some courts have abandoned pre-*Cipollone* decisions and have found express preemption of state law claims under FIFRA. Much of the rationale behind these recent decisions is the similar lan-

103. See generally S. REP. NO. 566, 91st Cong. 1st Sess. (1969).

104. See *Cipollone*, 112 S. Ct. at 2618-22.

105. *Id.* at 2618.

106. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

107. See, e.g., *Montana Pole & Treating Plant v. I. F. Laucks and Co.*, 775 F. Supp. 1339 (D. Mont. 1991); *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992).

guage of the preemption provisions in FIFRA and the Cigarette Labeling and Advertising Act.

For instance, the Tenth and Eleventh Circuits were the first to apply the new plain language test to FIFRA.¹⁰⁸ The United States Supreme Court remanded the original holdings in *Arkansas-Platte* and *Papas* for reconsideration in light of the *Cipollone* decision.¹⁰⁹ Those courts had used implied preemption analysis in their original holdings.¹¹⁰ Both courts subsequently found that the plain language of FIFRA caused failure to warn claims to be expressly preempted.¹¹¹ These courts predicated their holdings on a finding that such claims might result in adverse jury verdicts which are effectively "requirements" based on the inadequacy of the labeling.¹¹² However, neither court ruled out other state law claims that do not relate to the adequacy of the EPA-approved label.¹¹³ Thus, both courts impliedly found the similar language of FIFRA and the Cigarette Labeling and Advertising Act to be indistinguishable.

The Tenth and Eleventh Circuits attempted to follow the United States Supreme Court's construction of the "requirement or prohibition" language of the Cigarette Labeling and Advertising Act. The Court read that clause to include state law damage actions for the first time in *Cipollone*.¹¹⁴ While the Tenth and Eleventh Circuits implied that FIFRA's "requirements" language was substantially the same, one district court has expressly held that similar language to be "indistinguishable."¹¹⁵ Because the "requirement or prohibition" language includes some state common

108. *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993).

109. *Arkansas-Platte & Gulf Partnership*, 113 S. Ct. 314 (1992); *Papas*, 112 S. Ct. 3020 (1992).

110. See *Arkansas-Platte & Gulf Partnership*, 959 F.2d 158; *Papas*, 926 F.2d 1019.

111. See *Papas*, 985 F.2d at 518-19; *Arkansas-Platte & Gulf Partnership*, 981 F.2d at 1179.

112. See *Papas*, 985 F.2d at 518-19; *Arkansas-Platte & Gulf Partnership*, 981 F.2d at 1179.

113. See *Papas*, 985 F.2d at 518-19; *Arkansas-Platte & Gulf Partnership*, 981 F.2d at 1179.

114. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992).

115. *King v. E.I. Dupont De Nemours and Co.*, 996 F.2d 1346, 1349 (1st Cir. 1993).

law claims in *Cipollone*, it arguably means the same in the context of FIFRA.

A few other courts have found that FIFRA preempts some state common law damage actions after *Cipollone*, but those same courts often disagree about which claims are preempted.¹¹⁶ This debate has not been resolved, as the current confusion of the district courts in applying the *Cipollone* holding illustrates.¹¹⁷ Some find no express preemption of state claims by FIFRA while others do.¹¹⁸ The resulting confusion provides little guidance for a state court trying to apply a preemption formula.

One aspect of *Cipollone* is not confusing: courts must make a preemption analysis, regardless of whether there is a positive legislative enactment, such as a statute, or a state

116. *King v. E.I. Dupont De Nemours and Co.*, 996 F.2d 1346 (1st Cir. 1993)(holding that only failure to warn claims based on label are expressly preempted); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993)(holding that failure to warn claims are expressly preempted); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993)(holding that some failure to warn claims are expressly preempted); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993)(holding that some failure to warn claims are expressly preempted); *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992)(holding that failure to warn claims and oral representations made in connection with a specific sale are expressly preempted); *Couture v. Dow Chem. U.S.A.*, 804 F. Supp. 1298 (D. Mont. 1992)(holding that all state law claims are allowed by the express language); *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128 (E.D. N.Y. 1992)(holding that FIFRA expressly preempts only claims of mislabeling based on the warning attached to the pesticide container and nothing else); *Brennan v. Dow Chem. Co.*, 613 So. 2d 131 (Fla. App. 4 Dist. 1993)(allowing some failure to warn claims if not based on product labeling); *Yowell v. Chevron Chem. Co.*, 836 S.W.2d 62 (Mo. App. S.D. 1992)(finding that FIFRA impliedly preempted state law claims, despite *Cipollone* holding); *Davidson v. Velsicol Chem. Corp.*, 834 P.2d 931 (Nev. 1992)(finding FIFRA impliedly preempted state law claims, despite *Cipollone* holding); *Macrie v. SDS Biotech Corp.*, 630 A.2d 805 (N.J. Super. Ct. App. Div. 1993)(finding that FIFRA only expressly preempts failure to warn claims based on a specific sale).

117. *See, e.g., Kolich v. Sysco Corp.*, 825 F. Supp. 959 (D. Kan. 1993)(finding that all state common law claims based on the inadequacy of the EPA-approved labeling are expressly preempted); *MacDonald v. Monsanto Co.*, 813 F. Supp. 1258 (E.D. Tex. 1993)(finding that no state common law claims in disputes over pesticides labeled under FIFRA are expressly preempted); *Couture v. Dow Chem. U.S.A.*, 804 F. Supp. 1298 (D. Mont. 1992)(finding that no state common law claims in disputes over pesticides labeled under FIFRA are expressly preempted); *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128 (E.D. N.Y. 1992)(finding that FIFRA expressly preempts only claims of mislabeling based on the warning attached to the pesticide container and nothing else).

118. *See supra* text accompanying notes 5-6.

common law claim at issue. The United States Supreme Court made it clear that a jury can make a state requirement or prohibition just as easily as a legislature.¹¹⁹ However, prior Supreme Court cases indicate that jury awards are not *always* the same as state legislative enactments.¹²⁰ Thus, the question is whether state claims based on FIFRA products are the same as a state legislative enactment.

C. Comparison of FIFRA to the Cigarette Labeling and Advertising Act

The plain language test the Court announced in *Cipollone* is a broad test that can be applied outside the context of the Cigarette Labeling and Advertising Act. In *Cipollone*, the Court found the preemption provision's prohibition of a state-imposed "requirement or prohibition" to include state law damage claims. Thus, the Court determined that the failure to warn claim in that case was prohibited because it was such a state-imposed "requirement or prohibition." The Court has never confronted the issue of whether the similar language in FIFRA preempts state common law claims.¹²¹ FIFRA contains a similar prohibition of different or additional state "requirements." Thus, a comparison of the two statutes should be beneficial to a determination of whether the similar language of FIFRA preempts state law claims.

First, however, it might help to see the vast amount of common law that would be wiped out if a court considered the language to be the same. If a court reads the similar language of the two statutes to be indistinguishable there is no doubt about which state claims FIFRA preempts. The Court in *Cipollone* stated that any claim based on smoking and health was preempted, which prohibited a state claim

119. See *supra* text accompanying notes 84-87.

120. See, e.g., *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984) (depriving plaintiffs of remedies makes it less likely that a statute will preempt state common law actions than state legislative action).

121. *But see Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2483 (1991) (holding that the statute does leave a great deal of regulation to the states through its "sale and use" language); see also *supra* notes 56-63 and accompanying text.

based on failure to warn in the cigarette label.¹²² Accordingly, the same interpretation in the context of FIFRA means the Act preempts state claims based on the alleged inadequacy of an EPA-approved label. This would include all failure to warn, misrepresentation, and breach of warranty claims based on the label or labeling. Consequently, a court should determine which claims are based on the “label” or on “labeling.”

To determine which claims would be preempted under this interpretation of *Cipollone*, one must first look at the “labeling and packaging”¹²³ language in FIFRA. Those definitions are critical to a determination of which state law claims, if any, impose different or additional state “requirements” on the EPA-approved label. Those definitions state as follows:

(1) Label¹²⁴

The term “label” means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling

The term “labeling” means all labels and all other written, printed, or graphic material—

(A) accompanying the pesticide or device at any time; or

(B) to which reference is made on the label or in literature accompanying the pesticide or device¹²⁵

FIFRA uses the word “packaging” interchangeably with container or retail package. Although it gives no specific definition for any of those terms, they appear to refer to the container in which the manufacturer places the pesticide,

122. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2621-22 (1992).

123. See 7 U.S.C. § 136v(b) (1988) (“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.”)(emphasis added).

124. This definition is included because the definition of “labeling” refers to the word “label.” Thus, this word’s definition is also important. See 7 U.S.C. § 136(p) (1988).

125. *Id.*

along with other wrappers in which the container itself may be placed for retail sale.

The Ninth Circuit held that “label” and “labeling” include all things accompanying the pesticide except “point of sale” warnings, which are written warnings given only at the point of retail sale.¹²⁶ The court said that the language only includes warnings which accompany the product during consumer use. However, the plain language of FIFRA states that “labeling” includes any label or other printed material “accompanying the pesticide . . . *at any time.*”¹²⁷ A point of sale warning is included in such a definition because it accompanies the product at retail sale. Thus, FIFRA’s preemption provision includes state “requirements” on point of sale warnings.

The legislative history of the “label” and “labeling” definitions also supports the proposition that FIFRA preempts state requirements on point of sale warnings. First, the definitions have remained essentially unchanged since the enactment of FIFRA in 1947.¹²⁸ Second, Congress stated in 1947 that it intended “labeling” to refer not only to the label on the container and/or the retail packaging,

126. These are warnings which are not on the container or which do not accompany the pesticide after purchase. See *Chemical Specialties Mfrs. Ass’n v. Allenby*, 958 F.2d 941, 948 (9th Cir. 1992).

127. See 7 U.S.C. § 136(p) (1988).

128. The definitions of “label” and “labeling” under the original FIFRA stated:

(r) The term “label” means the written, printed, or graphic matter on, or attached to, the . . . [pesticide] . . . or device or the immediate container or wrapper of the retail package, if any there be, of the . . . [pesticide] . . . or device.

(s) The term “labeling” means all labels and other written, printed, or graphic matter—

(1) upon the . . . [pesticide] . . . or device or any of its containers or wrappers;

(A) accompanying the . . . [pesticide] . . . or device at any time;

(B) to which reference is made on the label or in literature accompanying the . . . [pesticide] . . . or device

Pub. L. No. 47-104, §§ 2r-2s (1947). The changes were basically made in an attempt to modernize the language. 1947 U.S.C.C.A.N. 170, 1203. For example, this original version referred to pesticides as “economic poisons.” *Id.*

but also to “any printed matter accompanying the . . . [pesticide] . . . at any time.”¹²⁹

For these two reasons, Congress intended that FIFRA include point of sale warnings. Thus, FIFRA preempts even those state requirements that are as attenuated from the actual product as are point of sale warnings. A finding that the language of FIFRA and the Cigarette Labeling and Advertising Act are indistinguishable would therefore take away much of a consumer’s ability to obtain compensation. The question of whether state law claims are state “requirements” with respect to FIFRA remains. Only a comparison of the Cigarette Labeling and Advertising Act and FIFRA will provide an answer.

Although the point could be made that the two statutes are distinguishable because of their respective legislative histories, there are many similarities in those histories. One such similarity is a congressional concern for the consumer. The history of the “requirement or prohibition” language in the Cigarette Labeling and Advertising Act shows that Congress was concerned with protecting the health of the public.¹³⁰ In response to that concern, Congress decided that a warning about the health effects of smoking cigarettes should be placed on the cigarette packaging.¹³¹

Similarly, the legislative history of FIFRA indicates that Congress was concerned about protection of the consumer of pesticides when it passed the “requirements” language.¹³² It is true that environmental concerns primarily spurred the initial congressional action to add the preemp-

129. 1947 U.S.C.C.A.N. at 1203; *see also* *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993)(holding that “point of sale” warnings are to be treated the same as warnings on the container or retail package, and are therefore expressly preempted).

130. S. REP. NO. 566, 91st Cong., 1st Sess. (1969).

131. *Id.*; *see also* 15 U.S.C. §§ 1331-40 (1969); *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2613 (1992). In *Cipollone*, the Supreme Court stated the warning as follows:

WARNING: THE SURGEON GENERAL HAS DETERMINED THAT
CIGARETTE SMOKING IS DANGEROUS TO YOUR HEALTH.

Id.

132. *See supra* note 102 and accompanying text (where it was noted that compensation of injured individuals was not necessarily recognized, but prevention of injury to persons who might potentially be exposed to such pesticides was a concern).

tion language to FIFRA.¹³³ However, the legislative history and the requirements of EPA registration and premarket approval for pesticides and their labeling illustrate a concern for protection of the consumer.¹³⁴ Because the two statutes have this consumer concern in common, one might read the similar language to be indistinguishable.

A second issue that spurred Congress to pass the Cigarette Labeling Act was a desire for uniformity in cigarette labeling.¹³⁵ Because of that concern, Congress required a warning on all cigarette packages and advertisements.¹³⁶ Likewise, Congress indicated a desire for uniform decision-making in the labeling of pesticides registered under FIFRA.¹³⁷ Partly due to that concern, Congress passed the preemption provision under discussion.¹³⁸

In passing FIFRA, Congress was concerned that certain states and localities would impose labeling requirements that differed from EPA standards.¹³⁹ Congress said that one purpose of subsection (a) of the preemption provision was to prevent manufacturers from "formulating different variations of the same pesticide to meet local needs."¹⁴⁰ Congress also wanted the EPA to use uniform decisionmaking procedures in evaluating manufacturer data.¹⁴¹ Finally, Congress added the heading to subsection (b) entitled "Uniformity."¹⁴² All of these actions are indications of congressional intent to have uniformity in pesticide labeling. Thus, this indication of a desire for

133. See *supra* note 102 and accompanying text.

134. See *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993).

135. S. REP. NO. 566, 91st Cong., 1st Sess. (1969).

136. *Id.*

137. See *infra* notes 139-42 and accompanying text.

138. *Id.*

139. S. REP. NO. 838, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 3993, 4111-12.

140. *Id.*

141. H.R. REP. NO. 343, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S.C.C.A.N. 1966, 2023.

142. 7 U.S.C. § 136v(b) (1988). Subsection (b) is the same section which contains the prohibition of different or additional state "requirements" on pesticide labeling or packaging. *Id.*

uniformity is another similarity between the two statutes that might make the similar language "indistinguishable."

A court should not read these statutes to be indistinguishable, however. Although FIFRA and the Cigarette Labeling and Advertising Act have a concern for the consumer in common, the differences between the weight of that concern indicate that courts should treat the two statutes differently. As noted, Congress exhibited some concern for consumers when it passed both acts.¹⁴³ However, the concern for consumers was not the major motivation behind FIFRA. Instead, Congress was more concerned with the environment.¹⁴⁴ The failure to include a compensatory or remedial provision in FIFRA also indicates a lack of consumer motivation behind Congress' action and a tolerance of state common law claims.¹⁴⁵

It is true that the Supreme Court in *Cipollone* was willing to forego compensation of the consumer in reliance on the plain language of the statute in the context of the Cigarette Labeling and Advertising Act.¹⁴⁶ However, the similar language in FIFRA should have a different result. This is because the Cigarette Labeling and Advertising Act is concerned with only one product, while FIFRA regulates literally thousands of products.¹⁴⁷ The public is probably exposed to pesticides on a more frequent basis, and through less personal choice, than to cigarettes because of the use of pesticides in growing most food crops, in caring for lawns, in exterminating household pests, and other uses.¹⁴⁸ Thus, FIFRA should not be interpreted in the same manner. State common law remedies are needed to protect the general consumer.

143. See *supra* text accompanying notes 130-34.

144. H.R. REP. NO. 939, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 3474, 3476-77.

145. See 7 U.S.C. §§ 136a-136y (1988 & Supp. V 1993)(failing to give remedial provision).

146. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992).

147. See Robert Perlis, *The Information Explosion: The Push For Data on Existing Pesticides*, 4 NAT. RESOURCES & ENV'T 3, 6 (1990)(stating that in 1989, "there were approximately forty-four thousand individual pesticide products registered in the United States").

148. *Id.*

The United States Supreme Court supported such a view in *Silkwood v. Kerr-McGee Corporation*.¹⁴⁹ The Court allowed punitive damages against a nuclear plant because there was no remedial provision provided in the Atomic Energy Act. The Court said that it was "difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct."¹⁵⁰ Similarly, Justice Blackmun's dissent stated that the "absence of federal regulation governing the compensation of victims of nuclear accidents is strong evidence that Congress intended the matter to be left to the states."¹⁵¹ Likewise, Congress' failure to include a remedial provision in FIFRA should have the same evidentiary value.

Aside from the lack of a remedial provision in FIFRA, there are other reasons to interpret the "requirements" language not to include state law damage actions.¹⁵² These reasons stem from the unclear language Congress employed in the preemption section of FIFRA. First, subsection 136v(a) and subsection 136v(b)¹⁵³ suggest that Congress only intended to preempt positive state legislative enactments and not common law damage actions. Subsection (a) provides that "[a] State may regulate the sale or use of [pesticides]" while subsection (b) provides that "[s]uch State shall not impose [additional requirements]."¹⁵⁴ The use of the word "such" in subsection (b) suggests that subsection will only preempt a state law when the state seeks to regulate the sale or use of pesticides via subsection (a).

Second, Justice Blackmun, in a dissenting opinion, has argued that compensation of victims does not necessarily "regulate" within the meaning of Congress.¹⁵⁵ Blackmun

149. 464 U.S. 238 (1988).

150. *Id.* at 251.

151. *Id.* at 264 n.7 (Blackmun, J., dissenting).

152. These reasons are also in addition to those put forth in *Ferebee*. See *supra* text accompanying notes 66-71.

153. See 7 U.S.C. § 136v(a)-(b) (1988).

154. *Id.*

155. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 264-67. There, the Court said that Congress normally intends to leave compensatory schemes intact. Thus, the prohibition of state "regulation" of certain areas in the preemption provision with which the Court was concerned there did not include state compensatory claims, because Congress "intended to rely solely on federal expertise in setting

further stated that awarding punitive damages was not state regulation of nuclear facilities.¹⁵⁶ Thus, the *Silkwood* dissent indicates that state common law claims are not *always* the equivalent of state regulation. This has some significance if subsection (b) of FIFRA's preemption provision only refers to states that regulate sale and use; any state that does not try to regulate the sale and use would not have its state common law claims preempted.

Another interpretation of the *Silkwood* dissent is that FIFRA's "requirements" do not include state common law claims, regardless of whether a state seeks to regulate sale and use of pesticides. If state law claims are not counted as "requirements," it would eliminate them from consideration in the preemption analysis. Under either interpretation, a court should find that Congress was only referring to positive legislative enactments, such as state legislation, in the "regulate" language of subsection (a) of FIFRA.¹⁵⁷ Arguably, this means that Congress did not intend the "requirements" language in subsection (b) of FIFRA to include state common law claims either because they are not positive legislative enactments or because they do not "regulate" labeling.

Lending some credence to this argument is the United States Supreme Court's findings that identical language in two different statutes may have two different meanings.¹⁵⁸ The statutory analysis depends on the meaning Congress intended to give to a particular word and on its context in the

safety standards, and to rely on States and juries to remedy whatever injury takes place under the exclusive federal regulatory scheme." *Id.* at 264.

156. *Id.*

157. 7 U.S.C. § 136v(a) (1988).

158. See, e.g., *Estate of Cowart v. Nickles Drilling Co.*, 112 S. Ct. 2589 (1992) (noting that the judiciary should give effect to the statute as written, using the context of the statute and the ordinary import of the words in the statute itself); *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 447-48 (1986) (stating "Judiciary is the final authority on issues of statutory construction and . . . [if it] ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect"); *Rose v. Locke*, 423 U.S. 48 (1975) (reviewing a conviction under a state statute prohibiting "crimes against nature", and noting that the jurisdiction using the phrase determines its meaning over time, so that it could mean one thing in Tennessee and something different in another state).

statute.¹⁵⁹ Thus, the word “requirements” in FIFRA does not necessarily have the same meaning that it did in the Cigarette Labeling and Advertising Act. Although one lower federal court has rejected this argument, this same court did not demand preemption of all common law claims when it stated:

[W]e fail to see how a state-imposed standard of care relating to product design, manufacture, testing, and the like can qualify as a labeling requirement [If a product does not] live up to the merchant’s representations as to quantity, quality, or performance, then . . . rescission is not a regulation of labeling, because the statute does not seem to include statements not made in connection with a particular sale.¹⁶⁰

It is possible that Congress intended the similar language of the two statutes to mean the same thing in light of its concerns about protection of the consumer and label uniformity. However, it is more likely that if Congress intended to preempt state law damage actions, it would have said so explicitly. Congress was probably aware of the debate concerning the scope of preemption when it made its last amendments to FIFRA,¹⁶¹ yet it declined to expressly preempt such actions with specific “plain language.” Consequently, a court should conclude that the language is distinguishable and that “requirements” in FIFRA do not include state common law claims.

Another argument against FIFRA preemption of state common law claims is that its simple, premarket approval procedure¹⁶² does not adequately protect the consumer. New data on pesticides arrive as consumers use the prod-

159. *Estate of Cowart v. Nickles Drilling Co.*, 112 S. Ct. 2589 (1992).

160. *King v. E.I. Dupont De Nemours and Co.*, 996 F.2d 1346, 1350 (1st Cir. 1993). The court concluded that the Supreme Court must have intended its interpretation of the word “requirements” to apply in the context of FIFRA or it would not have remanded the decisions of the Tenth and Eleventh Circuits in *Arkansas-Platte* and *Papas*, respectively. *Id.* Also, citing H.R. REP. NO. 511, 92d Cong., 2d Sess. 1, 16 (1971), the court determined that the legislative history showed that Congress “intended to completely preempt State authority in regard to labeling and packaging.” *Id.*

161. 7 U.S.C. §§ 136a-136y (1988 & Supp. V 1993).

162. See *supra* notes 51-60 and accompanying text.

ucts.¹⁶³ Pesticides approved in the past may not be safe under current standards.¹⁶⁴ The state compensatory scheme would be an effective check on the possible health risks of these "old" pesticides.

FIFRA did contain a reregistration procedure prior to 1988 which dealt with this problem.¹⁶⁵ However, the General Accounting Office of the United States reported that the EPA's approach to reregistration caused unconscionable delays on hazard assessment of these old products.¹⁶⁶ Others have argued that the EPA decisionmakers are biased in favor of manufacturers, which results in irregularities.¹⁶⁷ The EPA itself has complained that the agency lacks necessary funding to reregister products expediently.¹⁶⁸

Congress addressed these problems with the 1988 amendments to FIFRA.¹⁶⁹ Nevertheless, the costs and delays in reregistering old pesticides have proved too much for the 1988 amendments adequately to accomplish stream-

163. Scott Ferguson & Ed Gray, *1988 FIFRA Amendments: A Major Step in Pesticide Regulation*, 19 ENVTL. L. RPTR. 10070, 10071 (1989).

164. See Perlis, *supra* note 147.

165. 7 U.S.C. § 136a-1(e)(2) (1984)(allowing cancellation of registrations after a five year period if the manufacturer did not request a continuance).

166. GENERAL ACCOUNTING OFFICE, DELAYS AND UNRESOLVED ISSUES PLAGUE NEW PESTICIDE PROTECTION PROGRAMS, at 4-27, CED-80-32 (1980).

167. *Natural Resource Defense Council v. Environmental Protection Agency*, CIV No. 83-1509 (DPC Oct. 10, 1984); see also Perlis, *supra* note 147.

168. EPA, S. REP. NO. 334, 95th Cong., 1st Sess., 34-55 (1977).

169. 7 U.S.C. § 136a-1(a)-(1) (1988). The EPA was no longer required to direct its own budget towards reregistration. The agency was authorized to levy a one-time-only "active ingredient fee" on manufacturers of pesticides. 7 U.S.C. § 136a-1(i)(1)-(4) (1988). It was expected that about \$150 million would be raised from this fee during the nine year life of the reregistration program. See Ferguson, *supra* note 163, at 10076. The EPA was also allowed to assess a yearly "maintenance fee" on each registration of a pesticide. 7 U.S.C. § 136a-1(i)(5) (1988), as amended by 7 U.S.C. § 136a-1(i)(5) (Supp. V 1993)(allowing a higher fee to be assessed). All of this money was to be used to speed reregistration and to defray the cost of doing it. See Ferguson, *supra* note 163, at 10077. The amendments also set forth a detailed process of data evaluation in reregistration that placed more of the burden on the manufacturers of pesticides registered before 1984. 7 U.S.C. § 136a-1(e) (1988). The EPA still had the duties of "deciding whether data gaps existed, reviewing all data, and making a final regulatory assessment." See Ferguson, *supra* note 163, at 10078. However, the registrants were to perform much of the preliminary work. *Id.*

lining the process.¹⁷⁰ Much of reregistration remains incomplete.¹⁷¹ Thus, state common law claims are currently the only way to protect consumers of pesticides from those products. This problem is a distinguishing factor between cigarette regulation and pesticide regulation.

Another difference between the Cigarette Labeling and Advertising Act and FIFRA is that uniformity of labeling was not the motivating factor for FIFRA. In *Cipollone*, Congress passed the act at issue with the intention that all cigarette packages have the same uniform warning.¹⁷² However, under FIFRA the manufacturer submits the label,¹⁷³ instead of it being congressionally prescribed, as in the Cigarette Labeling and Advertising Act. The EPA only ensures that adverse health or environmental risks are conspicuous enough on the label for the consumer to see and understand them.¹⁷⁴ Because of this, identical pesticides which contain the same active ingredients may have completely different warnings.¹⁷⁵

The legislative history of FIFRA shows that Congress wanted no state labeling requirements different from EPA standards.¹⁷⁶ Congress therefore expressed a clear intent that the EPA was to be in control of pesticide labeling. Also, the EPA regulations contain no express intent that there be uniformity in pesticide labeling. In fact, the only mention of uniformity expressed in FIFRA is in the heading of the preemption provision.¹⁷⁷ These factors coupled with the agency practice of allowing nonuniform labeling indicates that the primary concern of Congress in FIFRA

170. 7 U.S.C. § 136a-1(i)(5) (Supp. 1993)(amending the subsection to allow the EPA to assess a higher yearly maintenance fee from manufacturers of pesticides in a second attempt to speed the process).

171. See Perlis, *supra* note 147, at 7.

172. 112 S. Ct. at 2619.

173. See *supra* text accompanying notes 51-60.

174. *Id.* Thus, there is a uniform, general format for labeling pesticides, but the individual wording for a label comes from the manufacturer, which the EPA can accept or reject. *Id.*

175. See *Ciba-Geigy v. Alter*, 834 S.W.2d 136, 144 (Ark. 1992).

176. 7 U.S.C. § 136a(c)(5) (1972); S. REP. NO. 838, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S.C.C.A.N. 3993, 4111-12.

177. 7 U.S.C. § 136v(b) (1988).

was not uniformity. The EPA has interpreted FIFRA to allow nonuniform pesticide labeling.

The United States Supreme Court has held that a court should give considerable deference to the administrative interpretation of a statute.¹⁷⁸ The Court has also indicated that although “[t]he judiciary is the final authority on issues of statutory construction . . . [it should only] reject administrative constructions which are contrary to clear congressional intent.”¹⁷⁹ Congress made one express mention of uniformity through an amendment which it passed over forty years after the original act.¹⁸⁰ This does not indicate a “clear congressional intent” of the drafters of FIFRA for uniform labeling. In fact, the Supreme Court has stated that “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”¹⁸¹

One other difference between the Cigarette Labeling and Advertising Act and FIFRA is in the “requirement or prohibition” language of the former Act. Congress added that language to the Cigarette Labeling and Advertising Act to clarify exactly what was preempted.¹⁸² An earlier version of the statute had stated that “[n]o *statement* relating to smoking and health” was permitted.¹⁸³ The Supreme Court found that the change of the language to allow “[n]o requirement or prohibition based on smoking and health . . . imposed under State law” indicated a congressional intent to broaden the scope of preemption.¹⁸⁴ The Court

178. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984).

179. *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); *see also Chevron*, 467 U.S. at 842-43 (stating that “[i]f the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress”).

180. 7 U.S.C. § 136(b) (1988 & Supp. V 1993).

181. *United States v. Price*, 361 U.S. 304, 313 (1960); *but see Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969) (stating “[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction”).

182. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2619 (1992).

183. *Id.* at 2616.

184. *Id.* at 2619.

stated that this change showed a clear intent to effectuate cigarette labeling and advertising uniformity.¹⁸⁵

No such broadening has taken place in the context of FIFRA. In fact, the only amendment made to the language of the preemption provision since Congress passed FIFRA is the change of the heading to say “[u]niformity.”¹⁸⁶ The indicia of congressional intent to broaden preemption which was present in the history of the Cigarette Labeling and Advertising Act is nonexistent in FIFRA. Therefore, the heading in question probably does not express a clear congressional desire for uniformity in pesticide labeling.

The federal judiciary of Arkansas has found preemption because of congressional concern for uniformity of EPA decisionmaking in pesticide labeling.¹⁸⁷ One court has stated that FIFRA regulations on labeling and packaging were “promulgated in order to ensure uniformity [C]ommon law tort actions based upon inadequate labeling and warning would destroy the uniformity Congress sought to legislate.”¹⁸⁸ However, the courts’ finding of a clear congressional intent for uniformity in pesticide labeling has no support. The debate over Congress’ intent and the plain language of FIFRA’s preemption provision are evidence that such a clear intent was not expressed. Even if there were evidence of a clear congressional intent that there be uniform pesticide labeling, such evidence is not a clear intent to preempt all state law damage actions.

Even the *Cipollone* Court struggled with its finding that the Cigarette Labeling and Advertising Act preempted state law damage actions.¹⁸⁹ In fact, the Court allowed many state law claims.¹⁹⁰ It looked at each claim individually and came up with some unusual findings. For example, it found that the “requirement or prohibition” language of that statute preempted failure to warn claims because such claims were based on “smoking and health” which the state

185. *Id.*

186. 7 U.S.C. § 136v (1988).

187. *DerGazarian v. Dow Chem. Co.*, 836 F. Supp. 1429 (W.D. Ark. 1993); *see also Young v. American Cyanamid Co.*, 786 F. Supp. 781 (E.D. Ark. 1991).

188. *DerGazarian*, 836 F. Supp. at 1430.

189. *See generally Cipollone*, 112 S. Ct. 2608 (1992).

190. *Id.* at 2625.

was not allowed to regulate.¹⁹¹ However, the Court found that fraudulent misrepresentation claims in the same case were not based on smoking and health. Instead, they were based “on a more general obligation—the duty not to deceive.”¹⁹² Additionally, the Court found that express warranty claims were not preempted because the manufacturer had undertaken the duty himself, leading to the conclusion that the claims were not “imposed under State law.”¹⁹³

The dissent of Justice Blackmun expressed grave reservations over this “frequent shift in the level of generality” in examining the individual claims.¹⁹⁴ He pointed out that failure to warn claims could be described as the “‘more general obligation’ to inform consumers of known risks.”¹⁹⁵ He also noted that “absent the State’s decision to penalize . . . [breach of express warranties] . . . through the creation of a common-law damages action, no warranty claim would exist.”¹⁹⁶ Justice Blackmun concluded that he did not believe that Congress clearly intended the plain language of the provision “to create such a hodge-podge of allowed and disallowed claims.”¹⁹⁷ Thus, even the *Cipollone* Court had difficulty finding that this language preempted state law claims.

The differences between FIFRA and the Cigarette Labeling and Advertising Act substantially outweigh the similarities and point to more tolerance for state law claims under FIFRA. A court should not find a clear congressional intent that FIFRA preempts state law damage claims. Even if state tort and contract actions have an effect on labeling, it does not follow that the “plain language” of the statute preempted such claims. The plain language of the preemption provision, when given the narrow construc-

191. *Id.* at 2621-22.

192. *Id.* at 2624.

193. *Id.* at 2622-23; *see also* *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993)(stating that the manufacturer imposes express warranties upon himself, while implied warranties are preempted because they arise by operation of law).

194. *Cipollone*, 112 S. Ct. at 2631 (Blackmun, J., dissenting).

195. *Id.*

196. *Id.*

197. *Id.*

tion that *Cipollone* demands, only requires preemption when the state action at issue has a direct regulatory effect on the EPA-approved "label" itself.¹⁹⁸ Thus, preemption will not occur unless the state requires the manufacturer to change the label on the product to conform to some state notion of an adequate warning. Analysis shows that a state requirement exists only if the state makes some kind of positive legislative enactment with respect to the label and not when a consumer makes a state law damage claim.

The best application of *Cipollone* is to take the "plain language" test as a general, bright-line rule of construction for federal statutes containing preemption provisions.¹⁹⁹ The construction of the specific language of the statute in that case, however, should be limited to the facts of that case. This view would still be in line with prior Supreme Court holdings on statutory construction. These holdings allow different interpretations of similar language and state that subsequent congressional expressions are not controlling in determining the intent behind a statute.²⁰⁰ This view of *Cipollone* would also allow a court to avoid deciphering the United States Supreme Court's troubling failure to analyze each claim in that case at the same level of generality.²⁰¹

Finally, limiting the Court's construction of the Cigarette Labeling and Advertising Act to that case would also correspond to other areas of the law. For example, Article Two of the Uniform Commercial Code (UCC) generally governs the sale of goods, including pesticides.²⁰² Most states have adopted the UCC, which provides remedies to parties to a sale of goods, such as breach of warranty claims.²⁰³ If a court interpreted FIFRA's "requirements"

198. See *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984).

199. See *Cipollone*, 112 S. Ct. at 2618.

200. See *supra* notes 149-51 and accompanying text; see *supra* notes 160-63 and accompanying text; see *supra* notes 178-81 and accompanying text.

201. See *supra* text accompanying notes 194-97.

202. See U.C.C. §§ 2-101 to 2-725 (1992). The UCC defines "good" as "all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities . . . and things in action." *Id.* § 2-105.

203. See, e.g., ARK. CODE ANN. §§ 4-2-312 to -318 (Supp. 1993)(providing remedies for breach of express and implied warranties).

language to include state law damage actions, this would effectively eviscerate much of the application of the UCC. This is because FIFRA would then take away a pesticide consumer's remedies under the UCC. In light of the general presumption against preemption, it is unlikely that Congress intended to overrule the UCC in this area without some kind of express language to that effect in the provision.²⁰⁴

Because of the vague language of FIFRA's preemption provision and the debate it has engendered, a court should find no clear congressional intent to preempt state law claims in the plain language of the statute. The plain language of the preemption provision and its legislative history make no reference to state law damage claims. Since the scope of the preemptive effect of the act is limited by that language, such state law claims are not preempted. The lack of a compensatory remedy in FIFRA and the narrow construction a court is to give the provision support the lack of preemption. Thus, not only may a state regulate the sale and use of pesticides without running afoul of FIFRA's preemption provision, but such a state may also allow injured consumers to bring common law claims.

D. Application of *Cipollone* to the *Alter* case

In *Alter*, the Arkansas Supreme Court did not address adequately the express language of FIFRA's preemption provision. Its reliance on the lack of previous case law finding express preemption is insufficient in the wake of *Cipollone's* "plain language" test.²⁰⁵ The court's use of implied preemption analysis is also incorrect after *Cipollone*.²⁰⁶ Because FIFRA has a preemption provision, no court analyzing a claim based on a pesticide should use implied preemption analysis.

Alter brought claims of negligence and strict liability which he based on the manufacturer's failure to warn him adequately of the risks associated with its product.²⁰⁷ He

204. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

205. *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136, 142 (Ark. 1992).

206. *Id.*

207. *Id.* at 140.

also made claims of breach of express warranty and fraudulent misrepresentation.²⁰⁸ Alter based these latter two claims on oral representations from the sellers and from company advertising. The definitions of "label" and "labeling" under FIFRA do not include such representations.²⁰⁹ Unlike point of sale warnings, there is no language in the preemption provision of FIFRA which refers to advertising of products or to oral representations.²¹⁰ This analysis is consistent with *Cipollone* because the United States Supreme Court stated that in such a case, the manufacturer has imposed the duty upon himself.²¹¹

FIFRA does not preempt Alter's failure to warn claims either. The "plain language" of FIFRA preempts different or additional state "requirements." Unlike the Cigarette Labeling and Advertising Act, Congress has not broadened the language of FIFRA to indicate an intent for label uniformity in pesticides.²¹² The EPA, which governs pesticide registration and labeling through congressional authorization, does not interpret FIFRA to require label uniformity.²¹³ Furthermore, Congress passed the similar language of the two statutes with entirely different motivating concerns. Finally, FIFRA contains no remedial provision for consumers injured by pesticides.²¹⁴ The "plain language" of FIFRA's preemption provision governs the scope of federal preemption of Arkansas common law, and nothing about that language suggests an intent to preempt these claims. Thus, both the federal statute and the Arkansas common law allow the state law claims, even if those claims are based on the alleged inadequacy of the EPA-approved label.

A finding by Arkansas state courts that FIFRA does not expressly preempt state law damage claims could present a problem because Arkansas's federal judiciary has held

208. *Id.*

209. *See supra* notes 123-29 and accompanying text; *see also, e.g.,* *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128 (E.D. N.Y. 1992).

210. *Id.*

211. *Cipollone*, 112 S. Ct. 2608, 2622-23 (1992).

212. *See supra* text accompanying notes 182-86.

213. *See supra* text accompanying notes 172-81.

214. *See supra* text accompanying notes 145-51.

that FIFRA expressly preempts such claims.²¹⁵ This finding could lead to forum-shopping by plaintiffs or to routine removal to federal court by defendant manufacturers, each looking for the court most favorable to their side. The federal courts would find preemption of the state claims and rule in favor of the manufacturer. On the other hand, the state courts would find no preemption of state law claims and would move to the merits of the individual case.

To prevent this problem, some courts have suggested that state courts adopt the legal requirements of FIFRA or other preemptive federal statutes as their common law definition of "duty."²¹⁶ One court recently held that:

if state law adopts or imposes a labeling requirement that is the same as the federal statute, even if the state law provides compensation or other remedies for a violation, so long as Congress chooses not to explicitly preempt the consistent law, it will not be said to be in conflict with federal law.²¹⁷

If, for example, FIFRA requires a manufacturer to submit data about their product that have important health implications, the failure to do so would be a violation of EPA standards as well as a basis for state remedy.²¹⁸ Subsection (a) of the preemption provision provides that the state may impose stricter standards than federal law in some areas of pesticide regulation.²¹⁹ Subsection (b) only adds that no differing state regulation is permitted in the limited area of pesticide labeling and packaging.²²⁰

Allowing state common law claims is not the state regulation Congress sought to avoid, especially if that state adopted the federal requirements as its definition of "duty." Such adoption would stop the problem of forum-shopping

215. *DerGazarian v. Dow Chem. Co.*, 836 F. Supp. 1429 (W.D. Ark. 1993).

216. *See, e.g., Moss v. Parks Corp.*, 985 F.2d 736 (4th Cir. 1993); *Stiltjes v. Ridco Exterminating Co.*, 343 S.E.2d 715, 719 (Ga. Ct. App. 1986)(adopting the federal standard for purposes of wrongful death claims under FIFRA).

217. *Moss*, 985 F.2d at 740 (quoting *Worm v. American Cyanamid Co.*, 970 F.2d 1301, 1307 (4th Cir. 1992)).

218. *See, e.g., Worm*, 970 F.2d at 1308 (stating that "if the Maryland common law recognizes a tort based on the breach of a federally imposed standard," a person can "pursue that claim without conflicting with federal law").

219. 7 U.S.C. § 136v(a) (1988).

220. 7 U.S.C. § 136v(b) (1988).

by parties to a state common law action. If the state adopts the federal statute's standards as its "duty" at common law, both state and federal law will be consistent. Presumably, when injury occurs to a pesticide consumer and when the label fails to warn the consumer of such danger, the failure of the manufacturer to submit all relevant information to the EPA would be the effective cause of the accident.²²¹ If the warning of that particular danger was present on the label, there is no claim.

A problem with adoption of the federal standards is that the EPA has been slow in reevaluating and reregistering possibly unsafe pesticides.²²² Thus, a manufacturer might turn over data to the EPA indicating a label change is in order, but that manufacturer could not change the label until the EPA eventually evaluated the data and gave him permission to make the label change.²²³ However, those are problems for Congress to address, either by speeding the reregistration process or by amending the language of FIFRA to express a clear intent to preempt state law claims. Until then, the equities favor the injured consumer who was unwarned of the dangers of the product. The plain language test of *Cipollone* also favors such a construction.²²⁴

When exercising its power to regulate the sale and use of pesticides, a state could pass legislation requiring that a manufacturer perform some testing or documentation before allowing the product to be sold or used in the

221. *Couture v. Dow Chem. U.S.A.*, 804 F. Supp. 1298 (D. Mont. 1992)(stating that all state law claims are allowed by the express language); *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128 (E.D. N.Y. 1992)(stating that a state could establish a claim for misleading the EPA when all relevant data has not been given to the agency voluntarily so that the label can be changed if not adequate); see also *Worm*, 970 F.2d at 1308 (stating that "if the Maryland common law recognizes a tort based on the breach of a federally imposed standard," a person can "pursue that claim without conflicting with federal law.").

222. See *supra* notes 162-71 and accompanying text.

223. See 7 U.S.C. § 136a(c)(5)(B) (1988)(stating that the EPA must give prior approval to any label change); 40 C.F.R. § 156.10(a)(1)(vii) (1991)(stating the same thing).

224. See generally *Cipollone*, 112 S. Ct. 2608 (1992).

state.²²⁵ The purpose would be to effect regulation of the sale and use of the product and not to regulate the labeling of pesticides. A court could interpret FIFRA's language to allow such state legislative regulation because of the narrow language FIFRA employs to define what is preempted.²²⁶ An example of this type of system is being used in California.²²⁷

In summary, the Arkansas Supreme Court's analysis in deciding that Congress did not impliedly preempt Arkansas common law claims arising from exposure to products registered in compliance with FIFRA is wrong, but the court reached the correct result. The court should only look at the express language of the preemption provision contained in FIFRA. Such examination would make it clear that federal law does not preempt state law claims like those in the *Alter* case. To minimize the potential conflict this finding has with Arkansas's federal judiciary, the state courts could adopt the federal standard as its definition of state common law "duty." Finally, the state legislature could adopt laws which minimize risks to its citizens who use or are exposed to pesticides through its express power to regulate the sale and use of pesticides within its borders. Whatever system Arkansas adopts, it would not be alone if it found the "requirements" language of FIFRA tolerates state law claims.²²⁸

VI. CONCLUSION

The holding of the United States Supreme Court in *Cipollone v. Liggett Group* clarified a muddled area of federal

225. One court has held that additional information or data can be required to be provided by the state pursuant to the state use and sale regulatory power of the preemption provision. *National Agric. Chems. Ass'n v. Rominger*, 500 F. Supp. 465 (E. Cal. 1980). The court was interpreting a California statute which states that "[e]very manufacturer of, importer of, or dealer in any . . . [pesticides] . . . shall obtain a certificate of registration from the department before the . . . [pesticide] . . . is offered for sale." CAL. FOOD AND AGRIC. § 12811 (West Supp. 1993)(emphasis added).

226. See 7 U.S.C. § 136v(b) (1988)(stating that labeling is the only limitation on the states).

227. CAL. FOOD AND AGRIC. § 12811 (West Supp. 1993).

228. See, e.g., *Couture v. Dow Chem. U.S.A.*, 804 F. Supp. 1298 (D. Mont. 1992); *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128 (E.D. N.Y. 1992).

law. The Court made it clear that when a statute contains a preemption provision, a court deciding the preemption issue should first examine the express language of that provision to determine the intent of Congress. Only when an express provision does not appear in the statute should a court use implied preemption analysis.

At the same time, the Supreme Court's holding created difficulty for courts deciding the scope of FIFRA's preemption. First, the Court did not use the same level of generality when analyzing the individual claims under the Cigarette Labeling and Advertising Act. This made it difficult for courts to determine which state "requirements" the similar language in FIFRA preempts. Also, the differences of the Cigarette Labeling and Advertising Act and FIFRA caused a debate over the applicability of the Court's holding to other federal statutes. Finally, the question became whether state common law claims were "requirements" preempted under FIFRA.

Nevertheless, a close inspection of the language of FIFRA and its legislative history shows there should be no preemption of state common law claims. Congress was not motivated by the same consumer protection concerns in its passage of FIFRA that had motivated it to pass the Cigarette Labeling and Advertising Act. Also, there was not an express requirement of uniform pesticide labeling in FIFRA and the EPA did not interpret there to be such a requirement. Finally, the sheer number of products under FIFRA and the problems with reregistration of pesticides distinguish the act from the Cigarette Labeling and Advertising Act.

Unfortunately, many courts seem unwilling to take the time to examine the language and history of FIFRA on its own merits and simply rubber-stamp "preempted" on such claims. This results in no compensation for injured consumers. The Arkansas Supreme Court reached the correct result but employed the wrong method of reaching that result. Hopefully, other courts will follow the example of

the Arkansas Supreme Court and stop the federal judiciary's circumvention of the state common law in this area.

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