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Cipollone v. Liggett Group, Inc.: One Step Closer to Exterminating the FIFRA Preemption Controversy

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Cipollone v. Liggett Group, Inc.: One Step Closer to Exterminating the FIFRA Preemption Controversy

INTRODUCTION

The Supremacy Clause of the United States Constitution\(^1\) declares that the laws of the United States "shall be the supreme Law of the Land; any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."\(^2\) The United States Supreme Court has interpreted this clause to mean that any state law that conflicts with federal law is "without effect" and is, therefore, preempted by the federal law.\(^3\) Thus began the battle between the states and the federal government to determine which will ultimately control when both attempt to regulate the same area.\(^4\) This battle continues to this day in several areas.\(^5\)

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\(^1\) U.S. CONST. art. VI, cl. 2.

\(^2\) Id.

\(^3\) Maryland v. Louisiana, 451 U.S. 725, 746 (1981). See generally McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (holding that, due to the Supremacy Clause, any state law that conflicts with federal law is preempted by federal law).


The question of whether section 136v(b) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") preempts state tort law damage claims based on failure to warn is one that has perplexed federal courts for several years. Since the controversy began, federal court decisions have fallen into one of two camps: FIFRA either expressly or impliedly preempts state tort law damage actions based on failure to warn, or there is no such preemption. While the Supreme Court has ruled on the issue of federal preemption of state regulation of pesticide use, it has never directly addressed the issue of state regulation of pesticide labeling and packaging.

Section 136v states in relevant part 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.
(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.


See Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2487 (1991) (holding that FIFRA did not preempt state or local pesticide use regulation, but not specifically addressing the narrower issue of pesticide labeling preemption).

Regarding the current status of the labeling and packaging issue in federal district and appellate courts, one court noted that "[t]he great split in authority is important to illustrate that even when the consequences of state action clearly pressure companies to change their FIFRA labels, there is no consensus on whether the state action is preempted." Chemical Specialties Mfrs. Ass'n v. Allenby, 958 F.2d 941, 948 (9th Cir.), cert. denied, 113 S. Ct. 80 (1992).
In *Cipollone v. Liggett Group, Inc.*,\(^{12}\) the Supreme Court faced the issue of federal preemption in the context of the Federal Cigarette Labeling and Advertising Act,\(^{13}\) which was later amended and replaced by the Public Health Cigarette Smoking Act of 1969.\(^{14}\) The Court held that certain of the petitioner's state tort law damage claims—particularly the failure-to-warn claim—were expressly preempted by these Acts, while others survived.\(^{15}\) As to the application of *Cipollone* to other federal statutes, however, this case clearly "raises more questions than it answers"\(^{16}\) and does little to aid lower courts in determining whether section 136v(b) of FIFRA preempts state tort law damage claims based on failure to warn due to inadequate labeling.\(^{17}\)

Part I\(^{18}\) of this Note sets forth the state of FIFRA preemption law prior to *Cipollone* by summarizing the leading cases of *Ferebee v. Chevron Chemical Co.*\(^{19}\) and *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc. ("Arkansas-Platte I")*.\(^{20}\) Part II\(^{21}\) addresses the *Cipollone* opinion itself in detail, and Part III\(^{22}\) applies the analysis undertaken in that case to the FIFRA preemption analysis. This Note concludes that, in light of *Cipollone*,\(^ {23}\) FIFRA expressly preempts all state tort law damage claims based on failure to warn if the label has been approved by the EPA. This conclusion is based on

\(^{11}\) 112 S. Ct. 2608 (1992).

\(^{12}\) See infra notes 26-110 and accompanying text.


\(^{15}\) *Cipollone*, 112 S. Ct. at 2625.

\(^{16}\) *Id.* at 2638 (Scalia, J., concurring in part and dissenting in part).

\(^{17}\) However, the Court has directed that this specific issue be decided by remanding *Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992), and *Arkansas-Platte & Gulf Partnership v. Dow Chem. Co.*, 113 S. Ct. 314 (1992), both FIFRA preemption cases, to be reconsidered in light of *Cipollone*, a cigarette labeling case. See infra notes 163-68 and accompanying text.

\(^{18}\) See infra notes 16-20 and accompanying text.


\(^{21}\) See infra notes 111-62 and accompanying text.

\(^{22}\) See infra notes 163-208 and accompanying text.

the application of the Supreme Court's holdings in Cipollone that if a federal statute contains an express preemption provision, then the analysis should be one of express preemption, and that a state damages action is the functional equivalent of direct state regulation.

I. PREEMPTION OF FAILURE-TO-WARN CLAIMS UNDER FIFRA PRIOR TO CIPOLLONE

A. The Preemption Doctrine

The doctrine of preemption has evolved from the Supremacy Clause, which gives Congress the power to enact legislation that supersedes state or local laws. The sweep of federal preemption is not limited to conflicting state legislative or regulatory law, but extends in some situations to state common law doctrines.

In deciding whether a federal statute preempts state law, the intent of Congress is the "ultimate touchstone," and this intent may be either "explicitly stated in the statute's language or implicitly contained in its structure and purpose." Preemption can be inferred in a number of ways:

1. "when there is outright or actual conflict between federal and state law;"
2. "where compliance with both federal and state law is in effect physically impossible;"
3. "where there is implicit in federal law a barrier to state regulation;"
4. "where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law;" or

Id. at 2618, 2633 (Scalia, J., concurring in part and dissenting in part).

Id. at 2620. In short, this author rejects the reasoning promulgated in Ferebee (introducing the "choice of reaction" theory) as being flawed. See infra notes 45-75 and accompanying text for a discussion of the Ferebee decision.

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


See, e.g., International Paper Co. v. Ouellette, 479 U.S. 481, 497 (1987) ("It would be extraordinary for Congress, after devising an elaborate . system that sets clear standards, to tolerate common-law suits that have the potential to undermine the regulatory structure.").


Implied preemption also occurs when a state law stands as an obstacle to the full implementation of a federal law.

**B. FIFRA**

The Federal Insecticide, Fungicide, and Rodenticide Act was enacted in 1947 to replace The Insecticide Act of 1910, which was Congress’ first pesticide regulation statute. FIFRA was “primarily a licensing and labeling statute” until its 1972 revision, which “transformed FIFRA from a labeling law into a comprehensive regulatory statute.”

Under FIFRA, the EPA has the power to regulate the use, sale, and labeling of pesticides, as well as their registration. In order to register a pesticide, the manufacturer must submit “enormous quantities of technical data” regarding the effects of the pesticide on humans and the environment and have its plan approved by the EPA. FIFRA controls almost every aspect of pesticide labeling through this registration process.

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32 Id.

33 61 Stat. 163 (1947) (originally enacted as The Insecticide Act of 1910, ch. 191, § 13, 31 Stat. 335 (1910)).


37 Ruckelshaus, 467 U.S. at 991.


39 Id. § 136a(a), (c).

40 Id. § 136a(a), (c).

41 7 U.S.C. § 136a(c)(2) (1988 & Supp. II 1990) (requiring specific data be approved); see also id. § 136a(a), (c)(5) (1988) (requiring that the plan be approved by the EPA).

42 A manufacturer must submit a copy of the label to the EPA for approval. 7 U.S.C. § 136a(c)(1)(C) (1988). The EPA has developed extensive regulation governing pesticide labeling, including the regulation of label contents, 40 C.F.R. § 156.10(a)(1)(i)-(ix) (1992), the label’s prominence and legibility, id. § 156.10(a)(2), a requirement that the label appear on a clear and contrasting background, id. § 156.10(a)(2)(ii)(B), regulation of the language, id. § 156.10(a)(3), placement, id. § 156.10(a)(4), use of certain hazard “signal words,” id. § 156.10(b)(1)(i)(A)-(E), and a statement regarding first aid treatment, id. § 156.10(b)(1)(iii)(B). For other labeling requirements,
If a manufacturer of pesticides does not comply with FIFRA regulations, the United States Attorney General may institute criminal and/or civil proceedings against the manufacturer. FIFRA also authorizes the EPA to assess civil penalties of up to $5000 per offense.

C. The Ferebee v. Chevron Chemical Co. Rationale

The first federal court of appeals to address the issue of whether FIFRA preempts state tort law damage claims based on failure to warn was the D.C. Circuit in Ferebee v. Chevron Chemical Co. This case has since become the leading case for the argument that FIFRA does not expressly or impliedly preempt state tort law damage claims based on failure to warn, regardless of the fact that the label in question complies with all other FIFRA labeling requirements.

The plaintiff in Ferebee had been exposed several times to the pesticide paraquat while applying it to greenhouse plants and fields during the course of his job as an agricultural worker. As a result, Mr. Ferebee suffered from pulmonary fibrosis and eventually died from this condition. His estate argued that the pesticide manufacturer, Chevron, had failed in its duty to warn Mr. Ferebee, via the label, of the dangers of long-term exposure to paraquat.

Chevron first argued that it could not be held liable for failure to warn because the labels affixed to its paraquat containers had been approved by the EPA and complied with FIFRA labeling requirements. Rejecting this argument, the court held that compliance with FIFRA’s labeling scheme does not automatically shield manufacturers from liability for failure to warn.

see generally 40 C.F.R. Part 156.


44 Id. § 136(a)(1) (1988).


47 Ferebee, 736 F.2d at 1532.

48 Id. at 1532-33.

49 Id. at 1534.

50 Id. at 1539.
from liability for state tort law damage claims.\textsuperscript{51} The court stated that "[t]he fact that EPA has determined that Chevron's label is adequate for purposes of FIFRA does not compel a jury to find that the label is also adequate for purposes of state tort law as well."\textsuperscript{52} The court stated that the purposes of state tort law were very distinct from those of FIFRA, noting that state tort law "may have broader compensatory goals [and, therefore,] a label may be inadequate under state law if that label fails to warn against any significant risk."\textsuperscript{53}

Chevron then argued that FIFRA preempted the states from even considering such questions because state tort law damage actions were completely preempted by FIFRA, based on section 136v(b)\textsuperscript{54} of the Act.\textsuperscript{55} At the heart of Chevron's argument was the contention that such actions have a regulatory effect on manufacturers and, therefore, are barred by the plain language of the statute.\textsuperscript{56} Again, the court rejected Chevron's argument. In support of its holding, the court noted that, while a damage award would certainly encourage a manufacturer to alter its labeling in order to avoid future lawsuits, it would in no way require a manufacturer to do so.\textsuperscript{57} In explaining this distinction, the court stated:

The verdict itself does not command Chevron to alter its label—the verdict merely tells Chevron that, if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries. That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label. Chevron can comply with both federal and state law by continuing to use the EPA-approved label and by simultaneously paying damages to successful tort plaintiffs such as Mr. Ferebee.\textsuperscript{58}

\textsuperscript{51} Id. at 1540.
\textsuperscript{52} Id.
\textsuperscript{53} Id. The court further stated that a state jury may find a product inadequately labeled despite the EPA's determination that, for purposes of FIFRA, the label is adequate. The EPA's determination may be taken into account by the jury, and the jury was instructed in this case that it was permitted to do so, but absent preemption the jury need not give that determination conclusive weight.
\textsuperscript{54} 7 U.S.C. § 136v(b) (1988). See supra note 6 (reproducing the statute in part).
\textsuperscript{55} Ferebee, 736 F.2d at 1540.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 1541.
\textsuperscript{58} Id.
This concept has become known as the “choice of reaction” theory, as manufacturers may simply choose how to react to a damages judgment. The Ferebee court next discussed the general preemption analysis that courts must undertake in determining whether FIFRA preempts state tort law. A court must “start with the assumption that the historic police powers of the States [are] not to be superseded by Federal Act unless that [is] the clear and manifest purpose of Congress.” However, if this purpose is found to exist either expressly or impliedly, then the state law must yield to the will of Congress. According to the Ferebee court, Congress may manifest this purpose in

35 In a pre-Cipollone cigarette labeling case, the First Circuit had this to say about the reasoning in Ferebee:

The [plaintiffs] disingenuously maintain that any monetary damages awarded would not compel a manufacturer to change its label for, after all, “the choice of how to react is left to the manufacturer.” This “choice of reaction” seems akin to the free choice of coming up for air after being underwater. Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not immediately take steps to minimize its exposure to continued liability. The most obvious change it can take, of course, is to change its label. Effecting such a change in the manufacturer’s behavior and imposing such additional warning requirements is the very action preempted by § 1334 of the [cigarette labeling] Act. Indeed, it arrogates to a single jury the regulatory power explicitly denied to all fifty states’ legislative bodies.


But see International Paper Co. v. Ouellette, 479 U.S. 481 (1987), wherein the Supreme Court stated the following regarding the effect of the Clean Water Act on state tort law damage actions:

If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, at a minimum [the defendant] would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability. Critically, these liabilities would attach even though the [defendant] had complied fully with its state and federal obligations. The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly—regulate the conduct of out-of-state sources [of water pollution].

Id. at 495. The New York Supreme Court considered the possible effect of Ouellette on Ferebee in Little v. Dow Chem. Co., 559 N.Y.S.2d 788 (Sup. Ct. 1990). In finding that FIFRA preempted the plaintiff's failure to warn claims, the court stated that “the Supreme Court’s recent decision in [Ouellette] undercuts Ferebee's precedential value.” Id. at 791. See also San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959) (“The obligation to pay compensation [through an award of damages] can be, indeed is designed to be, a potent method of governing conduct and controlling policy.”).

37 Ferebee, 736 F.2d at 1542 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
one of three ways: 1) Congress may explicitly or expressly preempt state action;\textsuperscript{62} 2) compliance with both the federal and state law may be impossible;\textsuperscript{63} or 3) the state law may "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."\textsuperscript{64}

The court concluded that none of these principles stood as a bar to a state tort law damage action such as the one at issue.\textsuperscript{65} First of all, "Congress has not explicitly preempted state damage actions; it has merely precluded states from directly ordering changes in the EPA-approved labels."\textsuperscript{66} In fact, several courts have acknowledged that compliance with a federal regulatory scheme does not in and of itself preclude a jury from finding that a label was inadequate.\textsuperscript{67} Second, the court observed that it was not impossible for Chevron to comply with both the federal and state law in this case. As discussed above, Chevron has a "choice" of how to react: it may either "continue to use the EPA-approved label and pay damages to successful tort plaintiffs"\textsuperscript{68} or "petition the EPA to allow the label to be made more comprehensive."\textsuperscript{69} Finally, the court stated that a damage claim did not stand as an obstacle to accomplishing the goals of FIFRA as evidenced in FIFRA's legislative history, which indicates an intent to allow the states broad regulatory powers in the area of pesticide use.\textsuperscript{70} Therefore, the court held, FIFRA

\textsuperscript{65} It should be noted that the Ferebee court failed to address one additional way in which Congress may evidence its intent to supplant state authority: "occupation of the field." See Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (holding that federal preemption exists if a scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement [federal law]. "). Regarding preemption doctrines in general, see Howarth, supra note 4, at 1309-17.
\textsuperscript{66} Ferebee, 736 F.2d at 1542.
\textsuperscript{67} Id.
\textsuperscript{68} Id.; see also, e.g., Stevens v. Parke, Davis & Co., 507 P.2d 653, 661 (Cal. 1973) (Food and Drug Administration requirements); Burch v. Amsterdam Corp., 366 A.2d 1079, 1086 (D.C. 1976) (requirements under Federal Hazardous Substances Act); Maze v. Atlantic Refining Co., 41 A.2d 850, 853 (Pa. 1945) (Surgeon General-approved label). See generally RESTATEMENT (SECOND) OF TORTS § 288c (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions.").
\textsuperscript{69} Ferebee, 736 F.2d at 1542.
\textsuperscript{70} Id. at 1542-43. It is odd that the Ferebee court reaches this conclusion before undertaking a full and complete analysis of the entire legislative history of the FIFRA preemption provision. Perhaps this is due to a desire to avoid the following language in H.R. REP. No. 511, 92d Cong., 1st Sess. 16 (1971): "In dividing the responsibility between the States and the Federal Government for the management of an effective pesticide program, the Committee had adopted language which is
does not expressly or impliedly preempt state tort law damage claims based on failure to warn.\textsuperscript{71}

The \textit{Ferebee} court's reliance on policy arguments is conspicuous. For instance, the court stated that "[e]ven if Chevron could not alter the label, Maryland could decide that, as between a manufacturer and an injured party, the manufacturer ought to bear the cost of compensating for those injuries that could have been prevented with a more detailed label than that approved by the EPA."\textsuperscript{72} Later in the opinion, the court pointed out that "a state tort action of the kind under review may aid in the exposure of new dangers associated with pesticides."\textsuperscript{73} Manufacturers burdened with damage judgments could petition the EPA to allow more detailed labeling requirements in light of the new information in the civil action, or the EPA could revise labeling requirements on its own initiative.\textsuperscript{74} Finally, the court noted that the fact "[t]hat Maryland cannot directly order a change in the way in which paraquat is labelled does not deprive the state of legitimate aims which it is entitled to further through the imposition of traditional tort liability."\textsuperscript{75} It thus appears that the \textit{Ferebee} court was more interested in furthering these "legitimate aims" than in relying upon a traditional preemption analysis.

D. The Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc. \textit{Rationale}

At the other end of the preemption spectrum from \textit{Ferebee} lies \textit{Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc. ("Arkansas-Platte I")}.\textsuperscript{76} In this case, the plaintiff, Arkansas-Platte, succeeded to ownership of property previously owned by a wooden fence-post treatment facility, which used the chemical "Dowicide 7" to

\textsuperscript{71} \textit{Ferebee}, 736 F.2d at 1542.
\textsuperscript{72} \textit{Id.} at 1541.
\textsuperscript{73} \textit{Id.}
\textsuperscript{74} \textit{Id.}
\textsuperscript{75} \textit{Id.} at 1542.
\textsuperscript{76} 959 F.2d 158 (10th Cir.) [hereinafter \textit{Arkansas-Platte I}], vacated and remanded sub nom. Arkansas-Platte & Gulf Partnership v. Dow Chem. Co., 113 S. Ct. 314 (1992), \textit{aff'd} sub nom. Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 981 F.2d 1177 (10th Cir. 1993). The Tenth Circuit recently heard \textit{Arkansas-Platte I} on remand from the Supreme Court. Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 981 F.2d 1177 [hereinafter \textit{Arkansas-Platte II}]. See \textit{infra} notes 185, 199 for a discussion of this decision.
treat the posts. When one of Arkansas-Platte's employees contracted pentachlorophenol poisoning, Arkansas-Platte sued Van Waters & Rogers and Dow Chemical, the manufacturer and distributor of the product, claiming negligence and strict liability based on failure to warn. The district court held that neither of the state tort law claims was expressly or impliedly preempted by FIFRA and denied the defendants' motion for summary judgment. The Tenth Circuit then took this issue on interlocutory appeal, reversing the denial of summary judgment and holding that FIFRA impliedly preempted the plaintiff's state tort law damage claims alleging improper labeling and failure to warn.

According to the court, implied preemption has two bases: "the direct conflict posed with federal uniform regulation of pesticides, and [Congress' intent] to occupy the field of pesticide labeling regulation." The Arkansas-Platte I court agreed with the reasoning employed by the Eleventh Circuit in Papas v. Upjohn Co.

According to the court, implied preemption has two bases: "the direct conflict posed with federal uniform regulation of pesticides, and [Congress' intent] to occupy the field of pesticide labeling regulation." The Arkansas-Platte I court agreed with the reasoning employed by the Eleventh Circuit in Papas v. Upjohn Co. At that time, the Eleventh Circuit was the only federal court of appeals that had considered the issue, and it had found preemption. According to the Arkansas-Platte I court:

> While FIFRA explicitly instructs [that] states can regulate the sale or use of federally registered pesticides, § 136v(b) precludes "any requirements for labeling or packaging in addition to or different from those required pursuant to this act." The Papas court reasoned jury awards of damages in these actions would result in direct conflict with federal law. We agree.

Thus, the court made a distinction between the regulation of pesticide use and the regulation of pesticide labeling and packaging, a distinction the

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77 Arkansas-Platte I, 959 F.2d at 158.
79 Id. at 159.
83 Arkansas-Platte I, 959 F.2d at 158.
84 Id. at 159.
The court concluded that while Congress had not occupied the broad field of pesticide regulation, it had occupied the narrower field of pesticide labeling and packaging. The Arkansas-Platte I court arrived at this distinction by relying heavily on the Supreme Court’s decision in *Wisconsin Public Intervenor v. Mortier*. Concluding that allowing damage claims against the manufacturer would result in a direct conflict with the federal mandate in section 136v(b), the court determined that no state may require anything in addition to or different from a label approved under FIFRA. The court maintained that “[s]tate court damage awards based on failure to warn would constitute ad hoc determinations of the adequacy of statutory labeling standards [by individual states’ juries]. This would hinder the accomplishment of the full purpose of § 136v(b), which is to ensure uniform labeling standards.”

The “choice of reaction” theory was not accepted by the Arkansas-Platte I court, which stated that “[a] business choice between paying damages and changing the label is only notional. This choice cannot be consistent with FIFRA’s preclusion of ‘any requirements for labeling or packaging in addition to or different from’ the statutory mandate.”

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83 See supra notes 45-75 and accompanying text.
84 Arkansas-Platte I, 959 F.2d at 160 (“A plain reading of the statute indicates a more specific intent to occupy the field in labeling and packaging, § 136v(b)”; see also Davidson v. Velscol Chem. Corp., 834 P.2d 931, 936 & n.7 (Nev. 1992) (holding that Congress intended to occupy the field of pesticide labeling and, therefore, failure-to-warn claims were impliedly preempted by FIFRA).
85 111 S. Ct. 2476 (1991); see infra notes 95-110 and accompanying text (discussing the Mortier decision).
86 Arkansas-Platte I, 959 F.2d at 163 (citing Mortier, 111 S. Ct. at 2479); see also id. at 163 nn.5-6 (emphasizing the use/labeling distinction and further stating that “Montana Pole wrongly relies on Mortier without considering the Court’s distinction between preemption of state regulation of the sale and use of pesticides, and state authority over labeling”).
87 7 U.S.C. § 136v(b) (1988); see supra note 6 (reproducing the statute in part).
89 See supra notes 59-60 and accompanying text.
90 Arkansas-Platte I, 959 F.2d at 162-63 (quoting The Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v(b) (1988)).
The court further rejected the Ferebee court’s conclusion as to the legislative history of FIFRA, stating that the history "is not clear on the question of state common law tort actions based on labeling and failure to warn[,]" contrary to the Ferebee court’s findings.

E. A Word on Wisconsin Public Intervenor v. Mortier

While the Supreme Court has not specifically addressed the issue faced in either Ferebee or Arkansas-Platte I, it has broached the subject of preemption of state regulation of pesticides under FIFRA in Wisconsin Public Intervenor v. Mortier. In this case, a property owner applied for a permit pursuant to a town ordinance in order to aerially spray pesticides on part of his property. The town issued the permit to Mortier, but with strict limitations. Mortier then sued for a declaratory judgment, claiming that FIFRA preempted the ordinance. The trial court granted summary judgment in favor of Mortier and the Wisconsin Supreme Court affirmed.

The United States Supreme Court reversed. The Court held that FIFRA did not preempt local regulation of pesticide use, either expressly or impliedly. There was no “occupation of the field” of pesti-

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93 Id. at 163.
95 The narrower issue in these cases was whether FIFRA preempted the states’ power to regulate pesticide labeling as opposed to pesticide use. See Arkansas-Platte I, 959 F.2d at 163; Ferebee, 736 F.2d at 540.
97 Id. at 2481.
98 Id.
99 Id.
100 Mortier v. Casey, 452 N.W.2d 555 (Wis. 1990).
101 "FIFRA nowhere expressly supersedes local regulation of pesticide use." Mortier, 111 S. Ct. at 2482.
102 "Likewise, FIFRA fails to provide any clear and manifest indication that Congress sought to supplant local authority over pesticide regulation impliedly." Id. at 2485.
cide regulation by FIFRA, as it "leaves substantial portions of the field vacant[ ]"

The Court further stated that FIFRA "does not occupy the field of pesticide regulation in general or the area of local use permitting in particular." Additionally, the Court found that there was no conflict between FIFRA and the ordinance at issue in Mortier. On the contrary, "FIFRA implies a regulatory partnership between federal, state, and local governments." It is therefore clear under Mortier that FIFRA leaves to the states the power to regulate the sale and use of pesticides.

However, the Supreme Court's position on whether FIFRA has preempted the field of pesticide labeling is much less clear. As noted in Arkansas-Platte I, certain statements made by the Court in dicta indicate that it might possibly hold the field of pesticide labeling preempted by FIFRA if it were to decide this specific issue in the future. For example, the Court noted the following regarding section 136v(b):

[The language of § 136v(b)] would be pure surplusage if Congress had intended to occupy the entire field of pesticide regulation. Taking such pre-emption as the premise, § 136v(a) would thus grant States the authority to regulate the "sale or use" of pesticides, while § 136v(b) would superfluously add that States did not have the authority to regulate "labeling or packaging," an addition that would have been doubly superfluous given FIFRA's historic focus on labeling to begin with.

This language provides strong support for the position that regulation of the labeling of pesticides does not necessarily fall under the scope of the regulation of pesticide sale or use.

Even more telling is a later statement made by the Court: "As we have also made plain, local use permit regulations— unlike labeling or certification—do not fall within an area that FIFRA's 'program' pre-empts or even plainly addresses." This necessarily implies that the

103 Id. at 2486. See also Worm v. American Cyanamid Co., 970 F.2d 1301, 1305 (4th Cir. 1992) (finding no occupation of the entire field of pesticide regulation).
104 Mortier, 111 S. Ct. at 2486 (emphasis added).
105 Id. at 2487.
107 Mortier, 111 S. Ct. at 2486 (citing Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984)).
108 Id. at 2487 (emphasis added).
fields of labeling and certification do fall within an area that FIFRA preempts and, therefore, states may not regulate in these areas. At the same time, this language forces a distinction between the regulation of pesticide sale or use and the regulation of pesticide labeling, a distinction relied upon by many courts and ignored by others.

In conclusion, Mortier is not dispositive on the issue of preemption of state tort law damage claims based on the inadequate labeling of pesticides. This is an area that the Supreme Court or Congress must eventually address directly.

II. CIPOLLINE v LIGGETT GROUP, INC.

A. Background and Procedural History

The Supreme Court recently spoke on the issue of federal preemption of state tort law damage actions in the context of cigarette labeling in Cipollone v. Liggett Group, Inc. The petitioner in Cipollone was the son of Rose Cipollone, who originated the action in federal court against a group of cigarette manufacturers and marketers. Mrs. Cipollone and her husband died during the course of the litigation, and their son maintained the action on behalf of their estates. He alleged that the respondents were responsible for his mother’s development of lung cancer and, ultimately, her death, based on the following claims: failure to warn, design defect, breach of express warranty, fraudulent misrepresentation, and conspiracy to defraud.

The respondents contended, inter alia, that section 5 of the Federal Cigarette Labeling and Advertising Act and section 5(b) of the

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Public Health Cigarette Smoking Act of 1969 \(^{117}\) preempted all state tort law damage claims "based on [the respondents'] conduct after 1965." \(^{118}\) Mrs. Cipollone began smoking cigarettes prior to the enactment of either provision. \(^{119}\)

The New Jersey District Court held that neither Act preempted state court common law actions and granted the petitioner's motion to strike the preemption defense. \(^{120}\) However, in an interlocutory appeal, the Third Circuit reversed this ruling and held that the preemption provisions did in fact preempt the petitioner's common law failure-to-warn claims. \(^{121}\) In so ruling, the court rejected the respondents' contention that the provisions \emph{expressly} preempted common law actions, but accepted their contention that they \emph{impliedly} did so. \(^{122}\) Upon remand to the district court, the petitioner's failure-to-warn claim was ruled preempted by the decision of the court of appeals. \(^{123}\) However, when the case was presented to the jury, "[t]he jury found that Liggett, prior to 1966, had failed to warn customers of health risks of smoking and that this failure to warn proximately caused Mrs. Cipollone's lung cancer and death." \(^{124}\)

The Third Circuit affirmed the ruling on the issues relevant to this discussion, \(^{125}\) and the Supreme Court granted the petition for certiorari \(^{126}\) "to consider the preemptive effect of the federal statutes." \(^{127}\)

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\(\S\) 5 Preemption

(a) No statement relating to smoking and health, other than the statement required by section 4 of this Act, shall be required on any cigarette package.

(b) No statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

\(\text{Id.} \S 1334.\)


(\(\text{Id.} \S 1334(b).\)

\(^{119}\) Rose Cipollone began smoking in 1942. \(\text{Id.} \) at 2613.


Cipollone v. Liggett Group, Inc., 789 F.2d 181, 187 (3d Cir. 1986). The court also held that petitioner's claim regarding the advertising and promotion of cigarettes was preempted. \(\text{Id.} \) at 187.

\(^{120}\) \(\text{Id.} \) at 185-87.


\(^{121}\) Cipollone, 112 S. Ct. 2608, 2615 (1992).
B. Holdings in Cipollone

The Court first acknowledged "that the historic police powers of the States [are] not to be superseded by Federal Act unless that [is] the clear and manifest purpose of Congress."\(^{128}\) This intent can, of course, be "explicitly stated in the statute's language or implicitly contained in its structure and purpose."\(^{129}\) While the Third Circuit engaged in an implied preemption analysis of the acts in question,\(^3\) the Supreme Court opted for an express preemption analysis.\(^{131}\) The Court explained its rationale as follows:

When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. \(^{3}\) The other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act. Therefore, we need only identify the domain expressly pre-empted by each of those sections.\(^{132}\)

Therefore, when Congress includes an express preemption provision in a federal statute, the express language of that statute controls and courts should not engage in implied preemption analysis at all.\(^{133}\)

\(^{128}\) Id. at 2617 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). As a result, an express preemption provision must be construed "in light of the presumption against the pre-emption of state police power regulations." Id. at 2618. Further, this "presumption against preemption" requires a narrow reading of express preemption provisions. Id.


\(^{130}\) Cipollone, 789 F.2d at 186-87.

\(^{131}\) "In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed entirely by the express language in § 5 of each Act." Cipollone, 112 S. Ct. at 2618 (emphasis added).


\(^{133}\) In his dissent, Justice Scalia explained the Court's ruling further in observvng that "[o]nce there is an express pre-emption provision, all doctrines of implied pre-emption are eliminated." Cipollone, 112 S. Ct. at 2633 (Scalia, J., concurring in part and dissenting in part).
The Court first examined the 1965 provision and found that it did not expressly preempt any of the petitioner's state tort law damage claims. Because "Congress spoke precisely and narrowly" in the Act, the provision "merely prohibited state and federal rule-making bodies from mandating particular cautionary statements on cigarette labels (§ 5(a)) or in cigarette advertisements (§ 5(b))." The Court stated that this was the "appropriate" conclusion for several reasons: "the presumption against the pre-emption of state police power regulations," the fact that the requirement of a specifically-worded warning label does not automatically preempt an entire field, and the fact that there is no "inherent conflict between federal pre-emption of state warning requirements and the continued vitality of state common law damages actions." The Court further stated that this holding was in line with the purposes and "regulatory context of the 1965 Act.

The Court reached a different conclusion regarding the 1969 Act. In finding that the 1969 provision may have preempted certain state tort law damage claims, the Court looked principally to changes in the language of the 1969 provision. To the Court, these changes indicated


135 Cipollone, 112 S. Ct. at 2619.

136 Id. at 2618.

137 Id. (emphasis added). Section 4 of the 1965 Act set forth the exact wording to be included on the labels of cigarette packs. Because the 1965 Act prohibited only any additional required statements, the Court construed this language to mean that states were merely prohibited from requiring additional "specifically-worded" statements of the same general type as in section 4 of the Act. In other words, a state could require additional labeling as long as it was not a statement different from that required by the Act. "[Section 5] is best read as having superseded only positive enactments by legislatures or administrative agencies that mandate particular warning labels." Id. at 2618-19 (emphasis added). A state common law damages action would not require any "particular cautionary statement" to be included on the label, and the Act, therefore, does not preempt these claims.

138 Id. at 2618. It is interesting to note that in reaching these conclusions, the Court relied in part on the legislative history of the 1965 Act. Because a review of the legislative history of an Act is indicative of an implied preemption analysis, this seems to directly conflict with the Court's earlier determination that the explicit language of an express preemption provision alone should control the determination of the scope of that provision. See supra note 132 and accompanying text.

139 Cipollone, 112 S. Ct. at 2619. Notice again that the Court seems to be contradicting itself by going beyond the explicit language of the statute and into the legislative history.


141 Cipollone, 112 S. Ct. at 2621. In determining whether or not all claims were preempted, the Court stated: "[W]e must look to each of petitioner's common law claims to determine whether it is in fact pre-empted." Id., see also infra notes 152, 161-62 and accompanying text.

142 "Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader." Cipollone, 112 S. Ct. at 2619.
Congress' intent to broaden the scope of the preemption provision in the 1969 Act.  

First, the Court noted that Congress added the phrase "requirement or prohibition" to the statute, broadening the 1965 provision's ban on "statements." Secondly, Congress extended the previous ban on statements "in advertising" to cover any communications "with respect to the advertising or promotion" of cigarettes. Despite the fact that both parties insisted that the 1969 provision did not change the preemptive scope of the 1965 provision, the Court found this reading to be "incompatible with the language and origins of the amendments" and that the language clearly evidenced an intent to broaden the reach of the statute. Finally, the 1969 provision added the phrase "imposed under State law," indicating that none of the aforementioned requirements or prohibitions could be construed in this manner.

However, the fact that the scope of the 1969 provision is not limited to positive enactments by a state legislature does not mean that all common law claims are necessarily preempted by the provisions. Rather, the Court implemented a "claim-by-claim" analysis, ultimately finding that some claims were preempted while others were not.

C. General Principles in Cipollone

Beyond these "bare bones" holdings by the Court, there are several general principles in Cipollone. First and foremost is the Court's finding that

143 The Court stated: "In the context of such revisions and in light of the substantial changes in wording, we cannot accept the parties' claim that the 1969 Act did not alter the [preemptive] reach of § 5(b)." Id. at 2619-20.


146 Cipollone, 112 S. Ct. at 2619 (discussing 15 U.S.C. § 1334(b) (1965)); see also supra note 116 (reproducing the statute in part).  

147 Cipollone, 112 S. Ct. at 2619 (discussing 15 U.S.C. § 1334(b) (1969)); see also supra note 117 (reproducing the statute in part).

148 Id. at 2619.

149 Id. at 2621.

150 See id. at 2621-25.

151 The Court held that the 1965 Act did not preempt any of the petitioner's state tort law damage claims and that the 1969 Act expressly did so as to certain of the petitioner's claims, but not all claims. Part VI of the Court's opinion outlines the Court's holding as to each specific claim. See id. at 2625.
the phrase "requirement or prohibition" in the 1969 provision encompassed both positive enactments by state legislatures and common law damages actions in state courts. The petitioner in Cipollone tried to argue that state common law damage actions do not impose any sort of "requirements or prohibitions" on defendants. The Court rejected this reasoning, stating that this analysis was at odds both with the plain words of the 1969 Act and with the general understanding of common law damages actions. The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common law rules.

The Court then reemphasized an earlier holding that a state common law damages award can be just as effective in exerting regulatory power as a positive enactment by the legislation of a state. In other words, a state tort law damage action may in some circumstances be considered the functional equivalent of a direct state regulation in the form of legislation.

Further, because certain common law damages actions are "premised on the existence of a legal duty[,] it is difficult to say that such actions do not impose 'requirements or prohibitions.'"

Therefore, the Court concluded that the preemptive scope of the 1969 Act was not limited to positive enactments by the legislature. Likewise, the Court found that the phrase "State law" in the 1969 provision included common law as well as direct regulation by the states in the form of a statute or other regulation. This was true despite the above maxim that express preemption provisions would be construed narrowly in light of the presumption against preemption.

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154 Cipollone, 112 S. Ct. at 2620.
155 Id.
156 Id. (citing San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 247 (1959), wherein the Court stated that "[t]he obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy").
157 Id. (citations omitted).
158 Id.
159 Id. See generally Erie R.R. v. Tompkins, 304 U.S. 64, 78-80 (1938) (holding that the phrase "laws of the several states" encompasses state common law as well as state statutory law).
160 See supra note 128 and accompanying text.
D. The Test

Given this discussion, the Court then announced the test to be applied to each of the petitioner’s common law claims in order to determine on an individual basis which were expressly preempted by the 1969 provision and which survived.

The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes a “requirement or prohibition based on smoking and health imposed under State law with respect to advertising or promotion,” giving that clause a fair but narrow reading.161

In applying this test to the petitioner’s failure-to-warn claim, the Court held that “insofar as claims under either failure-to-warn theory require a showing that respondents’ post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted.”162

III. THE APPLICATION OF CIPOLLONE TO THE FIFRA PREEMPTION ANALYSIS

Lower courts now face the task of applying the Supreme Court’s analysis in Cipollone to the question of preemption under FIFRA. While it may not be completely clear how the analysis is to be applied, it is clear that there is no longer any question, as there has been in the past, as to whether the analysis should be applied.163 The same preemption and damages analysis of the Federal Cigarette Labeling and Advertising Act164 applies to the issue of preemption under FIFRA. This is evidenced by the fact that the Supreme Court has recently remanded two FIFRA cases to be reconsidered in light of its decision in Cipollone.165

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162 Id. at 2621-22.
163 See, e.g., Palmer v. Liggett Group, Inc., 825 F.2d 620, 628 n.13 (1st Cir. 1987) (stating that FIFRA cases were not applicable to cigarette labeling cases).
The fact that one statute—the Federal Cigarette Labeling and Advertising Act—requires a specific label\textsuperscript{166} and the other—FIFRA—simply requires government approval of a label presented by the manufacturer\textsuperscript{167} no longer distinguishes the application of cigarette labeling cases from those under FIFRA.\textsuperscript{168}

\textbf{A. Express Preemption Analysis}

Applying the analysis in \textit{Cipollone} to FIFRA preemption cases, it appears that FIFRA expressly preempts state tort law damage claims based on failure to warn due to inadequate labeling. Because FIFRA contains an explicit provision regarding the authority granted to states,\textsuperscript{169} courts must look at the express language contained therein and determine only the scope of federal preemption.\textsuperscript{170} Courts should no longer engage in an implied preemption analysis of FIFRA after \textit{Cipollone}.\textsuperscript{171} In its analysis of the 1965 and 1969 cigarette labeling provisions, the Supreme Court explicitly stated that it focused solely on the provisions in question, not on the purpose as stated in the legislative history.\textsuperscript{172} Because FIFRA contains a similar provision, labeled "Authority of States,"\textsuperscript{173} courts must focus on the express language of that section and determine only which state tort law damage claims must fail and which may survive. According to the Supreme Court’s statement that it relied on the statutory language alone, it would appear to be improper to focus on the purposes of FIFRA as stated in its legislative history in

\begin{footnotesize}
\footnote{1177 (10th Cir. 1993); Papas v. Zoecon Corp., 112 S. Ct. 3020 (1992), \textit{vacating and remanding} Papas v. Upjohn Co., 926 F.2d 1019 (11th Cir. 1991).}
\footnote{166 15 U.S.C. §§ 1331-40, 1333(a) (1969).}
\footnote{169 7 U.S.C. § 136v (1988).}
\footnote{172 Cipollone, 112 S. Ct. at 2618. \textit{But see supra} note 138.}
\footnote{173 7 U.S.C. § 136v (1988).}
\end{footnotesize}
determining preemption, even though the Supreme Court's consideration of the federal statute's purpose in *Cipollone* sends mixed signals to lower courts.\(^{174}\) In the end, however, the inclusion of the express preemption provision in FIFRA is an "indicium" that Congress intended to preempt the area in question, namely pesticide labeling.\(^{175}\)

In reconciling the language of sections 136v(a) and (b) of FIFRA, courts must distinguish between state preemption of sale or use and state preemption of labeling,\(^{176}\) based on the holding in *Cipollone* that the express language of a preemption provision controls the scope of federal preemption.\(^{177}\) In section 136v(a), Congress mandated that "[a] State may regulate the sale or use of any federally registered pesticide in the State, except that the states may not go beyond FIFRA and allow a use expressly prohibited therein."\(^{178}\) Immediately following,

\(^{174}\) See supra notes 138-39. However, even if the legislative history is considered in the FIFRA preemption analysis, it seems clear that Congress intended to allow the states authority to regulate the sale or use of pesticides, but not the labeling of pesticides, as one of the stated purposes of FIFRA is "uniformity." See supra note 90.

See also Arkansas-Platte I, 959 F.2d 158, 162 (10th Cir.) (finding that part of the "full purpose of § 136v(b) is to ensure uniform labeling standards."); *Arkansas-Platte & Gulf Partnership v. Dow Chem. Co.*, 113 S. Ct. 314 (1992), aff'd sub nom. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993); *Chemical Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941, 944 (9th Cir.) ("Congress included the preemption provision in FIFRA to promote uniformity."); *cert. denied*, 113 S. Ct. 80 (1992); *Papas v. Upjohn Co.*, 926 F.2d 1019, 1025 (11th Cir. 1991) ("One of the EPA's objectives in its labeling regulations is the uniformity of labeling."); *vacated and remanded sub nom. Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992), aff'd sub nom. *Papas v. Upjohn Co.*, No. 89-3752, 1993 WL 41169 (11th Cir. Mar. 8, 1993); *Ruden v.ICI Ams.*, Inc., 763 F. Supp. 1500, 1508 (W.D. Mo. 1991) (noting that there is a "uniform system of labeling fostered under FIFRA."); *Davidson v. Velsicol Chem. Corp.*, 834 F.2d 931, 937 (Ne. 1992) ([State damage actions would hinder Congress' goal of reaching uniformity of pesticide labeling.] (citation omitted).

\(^{175}\) See *Cipollone*, 112 S. Ct. at 2618.

\(^{176}\) Discussing this distinction, the court in *Chemical Specialties Mfrs. Ass'n v. Allenby* stated the following:

So long as additional labeling is not required, FIFRA expressly authorizes state pesticide regulation. *Other than regulating labels*, states are left free to impose whatever restrictions they may wish. Consequently, a state could prohibit the sale of a pesticide within its borders even though it could not require the manufacturer of the pesticide to change the label. Congress included the preemption provision in FIFRA to promote uniformity and ease distribution practices for chemical product manufacturers. (The importance of a uniform labeling system under FIFRA is rooted in a concern for clarity so that consumers can easily recognize warning labels no matter which state they enter.

*Chemical Specialties Mfrs. Ass'n*, 958 F.2d at 944-45 (emphasis added); see also *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115, 118 (2d Cir. 1989) ("The states have joint control with the federal government in regulating the use of pesticides, with the exception of the EPA's exclusive supervision of labeling."); (citation omitted).

\(^{177}\) *Cipollone*, 112 S. Ct. at 2618 ("[T]he pre-emptive scope of the [Acts] is governed entirely by the express language in each Act.").

however, is section 136v(b), which provides that "[s]uch State shall not impose any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." The Supreme Court addressed this "use/labeling" distinction indirectly in Wisconsin Public Intervenor v. Mortier, and held that automatic preemption of pesticide labeling of any type would be inconsistent with the Court's decision in that case. To find that labeling regulations are not preempted would render the language in section 136v(b) superfluous and unnecessary.

Most pre-Cipollone FIFRA cases passed over the question of express preemption, relying instead on an implied preemption analysis. Therefore, Cipollone encourages courts to undertake an evaluation of the express preemptive value of FIFRA. By focusing their attention on

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179 Id. § 136v(b).
180 See also Yowell v. Chevron Chemical Co., which states:
While the holding of Mortier is confined to the regulation of pesticides by local governments, we are nevertheless inclined to adopt its construction of FIFRA. The court said: "A plain reading of the statute indicates an intent to maintain the traditional police powers of the states in the general grant of authority to 'regulate the sale or use' of pesticides, § 136v(a), and a more specific intent to occupy the field in labeling and packaging, § 136v(b)."

That construction of § 136v(b) is supported by the fact that Congress, in 1988, amended that provision to insert the caption "Uniformity."


183 Cipollone does not disturb the analysis undertaken in Burke v. Dow Chemical Co. (a post-Cipollone case finding express preemption); Kennan v. Dow Chemical Co. (a pre-Cipollone case finding express preemption); or Fitzgerald v. Mallinckrodt, Inc., 681 F. Supp. 404 (E.D. Mich. 1987) (a pre-Cipollone case finding preemption, but not indicating whether it is express or implied preemption).
the express language of section 136v(b) and not automatically dismissing the possibility of express preemption, lower courts may be more apt to find implied preemption analysis unnecessary after Cipollone. 185

B. Common Law Damage Claims Versus Legislative Action

In Cipollone, the Supreme Court indicated that in the case of the Federal Cigarette Labeling and Advertising Act, a state tort law damage action based on failure to warn would have the same effect as a state regulation or legislative action. 186 Whereas the FIFRA provisions in question seem to fall somewhere in between the 1965

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The only court of appeals to decide this issue post-Cipollone is the Tenth Circuit in Arkansas-Platte I, 981 F.2d 1177 (10th Cir. 1993). The court reaffirmed its decision in Arkansas-Platte I, this time relying on an express preemption analysis. Comparing FIFRA with the 1969 Act in Cipollone, the court stated:

Although the words employed in [§] 136v(b) of FIFRA are different from those in [§] 5(b) of the Cigarette Smokinq Act, their effect is the same. Section 136v(b) exists in the context of what federal law permits the state to regulate, and it simply deprives the state of power to adopt any regulation. This is as broad as the [§] 5(b) proscription.

Moreover, when Congress [included § 136v(b)], it gave a "reliable indicum of congressional intent with respect to state authority." We believe Congress circumscribed the area of labeling and packaging and preserved it only for federal law. With the same stroke, Congress banned any form of state regulation, and the interdiction law is clear and irrefutable.

Id. at 1179 (citation omitted) (emphasis added) (quoting Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2618 (1992)).


186 See supra notes 156-62 and accompanying text.
and 1969 provisions analyzed in Cipollone,\textsuperscript{187} it is not immediately clear whether Congress intended to allow state tort law damage claims based on inadequate pesticide labeling. However, closer examination including a comparison of the provisions of each federal statute support the conclusion that Congress did not intend to allow such claims.

One similarity between the preemption provisions is obvious: both statutes prohibit additional "requirements" from being imposed by the states.\textsuperscript{188} In Cipollone, the Court found that the 1969 provision’s ban on "requirements or prohibitions" implied that Congress intended a much more broad preemption than was established by the 1965 version of the Act.\textsuperscript{189} However, a reference to "prohibitions" is noticeably absent from the FIFRA preemption provision. It is possible to conclude that this omission indicates Congress’ intent to preempt only positive enactments by state legislatures, but this conclusion ignores the Court’s discussion of \textit{San Diego Building Trades Council v. Garmon}\textsuperscript{190} in Cipollone.\textsuperscript{191} It also overlooks part of FIFRA’s legislative history, which at one point refers to section 136v(b) as a "prohibition."\textsuperscript{192}

Another difference between the statutes is that the provision at issue in Cipollone bars any requirements or prohibitions "imposed under State law,"\textsuperscript{193} while the provision in FIFRA merely prohibits a "State" from imposing any additional requirements.\textsuperscript{194} The Court in Cipollone concluded that "State law" necessarily includes both statutory law and common law, rejecting any attempt to limit the preemption to positive enactments by state legislatures.\textsuperscript{195} There is no mention of the word "law" in the FIFRA provision, which the Supreme Court somewhat relies upon in Cipollone.\textsuperscript{196} However, the word "law" may be necessarily implied, for how else is a state to impose requirements but through "laws," be they positive enactments or the common law?\textsuperscript{197}

\begin{itemize}
\item \textsuperscript{187} \textit{See supra} notes 111-52 and accompanying text.
\item \textsuperscript{188} \textit{Compare} 15 U.S.C. § 1334(b) (1969) ("No requirement or prohibition shall be imposed") with 7 U.S.C. § 136v(b) (1988) ("Such State shall not impose any requirement for labeling or packaging ").
\item \textsuperscript{189} Cipollone, 112 S. Ct. at 2619; \textit{see supra} notes 140-45 and accompanying text.
\item \textsuperscript{190} 359 U.S. 236 (1959).
\item \textsuperscript{191} 112 S. Ct. at 2620; \textit{see supra} note 156 and accompanying text.
\item \textsuperscript{193} 15 U.S.C. § 1334(b) (1969).
\item \textsuperscript{194} 7 U.S.C. § 136v(b) (1988).
\item \textsuperscript{195} \textit{See Cipollone}, 112 S. Ct. at 2620-21.
\item \textsuperscript{196} \textit{Id.} at 2620; \textit{see supra} notes 157-59 and accompanying text.
\item \textsuperscript{197} This point is clearly open to interpretation by lower courts, but should not prove to be a stumbling block in the express preemption analysis.
\end{itemize}
More importantly, the Cipollone Court emphasized that the general understanding of common law rules is such that there is no distinction between positive enactments and common law when Congress uses the language "requirements or prohibitions." Regulation can be exerted by the states through an award of damages just as effectively as through direct regulation by legislatures and, therefore, there should be no distinction between the two. The Cipollone Court seems to have implicitly rejected the "choice of reaction" theory advanced in Ferebee v. Chevron Chemical Co., which proceeds on the premise that a damage award will not necessarily have a regulatory effect on manufacturers. Justice Blackmun cited Ferebee in support of his rationale denouncing preemption, bringing this theory to the Court's attention. Significantly, six members of the Supreme Court declined to subscribe to Blackmun's analysis, which further indicates that the Court would not accept the "choice of reaction" theory offered in Ferebee.

C. Applying the Cipollone Test

Cipollone does not offer a "bright line" rule for determining whether a particular federal statute preempts all state common law actions. Rather, the Court advocates a "claim-by-claim" evaluation, applying the same test to

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19  Cipollone, 112 S. Ct. at 2620.

In Arkansas-Platte II, the Tenth Circuit focused on this conclusion. Regarding the effect of an award of damages, the court stated the following:

When one looks to the purpose underlying both legislative regulation of labeling and packaging and a state common law duty to warn, it becomes evident those purposes are the same. Indeed, a state common law duty to warn is nothing more than a duty to label a product to provide information. In that sense, the common law duty is no less a "requirement" in the preemption scheme than a state statute imposing the same burden.

The objectives of the common law duty and a regulatory statute are the same. Both address a manufacturer's duty to convey information about a product through the medium of a label. Therefore, we believe it only logical to hold that the common law duty to warn is subjected to the same federal preemptive constraints as a state statute. Arkansas-Platte II, 981 F.2d 1177, 1179 (10th Cir. 1993) (citation omitted) (emphasis added). The court concluded that "[i]n the extent that state tort claims require a showing that defendants' labeling and packaging should have included additional, different or alternatively stated warnings from those required under FIFRA, they would be expressly preempted." Id.

20  See supra notes 58-75 and accompanying text.
20  Cipollone, 112 S. Ct. at 2628 (Blackmun, J., concurring in part and dissenting in part).
20  Id. Justice Blackmun was joined by Justices Kennedy and Souter in his opinion.
each. This test, adapted to reflect the language at issue in FIFRA preemption cases, is as follows:

The central inquiry in each case is straightforward: we ask whether the legal duty that is the predicate of the common law damages action constitutes ["any requirements for labeling or packaging in addition to or different from those required under" FIFRA], giving that clause a fair but narrow reading.\footnote{Id. at 2621 (inserting language from the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v(b) (1988)).}

The results of the application of this test to the facts in \textit{Cipollone} and to the facts present in a FIFRA failure-to-warn case appear to be identical. In \textit{Cipollone}, the Court found that the petitioner's failure-to-warn claim required a showing that respondents' advertising (or other promotional materials) should have included additional or more clearly stated warnings.\footnote{Id. at 2621-22.} Similarly, a FIFRA failure-to-warn claim based on adequate labeling requires a showing that the manufacturer should have included additional or more clearly stated warnings on the label of its pesticides.\footnote{One court described the showing required as follows: \begin{quote} Negligent failure to warn requires a showing that a manufacturer did not warn of a particular risk for reasons which fell below the acceptable standard of care, that is, what a reasonable manufacturer would have known and would have warned about. Strict liability requires only a showing that the manufacturer did not adequately warn of a risk known or knowable in light of the available information at the time of manufacture and distribution. Under either theory, the adequacy of the warning is a key determination. A warning is inadequate when it is not given in a manner likely to reach those to whom harm is reasonably foreseeable. \end{quote} Ramirez v. Plough, Inc., 12 Cal. Rptr. 2d 423, 427 (App. 1992) (citations omitted) (discussing a failure-to-warn claim in connection with aspirin bottle warnings requested by the Food and Drug Administration).}

The basic premise of the failure-to-warn claim is that the manufacturer should have included additional warnings. To the extent that state tort law damage claims are based on such omissions, they appear to be preempted by FIFRA, which unequivocally prohibits a state from requiring additional warnings on labels approved thereunder.\footnote{7 U.S.C. § 136v(b) (1988).} Therefore, application of the \textit{Cipollone} inquiry requires courts to find that FIFRA prevents plaintiffs from bringing state tort law damage claims based on failure to warn and inadequate labeling.\footnote{See \textit{Arkansas-Platte II}, 981 F.2d 1177 (10th Cir. 1993) for a post-\textit{Cipollone} analysis of these issues; see also supra notes 185, 199.}
CONCLUSION

The Supreme Court addressed the issue of federal preemption generally in *Cipollone*, but gave lower courts little direction in how to apply the analysis to federal statutes other than the Public Health Cigarette Smoking Act. In what seems to be becoming an all too familiar trend with the Court, a concurring majority held in often conflicting opinions that failure-to-warn claims based on inadequate labeling were expressly preempted by the preemption provision of the 1969 Act. It is disturbing, however, that the Supreme Court set aside any and all policy considerations in reaching this conclusion. For example, is it wise to ignore issues such as the compensatory aims of state tort law when Congress has not spoken in the clearest of terms?

The federal courts of appeals are currently split on the issue of whether section 136v(b) of FIFRA preempts state tort law damage claims based on the inadequate labeling of pesticides, the Supreme Court’s remand of *Arkansas-Platte I* and the Tenth Circuit’s reconsideration of the case have not mended this split, as several federal district courts have chosen not to apply the same analysis as that applied in *Arkansas-Platte II*. Applying *Cipollone* to the FIFRA preemption analysis results in the conclusion that Congress has expressly preempted all state tort law damage claims based on failure to warn. This is based on the explicit language of section 136v(b) of FIFRA and the Supreme Court’s emphasis in *Cipollone* on the regulatory effect of state tort law damages actions. However, it is not entirely clear that courts will extend *Cipollone* in this manner, as evidenced by the fact that post-*Cipollone* decisions in lower courts have not engaged in identical analyses of the issue. Clearly, the Supreme Court or Congress will have to speak directly to this issue if the lower courts cannot come to some

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209 See *supra* notes 8-9 and accompanying text; *supra* notes 45-75 and accompanying text (discussing Ferebee v. Chevron Chem. Co., 736 F.2d 1529 (D.C. Cir.), cert. denied, 469 U.S. 1062 (1984), which holds state tort law damage claims are not preempted by FIFRA); *supra* notes 76-94 and accompanying text (discussing *Arkansas-Platte II*, 959 F.2d 158 (10th Cir.), vacated and remanded sub nom. *Arkansas-Platte & Gulf Partnership v. Dow Chem. Co.*, 113 S. Ct. 314 (1992), aff’d sub nom. *Arkansas-Platte Gulf & Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993), which holds state tort law damage claims are preempted by FIFRA); *supra* notes 185, 199 (discussing *Arkansas-Platte II*, 981 F.2d 1177 (10th Cir. 1993)).


211 See *supra* note 185.

212 *Arkansas-Platte II*, 981 F.2d 1177 (10th Cir. 1993); see *supra* notes 185, 199 for a discussion of the Tenth Circuit’s subsequent decision to reaffirm.

213 See *supra* note 185.

214 See *supra* notes 157-59 and accompanying text.

215 See *supra* note 185.
consensus on their own, lest the state of FIFRA preemption law continue to be inconsistently applied. Given the trend that is being established, however, such a consensus seems unlikely.

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