An Agricultural Law Research Article

FIFRA's Puzzling Failure-to-Warn Preemption: Pesticide Use and the Right-to-Know

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Originally published in SAN JOAQUIN AGRICULTURAL LAW REVIEW
13 SAN JOAQUIN AGRIC. L. REV. 173 (2003)

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INTRODUCTION

Between 1991 and 1998, pesticide usage in California increased over 40%, with a total of more than 1.5 *billion* pounds applied during this period.[1] With no indication that the overall upward trend will reverse, and pesticide usage remaining near all-time highs, government agencies respond that usage is not indicative of exposure and pesticides can be safe if label directions are followed.[2] Complying with label directions, however, is becoming increasingly more difficult, because labels are becoming more technically complex, imposing additional detailed restrictions on application procedures.[3]

The State of California characterizes a pesticide as an "economic poison."[4] Research in the last 20 years confirms that pesticides cause cancer, sterility, birth defects, and nervous system damage.[5] Acute effects include respiratory problems, aggravation of asthma, eye, nose and throat irritation, blistering of skin, nausea, vomiting, coughing, and headache.[6] On the other hand, financial estimates indicate that farmers get a $4 return on average for every $1 invested in pesticide use.[7] Notably, however, these figures do not include the environmental and health impacts of pesticide use, as the public and the environment currently absorb these costs.[8] Nonetheless, in California's agricultural

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[1] SUSAN KEGLEY, PH.D. ET AL., CALIFORNIANS FOR PESTICIDE REFORM, HOOKED ON POISON: PESTICIDE USE IN CALIFORNIA 1991-1998, at 6 (2000).

[2] *Id.* at 6, 7.

[3] *Id.*

[4] CAL. GOV'T CODE § 862 (a)(1) (Deering 2003).

[5] KEGLEY, *supra* note 1, at 6.

[6] GINA SOLOMON, M.D., M.P.H. ET AL., CALIFORNIANS FOR PESTICIDE REFORM, PESTICIDES AND HUMAN HEALTH: A RESOURCE FOR HEALTH CARE PROFESSIONALS 7 (2000).

[7] KEGLEY, *supra* note 1, at 41.

[8] *Id.*

based economy, the financial benefits of use make pesticides a reality, if not a necessity.

The general consensus is that the safety and health concerns involving pesticides should focus on proactive prevention, since medical treatment of pesticide poisoning is reactive and fallible.[9] Consequently, content of labels become critical in disseminating necessary warnings and restrictions on use. Yet poisonings, drift of toxic pesticides into homes and schools, and pesticide contamination of California's water supply appear to indicate that the current restrictions and precautionary measures are ineffective.[10] The best way to ensure a change in the social/economic equation of pesticide use is to force pesticide manufacturers and users to pay the full cost associated with adverse heath and environmental effects.[11] Ultimately, this should include the imposition of damage awards for personal injuries caused by pesticides. In one recent pesticide products liability action, the court stated, " . . . the burden of the cost of serious injury actually caused by pesticides should, as a matter of public policy, be borne by the pesticide manufacturers and distributors rather than the innocent consumers."[12]

As noted, restrictions on use, and warnings on the labels of pesticides do not always protect the people actually exposed to the pesticides. Consider for example, that in California in 1997, Alexa Arnold suffered a stroke while still in utero, causing partial paralysis and blindness, allegedly from pesticides sprayed and scattered around her parent's home.[13] Her sister Ashley, under the age of three at the time, was diagnosed with hepatitis and pancreatitis, presumably because of contact with these same pesticides.[14] Dursban and other chemicals, known to have toxic affects to the central nervous, cardiovascular and respiratory systems were applied by a pesticide applicator employed by the Arnold's landlord.[15] But the Arnold's never saw the warning labels attached to these pesticides, since the products containing Dursban were sold to the applicator, not to the Arnold's directly.[16]

In *Arnold v. Dow Chemical Co.*, an action filed by the girls' mother, the Court of Appeal of California in August 2001, affirmed

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[9] J. ROUTT REIGART, M.D. & JAMES R. ROBERTS, M.D., M.P.H., U.S. ENVTL. PROT. AGENCY, RECOGNITION AND MANAGEMENT OF PESTICIDE POISONINGS 2, 3 (1999).

[10] KEGLEY, *supra* note 1, at 7.

[11] *Id.* at 11.

[12] Arnold v. Dow Chem. Co., 91 Cal. App. 4th 698, 703 (2001).

[13] *Id.* at 703.

[14] *Id.*

[15] *Id.* at 704, 716.

[16] *Id.* at 704, 717.

the trial court's summary judgment ruling in favor of defendant manufacturers on claims based on failure-to-warn, but remanded other claims based on strict liability and breach of implied warranties of fitness and merchantability.[17] In doing so, the court agreed with the manufacturers that federal law, specifically the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), preempted plaintiffs' state law failure-to-warn claims.[18] Interestingly, subsequent to the original complaint but prior to the Appellate Court's ruling, the Environmental Protection Agency (EPA) banned Dursban for both domestic and school use because of its toxic effect on children.[19] Nevertheless, even if the Arnold's do eventually recover damages on their remaining claims, a clear warning might have prevented the horrendous injuries to the children.

Similarly, in 1993, Harold Eyl, a city employee of Wisner, Nebraska, was permanently disabled as a result of hauling pea gravel through an area where another Wisner city employee had applied the pesticide Pramitol.[20] The label for Pramitol indicates it is corrosive, and warns not to get it in the eyes, on the skin, or on clothing, and to wear rubber gloves and a face shield when using the pesticide.[21] The material safety data sheet (MSDS) accompanying Pramitol makes clear the product can cause chemical burns.[22] But Harold Eyl never read the warning or the MSDS as he did not handle or apply the product.[23] Yet his boots became soaked with Pramitol while installing the pea gravel in the area treated with the pesticide, and subsequently Eyl developed ulcers on his feet, permanently disabling him.[24] In September of 2002, in *Eyl v. Ciba-Geigy Corp.*, the Supreme Court of Nebraska agreed with defendants, the manufacturer and distributor of Pramitol, that Eyl's claims were preempted by FIFRA, and reversed the jury's verdict for over $2 million in damages.[25] The action was remanded to the trial court with direction to dismiss the claim.[26] If the warnings included on the label had been given to Harold Eyl, or if a notification

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[17] Arnold v. Dow Chem. Co., 91 Cal. App. 4th 698, 703 (2001).

[18] *Id.*

[19] *Id.* at 707.

[20] Eyl v. Ciba-Geigy Corp., 650 N.W.2d 744, 746-747 (Neb. 2002).

[21] *Id.* at 747.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Eyl v. Ciba-Geigy Corp., 650 N.W.2d 744, 746 (Neb. 2002).

[26] *Id.* at 749.

had been posted in the area treated with pesticides, the injuries might have been prevented.

The warnings in the above cases were not provided, however, and may not be furnished in the future either, because the common law duty to supply such warnings for toxic pesticides is generally deemed preempted by federal law.[27] In fact, the overwhelming majority of courts that have addressed the issue of whether failure-to-warn claims are preempted by FIFRA, including eight federal circuit courts of appeal, have determined that they are.[28] The United States Supreme Court has not yet ruled on the issue.[29] Furthermore, because FIFRA allows for no private right of action or damages for those injured by pesticides, an individual harmed solely as a result of a lack of warning, given FIFRA preemption, is left with an inconsequential remedy for injuries: he or she may file a complaint with the EPA that the label is inadequate and request that the manufacturer be required to change it.[30] This is insufficient reparation for an injured party harmed by pesticide use.

Both of these cases highlight a failure in either the current legislative scheme, or in judicial or administrative enforcement of that legislation. The result is that manufacturers, distributors, and applicators, under the apparent protection of FIFRA preemption, have little or no incentive to provide warnings notifying innocent bystanders or the public at large about the significant health dangers that pesticides represent.

This comment will address this failure, seek to determine where the problems lie, and pose solutions to the recent record of injury without relief in pesticide failure-to-warn cases. The analysis is approached from three perspectives: judicial enforcement of state tort law, state enactment of right-to-know legislation, and additional federal and state administrative restrictions on pesticide registration. However, in considering these issues, a fundamental understanding of current regulation and enforcement measures is essential, with recognition that pesticide regulation and enforcement is necessarily a cooperative effort between federal and state governments.[31] The roles and responsibilities of each are briefly described.

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[27] Sun Valley Packing v. Consep, Inc., 94 Cal. App. 4th 315, 321-322 (2001).

[28] Etcheverry v. Tri-Ag Service, Inc., 22 Cal. 4th 316, 320 (2000).

[29] *Eyl*, 650 N.W.2d at 746.

[30] *Etcheverry*, 22 Cal. 4th at 350 (Werdegar, J., joined by Mosk, J., dissenting).

[31] Sleath v. West Mont Home Health Services, Inc., 2000 MT 381, ¶ 27, 16 P.3d 1042, 1046 (2000).

I. PESTICIDE REGULATION & ADMINISTRATIVE SUPERVISION

A. Federal Laws and Federal Agencies Regulating Pesticides

Initially, the United States Department of Agriculture (USDA) was responsible for the registration of pesticides, and the United States Food and Drug Administration (FDA) had the tolerance setting authority for pesticide residue on foods.[32] In 1970, the United States Environmental Protection Agency (EPA) was formed to bring consistency and structure to the rapidly expanding field of federal environmental activities.[33] At its inception, the functions of the USDA and the FDA were consolidated in the EPA, except that the FDA retained the responsibility for residue monitoring in food products.[34]

In order to be registered with the EPA, as mandated by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), pesticides must pass a series of safety and health standards.[35] First enacted in 1947, Congress amended FIFRA in 1972, largely as a result of public health concerns over the pesticide DDT.[36] The far-reaching amendments make it clear that the primary purpose of FIFRA is "the protection of human health and the environment from the risks posed by pesticides."[37] Prior to theses changes, FIFRA had principally regulated pesticides through requirements in labeling.[38] The 1972 amendments however, imposed federal regulations on pesticide use, a field previously occupied only by state regulation.[39] The EPA now determines not only whether the pesticide labeling and other materials comply with FIFRA, but also whether the pesticide will have unreasonable adverse environmental effects.[40]

To accomplish this task, FIFRA has a complex registration process.[41] The manufacturer of the pesticide, through extensive product

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[32] CAL. DEP'T OF PESTICIDE REGULATION, REGULATING PESTICIDES: THE CALIFORNIA STORY 5, 6 (2001).

[33] *Id.* at 7.

[34] *Id.*

[35] OFFICE OF PREVENTION, PESTICIDES AND TOXIC SUBSTANCES, U.S. ENVTL. PROT. AGENCY, DOCUMENT NO. 742-R-98-009, ENVIRONMENTAL LABELING ISSUES, POLICIES, AND PRACTICES WORLDWIDE, app. B, at B-141 (1998), *available at* http://www.epa.gov/opptintr/epp/documents/envlab/report.htm.

[36] Sleath v. West Mont Home Health Services, Inc., 2000 MT 381, ¶ 26, 16 P.3d. 1042, 1046 (2000).

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] Seth Goldberg, *The Defense Perspective Reaffirming and Extending FIFRA Pre-*

testing and submission of comprehensive toxicity, human health, and environmental impact data, bears the burden of demonstrating to the EPA that its product should be registered.[42] Specifically, the pesticide will be registered if the Administrator determines:

> (A) its composition is such as to warrant the proposed claims for it;
> (B) its labeling and other material required to be submitted comply with the requirements of this Act [7 USCS §§ 136 et seq.];
> (C) it will perform its intended function without unreasonable adverse effects on the environment; and
> (D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.[43]

Also, through this registration process or a similar re-registration process, the EPA undertakes a review of the registrant's proposed label for each pesticide product, and approves it for use with the product.[44] FIFRA also establishes conditions and limitations on the format and content of the label.[45] Specifically, as detailed in the Code of Federal Regulations, a pesticide label must prominently display the following information:

> (i) The name, brand, or trademark under which the product is sold . . .
> (ii) The name and address of the producer, registrant, or person for whom the product is produced . . .
> (iii) The net contents . . .
> (iv) The product registration number . . .
> (v) The producing establishment number . . .
> (vi) An ingredient statement . . .
> (vii) Hazard and precautionary statements . . .
> (viii) The directions for use . . .
> (ix) The use classification(s) . . . .[46]

The Office of Pesticide Programs (OPP), at the EPA, reviews separately the label for each pesticide, and may require additional warnings or statements, depending on the environmental or health effects associ-

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emption in the New Millennium, MEALEY'S EMERGING TOXIC TORTS, April 5, 2002, at 3.

[42] *Id.*

[43] 7 USCS § 136a(c)(5) (2002) (Note that pursuant to a 1978 amendment, the Administrator may waive requirements for data relating to efficacy and register the pesticide without determining that its composition actually justifies the manufacturer's proposed claims for its effectiveness.).

[44] OFFICE OF PREVENTION, PESTICIDES AND TOXIC SUBSTANCES, *supra* note 35, at B-141.

[45] *Id.*

[46] 40 CFR § 156.10(a) (2003).

ated with a particular pesticide.[47] If the pesticide producer or registrant fails to comply with the EPA mandated labeling, the product may be considered "misbranded," and the agency may cancel the registration or bring criminal and/or civil charges against the registrant or producer.[48] As previously noted, although the EPA may bring charges against offenders under FIFRA, no private right of action exists.[49]

B. State Laws and State Agencies Regulating Pesticides

FIFRA grants authority to the states to regulate pesticides through the following language:

> 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 Act . . .
> (c) Additional Uses.
> (1) A State may provide registration for additional uses of federal registered pesticides formulated for distribution and use within that State to meet special local needs in accord with the purposes of this Act and if registration for such use has not previously been denied, disapproved, or canceled by the Administrator.[50]

Based on this language, an individual state may directly and more strictly regulate the use of pesticides within its borders through positive enactment of statutes or administrative regulations, so long as the laws do not permit any sale or use prohibited by FIFRA.[51] As a result of this broad authority to regulate within states' borders, laws regulating pesticides vary significantly from state to state, lacking any real uniformity.[52]

In California, the Department of Pesticide Regulation (DPR) is entrusted with the protection of the environment and people within California from the harmful effects of pesticide use.[53] Utilizing the standards of the California Food and Agricultural Code (FAC) each pesticide is reviewed by DPR before it is registered for use in Califor-

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[47] OFFICE OF PREVENTION, PESTICIDES AND TOXIC SUBSTANCES, *supra* note 35, at B-141-B-142.

[48] *Id.* at B-150.

[49] Arnold v. Dow Chem. Co., 91 Cal. App. 4th 698, 703 (2001).

[50] 7 U.S.C.S. § 136v (2003).

[51] Etcheverry v. Tri-Ag Service, Inc., 22 Cal. 4th 316, 326 (2000).

[52] *See, e.g.*, Theodore A. Feitshans, *Article: An Analysis of State Pesticide Drift Laws*, 9 S.J. AGRI. L. REV. 37 (1999) (identifying wide variation in state laws related to pesticide drift).

[53] CAL. DEP'T OF PESTICIDE REGULATION, *supra* note 32, at 35.

nia.[54] The FAC, part of the California Code of Regulations, contains most of the pesticide laws for the State.[55] Section 11501 of this code delineates the specific purpose of the portions related to pesticides as follows:

> (a) To provide for the proper, safe, and efficient use of pesticides essential for production of food and fiber and for protection of the public health and safety.
> (b) To protect the environment from environmentally harmful pesticides by prohibiting, regulating, or ensuring proper stewardship of those pesticides.[56]

California's state registration process parallels the federal program, with a few notable differences.[57] DPR calls for data to be submitted on pesticide effectiveness, plus assesses pesticide use under California's distinctive weather patterns.[58] As a result, DPR may deny registration to federally registered products that are not effective under California conditions, or may impose restrictions to limit the use of certain pesticides in California.[59] As part of the registration process, DPR endeavors to assess the risks related to specific pesticides, and then manage these risks by deciding how much exposure to a particular chemical will be allowed.[60] DPR allows the use of a pesticide if the risk falls within an acceptable range.[61]

Risk management in registration is necessarily a subjective process not based on scientific data alone, but takes into account the social and economic benefits of the pesticide, as well as the reasonableness of risk reduction options and legal enforcement of mitigation measures, to determine the acceptability of the danger.[62] Yet, inherent to any subjective process are inaccuracies and misjudgments. DPR may later learn that risk management measures related to a particular pesticide are inadequate, and suspend or cancel a previously approved pesticide registration.[63]

Besides the additional requirements for pesticide registration, Cali-

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[54] *Id.* at 21.
[55] *Id.* at 15.
[56] CAL. FOOD & AGRIC. CODE § 11501 (Deering 2003).
[57] CAL. DEP'T OF PESTICIDE REGULATION, *supra* note 32, at 22.
[58] *Id.* at 23.
[59] *Id.*
[60] *Id.* at 38.
[61] *Id.*
[62] *Id.*
[63] *Id.*

fornia also requires the reporting of pesticide use.[64] Touted as the most comprehensive reporting systems of its kind, pesticide applications by structural pest control companies, and pesticide applications made to agricultural food crops, parks, golf courses, and cemeteries, as well as applications along roadside and railroad rights-of-way must be reported to the County Agricultural Commissioner.[65] The Commissioner then reports the use to DPR including the name and amount of pesticide applied, and the date and location of the application.[66] Most institutional and industrial uses, however, as well as all private home and garden uses, are not reported.[67] And while the use data is technically available to the public, the information is "expensive, cumbersome and complicated," and therefore, not readily accessible.[68] Furthermore, California's pesticide use reporting is an after-the-fact reporting; it is not a right-to-know system, which would provide notification before and after pesticide applications.[69]

Therefore, the general public in California remains largely unaware of when, where, and what kinds of pesticides are being applied. How to disseminate this information to ensure its accessibility, however, and what remedies are available when responsible parties fail to distribute the information, are questions not easily answered.

II. JUDICIAL ENFORCEMENT OF THE STATE TORT LAW SYSTEM

A. FIFRA's Specific Preemption Provision

As previously mentioned, FIFRA establishes a federal scheme for registering and regulating pesticide products.[70] In so enacting, Congress acknowledged that many of the products, especially if improperly used, are hazardous.[71] A significant goal of FIFRA is to ensure uniform product-specific labeling standards for enactment across the lines of interstate commerce so as to manage the risks associated with products through appropriate labeling and warnings.[72] To this end, Congress established an express preemption provision in the FIFRA

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[64] *Id.* at 11.
[65] *Id.* at 69.
[66] *Id.*
[67] *Id.*
[68] CALIFORNIANS FOR PESTICIDE REFORM, PESTICIDES: CALIFORNIA'S TOXIC TIME BOMB? THE RIGHT TO KNOW ABOUT PESTICIDES, (1998).
[69] *Id.*
[70] Goldberg, *supra* note 41, at 1.
[71] *Id.*
[72] *Id.*

statute.[73] Specifically, the provision provides:

> (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 Act.[74]

The debate continues as to the proper interpretation of the preemption provision in FIFRA, but until such time as the Supreme Court rules specifically and decisively on the subject, the controversy is likely to continue. One major issue has been whether the word "requirements" in subsection (b) refers to only positive enactments of state statutes or regulations, or encompasses common law actions in tort as well. Because successful common law actions that result in damage awards may have the indirect effect of encouraging manufacturers to alter their labeling or packaging, they could be interpreted as "requirements."[75] The disagreement has centered around two Supreme Court decisions.

Cipollone v. Liggett Group, Inc.,[76] considers the preemptive force of the 1969 Cigarette Act, which provides:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provision of this Act.[77]

In a plurality opinion, the Supreme Court concluded that in the 1969 Cigarette Act, "the phrase, 'no requirements or prohibitions' 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."[78] Yet, four justices reasoned that since Congress did not expressly include common law within the Act's preemptive reach, while also not explicitly preserving common law claims, "Congress was neither pre-empting nor saving common law as a whole—it was simply pre-empting particular common-law claims, while saving others."[79] These four justices assert that each common law claim must be evaluated separately to determine if in fact it is preempted, considering whether the legal duty that is the basis of the common law damage action constitutes a state re-

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[73] *Id.*

[74] 7 U.S.C.S. § 136v (2003).

[75] Etcheverry v. Tri-Ag Services, Inc., 22 Cal. 4th 316, 343 (2000).

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

[77] 15 U.S.C.S. § 1334(b) (2003).

[78] *Cipollone*, 505 U.S. at 521.

[79] *Id.* at 523, n.22.

quirement, giving the preemption clause a fair but narrow reading.[80] Three justices concluded that the act does not demonstrate the "clear and manifest" congressional intent necessary to preempt *any* common law damage claims,[81] while two other justices concluded that if the preemption clause is construed in accordance with its ordinary meaning, then *all* of plaintiff's common law claims are preempted.[82]

Soon after the Supreme Court's 1992 decision in *Cipollone*, seven federal circuit courts (the 1st, 4th, 5th, 7th, 8th, 10th and 11th) concluded that the preemptive powers of FIFRA extended to common law failure-to-warn claims.[83] Partly based upon the weight of this authority, and asserting "there is no notable difference between the language in the 1969 Cigarette Act and the language in FIFRA," the 9th Circuit concurred."[84]

However, in *Medtronic, Inc. v. Lohr*,[85] the Supreme Court once again analyzed the preemptive power of a federal act, specifically the Medical Device Act (MDA) of 1976, which provides that:

> (a) . . . no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
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> (1) which is different from, or in addition to, any requirement applicable under this Act to the device, and
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> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this Act.[86]

In contrast to *Cipollone*, in which the Supreme Court construed the preemption provision broadly, the Supreme Court interpreted the MDA to limit significantly the preemption of state law tort claims. Again, in a plurality opinion, the Court said that the Act "simply was not intended to pre-empt most, let alone all, general common law duties enforced by damage actions."[87] In differentiating the language of the MDA from the language in the Cigarette Act, the Court acknowledged that Congress gave the Food and Drug Administration authority to determine the scope of preemption under the MDA.[88] Specifically, MDA

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[80] *Id.* at 523-524.

[81] *Id.* at 534, 544.

[82] *Id.* at 544.

[83] Taylor Ag Indus. v. Pure-Gro, 54 F.3d 555, 560 (9th Cir. 1995).

[84] *Id.* at 561.

[85] Medtronic, Inc. v. Lohr, 518 U.S. 470 (1996).

[86] 21 U.S.C.S. § 360k(a) (2003).

[87] *Medtronic*, 518 U.S. at 491.

[88] *Id.* at 489.

states:

> (b) Exempt requirements. Upon application of a State or political subdivision thereof, the Secretary may . . . exempt from subsection (a) . . . a requirement of such State or political subdivision applicable to a device intended for human use if—
>
> (2) the requirement is more stringent than a requirement under this Act . . . or
>
> (3) the requirement—
>
> (A) is required by compelling local conditions, and
>
> (B) compliance with the requirement would not cause the device to be in violation of any applicable requirement under this Act.[89]

Thus, Congress delegated to the FDA, as the federal agency with the authority to implement the MDA, a unique role and the power to exempt state regulations from the preemptive effect of the MDA.[90]

The plurality in *Medtronic*, however, also recognized other differences in the 1969 Cigarette Act and the MDA that mandated that Congress did not intend the term "requirements" to mean the same thing in both statutes.[91] Of particular note is, unlike the Cigarette Act, the MDA refers to "requirements" many times throughout the act, and in each case the word is focused on device-specific enactments of positive law, not common law.[92] Although not specifically stated as such, the Court applied the "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning"[93] in concluding that "there is nothing . . . suggesting that . . . the legislation intended a sweeping pre-emption of traditional common-law remedies against manufacturers and distributors of defective devices. If Congress intended such a result, its failure to even hint at it is spectacularly odd . . . . "[94]

Following *Medtronic*, many courts continued to apply the reasoning of *Cipollone* to FIFRA preemption cases, differentiating *Medtronic* by noting that unlike the power conferred on the FDA to exempt state regulation from the preemptive effect of the MDA, Congress did not give a similar authority to the EPA in implementing FIFRA.[95] Other

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[89] 21 U.S.C.S. § 360k(b) (2003).

[90] Etcheverry v. Tri-Ag Services, 22 Cal. 4th 316, 329 (2000).

[91] *Medtronic*, 518 U.S. at 489.

[92] *Id.*

[93] Sleath v West Mont Home Health Services, Inc., 2000 MT 381, ¶ 50, 16 P.3d. 1042, 1051 (2000), *cert. denied*, 534 U.S. 814 (2001) (quoting Sullivan v. Stroop, 496 U.S. 478, 484 (1990)).

[94] *Medtronic*, 518 U.S. at 491.

[95] *See, e.g., Etcheverry*, 22 Cal. 4th at 329-330; Eyl v. Ciba-Geigy Corp., 650 N.W.2d 744, 752-753 (Neb. 2002); Arnold v. Dow Chem. Co., 91 Cal. App. 4th 698,

courts, however, applied *Medtronic* to FIFRA preemption cases and found that failure-to-warn claims are not preempted.[96] In explaining its conclusion that failure-to-warn claims are not preempted by FIFRA, the Montana Supreme Court asserted, "throughout FIFRA, the term 'requirements' refers exclusively to positive enactments of statutory and regulatory law . . . . Simply because the term 'requirements' was found in *Cipollone* to encompass common law actions for damage, does not preclude this Court from reaching a contrary result in this case."[97] While this reasoning seems logical, it highlights the fact that courts still disagree on the scope of FIFRA's preemptive powers as it relates to failure-to-warn claims.

B. State Law Claims Not Preempted By FIFRA

While disparity exists in treatment of failure-to-warn claims, it is given that FIFRA does not preempt all state law claims.[98] States are specifically authorized to regulate pesticide use, but are prevented from imposing any labeling or packaging requirements beyond those imposed by FIFRA.[99] As a result, there are a number of claims not predicated on requirements for labeling and packaging different from FIFRA that have generally been upheld by the courts and deemed not preempted.[100] These include claims for strict liability for defective design and manufacture, negligent design and manufacture, negligent testing and inspection, express warranty claims, and implied warranty claims.[101] The distinguishing line between which claims are preempted and which claims are not appears to be a thin one. Courts have soundly rejected artful pleading in order to avoid FIFRA preemption, and allegations are closely scrutinized to ensure they are not failure-to-warn claims in disguise.[102] Each claim is considered separately. The bottom line analysis is whether the legal duty which is the basis for the damage action would "constitute[] a State 'requirement[] for labeling or packaging in addition to or different from' the FIFRA require-

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711 (2001).

[96] *Sleath*, 2000 MT 381 at ¶ 6, 16 P.3d at 1051; Brown v. Chas. H. Lilly Co., 985 P.2d 846 (Or. Ct. App. 1999), *review denied*, 6 P.3d 1098 (2000).

[97] *Sleath*, 2000 MT 381 at ¶ 52, 16 P.3d at 1051.

[98] Sun Valley Packing v. Consep, Inc., 94 Cal. App. 4th 315, 322 (2001).

[99] 7 U.S.C.S. § 136v (2003).

[100] *Etcheverry*, 22 Cal. 4th at 336.

[101] *Id.*

[102] *E.g.*, *In Re* StarLink Prod. Liab. Litig., 212 F. Supp. 2d 828, 836 (N.D. Ill. 2002), *mot. to amend. j. denied*, 2002 U.S. Dist. LEXIS 13507 (2002) [hereinafter StarLink Litigation]; *Sun Valley Packing*, 94 Cal. App. 4th at 321.

ments."[103] As succinctly stated by the California Supreme Court, "when a claim, however couched, boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered, the claim is preempted by FIFRA."[104] But the actual legal analysis is problematic, and court decisions have varied significantly.[105]

For example, some courts have held that FIFRA does not prevent states from creating civil remedies for violation of the federally imposed FIFRA standards, noting that the statute does not prohibit identical requirements to labeling and packaging, only those which are "in addition to" FIFRA's requirements.[106] The Eleventh Circuit, at least, disagrees.[107] Also, some courts hold that off-label representations by manufacturers, distributors, and retailers, to the extent they substantially differ from the label, are not preempted by FIFRA.[108] The Ninth and Eleventh Circuits disagree.[109] Notably, several courts have recognized a difference between failure-to-warn the initial purchaser, and failure-to-warn third parties, holding that the third party failure-to-warn cases are not preempted.[110] These decisions illustrate the legal quagmire surrounding FIFRA preemption, and exemplify the fact that the law is still extremely unsettled.

C. Preemption of Failure-to-Warn Claims, An EPA Viewpoint

In 1999, in a case before the California Supreme Court, the United States Environmental Protection Agency filed an Amicus Curiae brief, representing the first time the EPA has taken a position on the continuing FIFRA controversy.[111] The brief was specifically submitted to

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[103] *Etcheverry*, 22 Cal. 4th at 335.

[104] *Id.*

[105] Arnold v. Dow Chem. Co., 91 Cal. App. 4th 698, 709-710 (2001).

[106] *See, e.g.*, Lowe v. Sporicidin Int'l., 47 F.3d 124, 130 (4th Cir. 1995); Higgins v. Monsanto Co., 862 F. Supp. 751, 758 (N.D.N.Y. 1994); StarLink Litigation, *supra* note 102, at 836.

[107] Papas v. Upjohn Co., 985 F.2d 516, 519 (11th Cir. 1993).

[108] *E.g., Lowe*, 47 F.3d at 130; *Etcheverry*, 22 Cal. 4th at 337.

[109] Taylor v. Pure-Gro, 54 F.3d 555, 561 (9th Cir. 1995); *Papas*, 985, F.2d at 519.

[110] Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 603, 615 (1991) (local ordinance requiring placards to be posted to warn third parties of pesticide use not preempted); N.Y. State Pesticide Coalition, Inc. v. Jorling, 874 F.2d. 115, 120 (2d Cir. 1989) (warnings to the public at large by people who sell and apply pesticides not preempted); Dow Chem. Co. v. Ebling, 753 N.E.2d 633, 639 (Ind. 2001) (pesticide applicators' state law duty to convey EPA-approved warnings to persons placed at risk not preempted by FIFRA); StarLink Litigation, *supra* note 102, at 828, 837 (state requirement that pesticide manufacturers share EPA-approved warnings with parties beyond immediate purchaser not preempted).

[111] *"U.S. Says FIFRA Does Not Preempt State Law Failure to Warn Claims"*, MEA-

"more fully inform the Court of its views on the preemptive force of FIFRA."[112] The EPA maintained that although *Cipollone* and *Medtronic* seem to be in some discord, instead they actually both highlight the same principle: the need to interpret the term "requirements" in its statutory context.[113] Further, the EPA asserted that the text, legislative history, and goals of FIFRA make it clear that "the term 'requirements' means [only] direct commands imposed by law regarding contents of labels. In this context, the term 'requirements' does not include state damage actions because such actions do not mandate changes in labeling."[114]

To support this conclusion, the EPA first noted, as the Supreme Court did in *Medtronic*, that based upon standard rules of statutory construction "identical words used in different parts of the same act are intended to have the same meaning."[115] Throughout FIFRA, each of the seventy-five times that the term "requirements" is used, it means only positive enactments of law.[116] Furthermore, the EPA differentiated damage awards from positive enactments in that such awards may prompt a pesticide manufacturer to request approval for a change in an EPA label, but they do not *compel* a change.[117]

Next, the EPA observed that before the 1972 amendments to FIFRA, state law actions against manufacturers and distributors for failure-to-warn were available in almost every state and federal jurisdiction.[118] The widespread recognition of these types of actions against pesticide manufactures contrasts to the unavailability of similar actions against Cigarette manufacturers under the Cigarette Act.[119] Also, a review of the legislative history to the 1972 amendments reveals that there were twenty-five days of hearings by three House and Senate Committees, and floor debates that lasted over five days.[120] The committee hearings filled over 2300 pages of transcripts, and the floor de-

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LEY'S EMERGING TOXIC TORTS, April 9, 1999, at 1.

[112] Brief of Amicus Curiae for the United States in Support of Plaintiffs-Appellants at 5, Etcheverry v. Tri-Ag Services, Inc., 22 Cal. 4th 316 (2000) (No. S072524) [hereinafter Brief].

[113] *Id.* at 12.

[114] *Id.* at 9-10.

[115] *Id.* at 14 (quoting Sullivan v. Stroop, 496 U.S. 478, 484 (1990)).

[116] *Id.*

[117] *Id.* at 17.

[118] *Id.* at 22-23.

[119] *Id.* at 20 n.27.

[120] *Id.* at 23-24.

bates filled 150 transcript pages.[121] Nowhere in the volumes of hearings, reports and debates is there any suggestion that the 1972 amendments would preempt state tort law.[122] In fact, in the very first hearing, before the House Agricultural Committee, the EPA's General Counsel stated, "This bill does not affect tort liability."[123] No one disagreed.[124]

Moreover, the indirect pressure of damage awards does not frustrate the purposes of FIFRA in implementing a nationwide uniform labeling system.[125] Even if state law damage awards prompt a manufacturer to request a change in an EPA approved label, once the EPA approves the change, a new nationally uniform label is substituted.[126] This process doesn't vary, regardless of whether the change is prompted by damage awards or by state regulation permissible under FIFRA.[127] Furthermore, given the absence of a federal private damage remedy,[128] and given that the 1972 amendments were enacted for the specific purpose of protecting human health and the environment, it is not logical to surmise that Congress deliberately planned to preclude state damage awards.[129]

The EPA drew the conclusion that Congress did not intend to preempt traditional state actions against pesticide manufacturers for failure-to-warn.[130] As the EPA noted, "it would be astonishing that, without any discussion [in enacting FIFRA legislation], Congress could have intended to deprive injured persons of all means of relief."[131] In spite of the persuasiveness of its argument, the EPA noted that even if FIFRA can be read to restrict certain state law damage claims, it only restricts state authority in regard to labeling or packaging, and labeling is limited to printed matter, on the label or accompanying the product.[132]

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[121] *Id.*

[122] *Id.* at 24.

[123] *Id.* at 28.

[124] *Id.*

[125] *Id.* at 18.

[126] *Id.*

[127] *Id.*

[128] Etcheverry v. Tri-Ag Service, Inc., 22 Cal. 4th 316, 350 (2000) (Werdegar, J., joined by Mosk, J., dissenting).

[129] Brief, *supra* note 112, at 34.

[130] *Id.* at 46.

[131] *Id.* at 6.

[132] *Id.* at 44, 45.

D. Preemption of Failure-to-Warn Claims, A California Supreme Court Viewpoint

In a majority decision the California Supreme Court rejected the EPA's arguments and concluded that FIFRA does preempt state law claims for failure-to-warn of the risks of using pesticides.[133] In doing so, they declined to give deference to the federal agency responsible for implementing FIFRA, and refused to acknowledge the legislative history surrounding the 1972 amendments to FIFRA. Their judgment was based, at least in part, on what the majority called "the comprehensive and stringent character of California's program of pesticide regulation."[134] The Court maintained that because the director of the California Department of Pesticide Regulation is charged with the responsibility for the "continuous evaluation of all registered products," and because a pesticide registration may later be cancelled if there are newly discovered risks, California is protected.[135] Pesticides will not "go largely, or entirely unregulated" if failure-to-warn claims are preempted, and preempting such actions reinforces the state regulatory scheme, promoting federalism rather than undermining it.[136]

Regarding the meaning of the term "requirements," the majority perceived no significant difference between the language of FIFRA and that of the 1969 Cigarette Act.[137] Quoting prior authority, the Court stated, "not even the most dedicated hair splitter could distinguish these statements. If common law actions cannot survive under the 1969 cigarette law, then common law actions for labeling and packaging defects cannot survive under FIFRA."[138] The majority went on to assert, "[w]hen Congress intends to preempt state regulatory authority but to leave common law actions intact, it knows how to accomplish that."[139]

But as Justice Werdegar in a dissenting opinion states,

> In concluding plaintiffs are no longer entitled to seek this relief in our courts due to the asserted preemptive effect of federal legislation, the majority discerns an expression of congressional intent . . . that I do not perceive. In so doing, the majority not only misapplies the latest United State Supreme Court decision in this area of the law, but, more impor-

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[133] Etcheverry v. Tri-Ag Services, Inc., 22 Cal. 4th 316, 334 (Cal. 2000).

[134] *Id.*

[135] *Id.*

[136] *Id.* at 332, 334.

[137] *Id.* at 324.

[138] *Id.* at 325 (quoting Shaw v. Dow Brands, Inc., 994 F.2d 364, 371 (7th Cir. 1993)).

[139] Etcheverry v. Tri-Ag Services, Inc., 22 Cal. 4th 316, 328 (Cal. 2000).

> tantly, fails to heed the most basic and important rule governing questions of federal preemption of state law: when Congress intends to displace state law, it must express that intent *clearly*.[140]

The dissent points out that "where state law directly conflicts with federal law, the federal law controls," but also recognized the quandary created by the majority viewpoint: a state may *directly* regulate pesticides through statutes or regulations so long as the state does not require labeling different or in addition to the EPA approved labeling, even if the effect of the regulation is to indirectly encourage manufacturers to change their labels, but a state may not *indirectly* regulate pesticides by allowing common law damage claims for the exact same reason: that the damage claims may indirectly encourage the manufacturers to change their labels![141] As Justice Werdegar points out, "this makes so little sense that the majority must be mistaken."[142]

In a concurring and dissenting opinion, Justice Kennard rejected the majority's conclusion that FIFRA preempts *all* state law failure-to-warn claims, but also rejected the dissent's position that FIFRA preempts *no* state law failure-to-warn claims.[143] Instead she concluded that FIFRA preempts state law failure-to-warn claims that are based on inadequacies of the EPA approved label, if the finding of inadequacy is inconsistent with FIFRA.[144] Justice Kennard reasoned that the preemption provision of FIFRA applies to both positive enactments of law as well as common law liability, when either is inconsistent with the requirements of FIFRA.[145] Her logic is partially based on the fact that the EPA approval of a pesticide label is contingent, and subject to correction if the EPA later becomes aware of the need for different or additional warnings.[146] Just because the EPA has approved the label, it does not mean that the label is necessarily in compliance with FIFRA.[147] Her analysis leads to the conclusion that common law claims for damages are permissible if based upon the failure of the pesticide's label to appropriately warn of the dangers of use, if the results are consistent with FIFRA.

Justice Kennard's opinion is somewhat reminiscent of the opinion of the four-justice plurality in *Cipollone* in that they concluded that Con-

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[140] *Id.* at 340 (Werdegar J., joined by Mosk, J., dissenting).
[141] *Id.* at 341, 347.
[142] *Id.* at 347.
[143] *Id.* at 338 (Kennard, J. concurring and dissenting).
[144] *Id.*
[145] Etcheverry v. Tri-Ag Services, Inc., 22 Cal. 4th 316, 339 (Cal. 2000).
[146] *Id.*
[147] *Id.* at 338.

gress was neither preempting nor saving common law as a whole, and that each common law claim must be evaluated separately to determine if in fact it is preempted, reading the preemption provision narrowly.[148] Justice Kennard's opinion makes a clear pronouncement that common law claims should be preempted only if they are in conflict with the goal of FIFRA, and that goal is to protect human health and the environment. Under her rationale, anything that limits redress when human health and the environment are harmed would be in conflict.

Both Justice Werdegar's opinion and Justice Kennard's opinion support the premise that federal preemption should occur only in those instances where state law and federal law are in actual conflict. Although Justice Werdegar deals with the absence of express preemption based upon a lack of clear congressional intent, whereas Justice Kennard's opinion seems to addresses implied preemption and/or frustration of congressional purpose, both lead to the conclusion that at least some failure-to-warn claims should not be preempted. This conclusion makes sense.

E. Failure-to-Warn Outside of FIFRA's Preemptive Reach

Missing from the bulk of debate is a subtle distinction that many courts seem to have overlooked: there are warnings that do not fall within FIFRA's preemption provision.[149] As one perceptive court put it, "There are failures to warn and there are failures to warn."[150] One type of warning is the warning actually on the product label, placed there with EPA approval to protect the pesticide purchaser from the harmful effects of substances FIFRA regulates.[151] This is the kind of warning contemplated by the typical FIFRA preemption case.[152] The preemption clause essentially sanctions a defense by the manufacturer that a warning on the product label in compliance with FIFRA prohibits a state tort claim by the purchaser based on failure-to-warn, insulating the manufacturer from liability.[153] But there are warnings from sources other than the manufacturer, such as an employer or a pesticide applicator.

In *Mann v. H.W. Andersen Products, Inc.*, the complaint alleged an employer's failure-to-warn an employee of the dangers of handling the

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[148] Cipollone v. Liggett Group, Inc., 505 U.S. 504, 523 & n.22, 524 (1992).

[149] Mann v. H.W. Andersen Products, Inc., 676 N.Y.S.2d 658, 661 (App. Div. 1998).

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.*

active ingredient used in the manufacture of medical supply sterilizer, which was labeled in conformity with FIFRA.[154] The defendant employer sought summary judgment on the grounds that the claim was preempted by FIFRA.[155] The Supreme Court of New York, Appellate Division held that FIFRA did not preempt plaintiff's failure-to-warn cause of action, recognizing the difference between a warning defect when an employee handles the ingredient before it is packaged for sale, and a warning defect claim by a consumer who can rely on the warnings on the label of the product prior to use.[156]

Another example of a warning not preempted by FIFRA is derived from the case of Todd and Cynthia Ebling. The Eblings alleged that their two young children experienced respiratory disorders, developmental delays, brain damage and seizures as a result of being repeatedly exposed to Dursban and another pesticide when their apartment was sprayed over nearly a year period by a private applicator, without being warned of the dangers of the pesticides.[157] In considering preemption of plaintiffs' failure-to-warn cause of action against the applicator of the pesticides, the Indiana Supreme Court noted, "while FIFRA requires pesticide manufacturers to affix an approved label to their product in order to sell it, applicators, either commercial or private, are not required to label anything."[158] Quoting prior authority, the court contended that the law is fairly settled: "when a pesticide *manufacturer* 'places EPA-approved warnings on the label and packaging of its products, its duty to warn is satisfied, and the adequate warning issue ends.' "[159] The Court then held that because of a lack of an affirmative FIFRA labeling requirement for applicators, a state law duty is imposed upon the applicators to convey information in the EPA approved warnings to persons placed at risk, and this warning does not constitute a requirement additional to that imposed by FIFRA.[160] The message garnered from the Indiana Supreme Court decision is that assuming FIFRA does not impose a duty on the manufacturer, then the applicator must owe a duty to notify and warn foreseeable bystanders who may be injured.

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[154] Mann v. H.W. Andersen Products, Inc., 676 N.Y.S.2d 658, 658-659 (App. Div. 1998).

[155] *Id.* at 669.

[156] *Id.* at 661.

[157] Dow Chem. Co. v. Ebling, 753 N.E.2d 633, 636 (Ind. 2001).

[158] *Id.* at 639.

[159] *Id.* (quoting Papas v. Upjohn Co., 985 F.2d 516, 519 (11th Cir. 1993)).

[160] *Id.*

The cases above exemplify two types of warnings that some courts have deemed not preempted by FIFRA. The warnings examined do not implicate the product label, but instead place a duty on responsible parties downstream of the manufacturer (employer and applicator) to disseminate warnings. These cases make sense from a standpoint of fundamental fairness. People have a basic right-to-know of the use of pesticides so that they may take precautionary measures to limit their exposure to the potentially harmful effects.[161] But if judicial enforcement of common law tort actions leaves gaps in the protection of people from the damaging consequences of pesticide use, other steps must be employed to protect human health and the environment.

III. NOTIFICATION THROUGH STATE RIGHT-TO-KNOW LEGISLATION

FIFRA labeling is to be read and adhered to by the person who applies the pesticide product.[162] It is attached to the pesticide container and is expected to remain affixed for the duration of use.[163] In contrast, a comprehensive pesticide notification program can alert innocent bystanders as well as the public at large of the impending use of poisonous chemicals, and disseminate information to those that may be exposed.[164]

A. New York's Commercial Pesticide Applicator's Notification Program

New York, in 1987, was the first State to enact a pesticide notification program.[165] The notification program requires commercial pesticide applicators to follow a number of steps prior to commercial lawn applications including:

> [E]nter into a written contract with the owner of the premises where the extermination is to occur, and provide a list of the chemicals to be utilized along with any warnings that appear on the pesticide's Environmental Protection Agency (EPA) approved label . . . give the prospective purchaser a notification "cover sheet" which provide further warnings and safety information . . . signs must be posted on the perimeter of the affected property, instructing persons not to enter the area for a 24-hour period. And in some instances vendors must notify the public in newspapers of prospective use over large tracts.[166]

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[161] CALIFORNIANS FOR PESTICIDE REFORM, PESTICIDES: CALIFORNIA'S TOXIC TIME BOMB? THE RIGHT TO KNOW ABOUT PESTICIDES (1998).

[162] StarLink Litigation, *supra* note 102, at 837.

[163] *Id.*

[164] New York State Pesticide Coalition v. Jorling, 874 F.2d 115, 116 (2d Cir. 1989).

[165] *Id.*

[166] *Id.* at 116-117 (citations omitted).

Subsequently, in *New York State Pesticide Coalition v. Jorling*, the notification program was challenged by a coalition of pesticide applicators as "labeling" preempted by FIFRA.[167] The contention was that irreparable injury would result from the cost of compliance and potential liability under New York's notification program, and worse yet, other states would enact similar notification legislation.[168] The court, in analyzing possible preemption noted that FIFRA defines "label" and "labeling" as:

> (1) Label—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 matter-
> (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 device . . . .[169]

The Court of Appeal for the Second Circuit concluded that even though notification materials are in some spatial and temporal proximity to the applied pesticide, the cover sheet, signs and newspaper advertisements do not impair the integrity of the FIFRA label, but instead serve to further the purpose of FIFRA by aiding the EPA in preventing "unreasonable adverse effects [of pesticide use] on the environment."[170] Since the intent of Congress is to control the behavior of people who sell and apply pesticides, and because the New York statute is designed to warn the public at large, it does not constitute labeling preempted under FIFRA.[171]

B. Casey, Wisconsin's Local Permit Application Program

Similarly, the town of Casey, Wisconsin implemented an ordinance requiring a permit for application of pesticides to public lands, private lands for public use, or aerial application of any pesticide to private lands, and empowered the town board to grant or deny any permit, or grant a permit with any reasonable conditions to protect the health, safety and welfare of the residents of Casey.[172] The local ordinance further requires that when a permit is granted, placards must be posted giving notice of the pesticide use and any label information designat-

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[167] *Id.* at 117.
[168] *Id.* at 117.
[169] 7 U.S.C.S. §136(p) (2003).
[170] *Jorling*, 874 F.2d at 119.
[171] *Id.* at 120.
[172] Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 602-603 (1991).

ing a safe reentry time.[173] When Ralph Mortier's application for a permit for spraying of a portion of his land was granted, but the permit prohibited any aerial spraying and restricted the land on which he could ground spray, he challenged the ordinance as preempted by FIFRA.[174]

In *Wisconsin Public Intervenor v. Mortier*, the only FIFRA preemption case considered by the United States Supreme Court to date, the Court, in overturning the decision of the Supreme Court of Wisconsin and upholding the local ordinance, determined that, "the [FIFRA] statute does not expressly or impliedly preclude regulatory action by political subdivisions with regard to local use. To the contrary, FIFRA implies a regulatory partnership between federal, state *and* local governments."[175] The Court also reemphasized, "local use permit regulations — unlike labeling or certification — do not fall within an area that FIFRA's 'program' pre-empts or even plainly addresses."[176] Rather, FIFRA's specific grant of authority to the States guarantees that they may continue to regulate use and sales even where there may be some narrow preemptive overlap.[177]

C. California's Safe Water and Toxic Enforcement Act

Important right-to-know legislation in California, the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65), requires companies to disclose toxic chemical exposure information to the public in the form of warnings. Specifically the Act provides:

> No person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state of California to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such an individual. . . .[178]

Proposition 65 allows several means of compliance with its warning requirements including: "(1) labeling on consumer products; (2) posting notices; (3) placing notices in the news media; (4) any other method providing clear and reasonable warning of the hazard."[179] The Act was overwhelmingly approved by 62% of California voters despite

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[173] *Id.* at 603.

[174] *Id.*

[175] *Id.* at 615.

[176] *Id.*

[177] *Id.* at 614.

[178] CAL. HEALTH & SAFETY CODE § 25249.6 (2003).

[179] Chem. Specialties Manufacturers Ass'n v. Allenby, 958 F.2d 941, 944 (9th Cir. 1992).

opposition from industry,[180] and then later was challenged against FIFRA's preemption provision.[181]

A large focus of the litigation was whether point-of-sale warnings constitute additional labeling under FIFRA.[182] In a three-prong analysis considering express preemption, implied preemption and frustration of congressional purpose,[183] the court's perspective was that the definition of FIFRA labeling could not consist of every kind of written material accompanying the pesticide at any time.[184] If this were the case, "then price stickers affixed to shelves, sheets indicating that a product is on sale, and even the logo on the exterminator's hat would all constitute impermissible labeling."[185] The court recognized, as did the New York State Appellate Court in *Jorling*, that rather than proximity, relationship of the label to the product is important, and in the context of FIFRA, the label is understood to be affixed to the product and to be followed by the end user of such product.[186] Instead, Proposition 65 warnings are not attached to the container of the product, will not accompany the pesticide during use, and therefore are not expressly preempted.[187]

Also implied preemption by FIFRA was argued based on the contention that Proposition 65's additional warnings to the public would cause manufacturers to change their labels to avoid product liability claims.[188] The court disagreed however, stating that point-of-sale warnings are not an admission of liability, and Proposition 65 does not pressure manufacturers to affix additional labels to the containers of their products.[189] Therefore, "the argument for implied preemption is not persuasive."[190]

The court also considered, as the final prong of the analysis, whether Proposition 65 frustrates Congressional purpose, tested by a showing of physical impossibility of compliance with both Proposition

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[180] Michael W. Graf, *Article: Regulating Pesticide Pollution in California Under the 1986 Safe Drinking Water and Toxic Exposure Act (Proposition 65)*, 28 ECOLOGY L.Q. 663, 665 (2001).

[181] *Chem. Specialties Manufacturers Ass'n,* 958 F.2d at 942.

[182] *Id.* at 943.

[183] *Id.* at 945-949.

[184] *Id.* at 946.

[185] *Id.*

[186] *Id.*

[187] Chem. Specialties Manufacturers Ass'n v. Allenby, 958 F.2d 941, 946-947 (9th Cir. 1992).

[188] *Id.* at 947.

[189] *Id.* at 948.

[190] *Id.*

65 and FIFRA.[191] Defendants conceded the ability to comply with both.[192] Consequently, the court held that Proposition 65's point-of-sale warnings did not constitute additional labeling under FIFRA.[193]

Clearly, albeit somewhat ironically, while there is still debate as to whether common law damage awards for failure-to-warn claims constitute requirements preempted by FIFRA,[194] positive enactments of state law that require warnings, but do not compel changes to the EPA's approved pesticide labels, are not preempted by FIFRA.[195] The above examples each illustrate a somewhat different approach by which a state can require that notice be provided to persons, not the actual purchasers of the pesticide product, who may potentially be affected by the pesticide use, but who probably would not otherwise read the warning on the pesticide label. The New York legislation applies to pesticide applicators, the Casey, Wisconsin local ordinance exemplifies what local government may do, and Proposition 65 in California applies to persons and entities engaged in the operation of private business enterprises.

Standing alone, however, each of these positive enactments of law falls short. The New York legislation applies to commercial lawn applications only, and specifically excludes application of pesticides for agricultural purposes, residential applications of pesticides, application of pesticides around or near the foundation of a building, and the application of pesticides on golf courses or turf farms.[196] The Casey ordinance requires a permit be issued for the application of pesticides on public lands or lands with public use, and for any aerial pesticide applications on private lands, but presumably does not include ground applications on private land.[197] Proposition 65 deals only with chemicals known to cause cancer or reproductive harm, and not with the other life-threatening acute effects of pesticide poisoning.[198] Therefore, none comprehensively protects the innocent bystander from the harmful effects of pesticide use.

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[191] *Id.* at 948-949.

[192] *Id.* at 949.

[193] Chem. Specialties Manufacturers Ass'n v. Allenby, 958 F.2d 941, 945 (9th Cir. 1992).

[194] *See* cases cited *supra* note 95, 96.

[195] *See supra* notes 165-193 and accompanying text.

[196] N.Y. COMP. CODES R. & REGS. Tit. 6, § 325.1 (2003).

[197] Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 602-603 (1991).

[198] CAL. HEALTH & SAFETY CODE § 25249.6 (2003).

D. California's Healthy Schools Act of 2000

California's Healthy Schools Act of 2000 represents a significant step in the enactment of right-to-know legislation specifically geared toward improving the health and safety of California school children.[199] The Act considers that children are especially vulnerable to the health impact of pesticides and that pesticides use can grievously affect children's short-term and long-term health.[200] The Act requires that annually, a school district designee provide to staff, parents, and guardians of pupils enrolled at each school site, a written notification of the name of all the pesticides expected to be applied during the next year.[201] An opportunity is provided for staff, parents and guardians to register with the school district if they wish to receive notification of individual pesticide applications at the school facility.[202] The Act also requires that a warning sign be posted at each area of the school where pesticides will be applied twenty-four hours in advance of the application and remain posted seventy-two hours after the application.[203] The warning sign shall be visible to all persons entering the treated area and must contain the language, "Warning/Pesticide Treated Area," and must also include the product name, the manufacturer's name, the EPA registration number, the intended dates and areas of application, as well as the reason for the pesticide application.[204] The legislation is publicized as one of the strongest children's pesticide right-to-know laws in the country.[205] To date, there has been no claim that the Healthy Schools Act of 2000 violates the preemption provision of FIFRA.

While similar to the New York right-to-know legislation regarding commercial lawn application of pesticides, and to Proposition 65 as it relates to carcinogens and reproductive toxins, the Health Schools Act is the first true right-to-know legislation relating specifically to pesticides in California, and not surprisingly is directed at children, those particularly vulnerable to pesticide use.[206] It is important, groundbreak-

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[199] Californians for Pesticide Reform, *Healthy School Bill Becomes Law!*, 9 CPR RESOURCE 1 (2000).

[200] CORINA MCKENDRY, CALIFORNIANS FOR PESTICIDE REFORM, LEANING CURVE: CHARTING PROGRESS ON PESTICIDE USE AND THE HEALTHY SCHOOLS ACT, at 12 (2002).

[201] CAL. ED. CODE § 17612(a) (Deering 2003).

[202] § 17612(a)(1).

[203] § 17612(d).

[204] § 17612(d).

[205] MCKENDRY, *supra* note 200, at 9.

[206] *See supra* note 200 and accompanying text.

ing legislation. Yet schools are not the only place where children may contact pesticides, and children are not the only group at risk to pesticide poisonings. Elderly, those with existing respiratory conditions and sensitivities, and farm workers and their children, as well as the general public, also have a right-to-know. Even at that, right-to-know legislation is not the entire answer. Warnings are beneficial, but restrictions on use may be an even more powerful method of preventing harm from pesticides.

IV. Federal and State Limitations on Pesticide Registration

Every pesticide registered by the EPA has one or more designated uses.[207] Each of these is evaluated for hazard potential, and a pesticide use will be categorized as restricted "if necessary to protect human health or the environment."[208] Products that are designated for restricted use must include a statement describing the nature of the restriction on the label of the product.[209] For example, some pesticides may only be applied by certified applicators and are only for those uses allowed under their certification.[210] The EPA may also impose other restrictions and limitations in the registration of pesticides in order to protect human and environmental health.[211]

For example, when the EPA approved the limited registration of StarLink, the brand name for a corn seed containing a genetically engineered protein toxic to certain insects, the agency also imposed a number of obligations on the manufacturer because the protein in the seed was determined to be a human allergen and unfit for human consumption.[212] The EPA registration limited the use of the corn grown from the seed to animal feed, ethanol production, and seed increase.[213] Among other criteria, the EPA also obligated the manufacturer to:

> (a) inform purchasers . . . of the need to direct StarLink harvest to domestic feed and industrial non-foods uses only;
> (b) require all Growers to sign a "Grower Agreement" outlining field management requirements and stating the limits on StarLink corn use;
> (c) deliver a Grower Guide, restating the provisions stated in the Grower Agreement, with all seed;

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[207] Office of Prevention, Pesticides and Toxic Substances, *supra* note 35, at B-149.

[208] *Id.*

[209] *Id.* at B-150.

[210] *Id.*

[211] *Id.* at B-149 to B-150.

[212] StarLink Litigation, *supra* note 102, at 833-834.

[213] *Id.* at 834.

> (d) provide all Growers with access to a confidential list of feed outlets and elevators that direct grain to domestic feed and industrial uses . . . .[214]

When reports surfaced that human food products had tested positive for the genetically engineered protein, numerous food manufacturers recalled their corn products and instituted a class action suit, *In re StarLink Corn Products Liability Litigation*.[215] Defendant seed manufacturers filed a motion to dismiss, arguing that FIFRA preempts the plaintiffs' state law claims.[216] The court acknowledged being bound by the Seventh Circuit decision that EPA labeling "requirements" encompasses both positive law, in the way of statutes and regulations, and common law actions that impose civil damages.[217] One of the claims by the plaintiff food manufacturers' was founded on the premise that defendants seed manufacturers "failed to adequately inform those who handled corn further down the distribution chain, *e.g.*, grain elevator operators and transport providers, of the required warnings."[218] The United States District Court for the Northern District of Illinois noted that parties down stream in the supply chain will not see the label on the original seed bag and therefore will not know that a particular lot of corn is unfit for human consumption.[219] The court held that states "could reasonably require that pesticide manufacturers share the same EPA approved warnings with parties beyond the immediate purchaser."[220] Because FIFRA prohibits only additional requirements, not identical ones, the state standard here does not interfere with the EPA's labeling authority, and therefore does not constitute an additional requirement.[221] As a result, the claim for failure "to inform parties handling StarLink corn downstream of the EPA-approved warnings" is not preempted.[222]

The holding appears to be a departure from previous holdings where courts have deemed that when a manufacturer places an EPA approved warning on their product, the warning issue ends.[223] In so holding the court likened the notification of parties downstream in the supply

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[214] *Id.* at 834-835.
[215] *Id.* at 833, 835.
[216] *Id.* at 833.
[217] *Id.* at 836 n2.
[218] StarLink Litigation, *supra* note 102, at 837.
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.* at 838.
[223] *See supra* note 159 and accompanying text.

chain who would not otherwise see the label on the seed bag, to a state notification program where the target audience is innocent members of the general public.[224] However, there appears to be one distinctive difference: the state notification programs in New York, Wisconsin, and California detailed above, all involve a duty placed on applicators, private business enterprises, or schools to warn bystanders and/or the general public, not on the manufacturer of the pesticide product.[225] The *StarLink Litigation* holding places the duty squarely on the manufacturer of the genetically engineered corn seed, and although the third parties referred to are grain elevator operators and transport providers, the analysis appears to open the door to impose state standards on manufacturers for restricted use pesticides, at least on those that have an affirmative duty imposed by an EPA limited registration requiring compliance to a user agreement. Employing the *StarLink Litigation* reasoning, so long as the state standard imposing a duty (and therefore potential liability) on the manufacturer mirrors the EPA's imposed duty, it does not raise the preemption issue.

V. Proposed Solutions and Conclusions

There are a number of deductions and conclusions that may be drawn from the above discussion. First, it is reasonable to state that since *Cipollone*, FIFRA's preemptive powers are not at all clear. The debate continues over the word "requirements"[226] and the preemption of state law claims vary by jurisdiction.[227] Perhaps Justice Blackmun said it best when referring to the holding in *Cipollone*, "I can only speculate as to the difficulty the lower courts will have in attempting to implement today's decision."[228] To which Justice Scalia added, " . . . questions raised by today's decision will fill law books for years to come. A disposition that raises more questions than it answers does not serve the country well."[229] It does seems reasonably certain, however, that the majority of federal and state courts, absent some clear direction to the contrary from the United States Supreme Court, will continue to interpret FIFRA's preemption provision to apply to

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[224] StarLink Litigation, *supra* note 102, at 837.

[225] *See supra* notes 166, 172, 178, 201 and accompanying text.

[226] *See* cases cited *supra* notes 95, 96.

[227] *See supra* notes 106-110 and accompanying text.

[228] Cipollone v. Liggett Group, Inc., 505 U.S. 504, 543-544 (1992) (Blackmun, J., dissenting, with whom Kennedy, J. and Souter, J., join, concurring in part, concurring in the judgment in part, and dissenting in part).

[229] *Id.* at 556 (Scalia, J., with whom Thomas, J., joins, concurring in part and dissenting in part).

both positive enactments of state law implicating requirements for labeling, as well as state tort claims for injuries against the manufacturers due to failure-to-warn of the dangers of pesticide use. The United States Supreme Court should conclusively state that "requirements" in the FIFRA context applies only to positive enactments of state law, or at a minimum, proffer an unambiguous statement that state law failure-to-warn claims are preempted only when they directly compel a change in the product label or packaging and/or frustrate the purpose of FIFRA. Failure-to-warn claims against manufacturers, which create an indirect pressure to change labels, should not be preempted.

State legislatures must continue to enact tough right-to-know laws designed to make the general public aware of the application of pesticides in any and all areas that may affect them. The notifications should extend to all pesticide applications for which California collects use data, specifically pesticide applications made to agricultural food crops, parks, golf courses, and cemeteries, as well as applications along roadside and railroad rights-of-way,[230] and should in all cases included written warnings, remaining for the entire time required for safe reentry, posted at the perimeter of the area to be treated. Additionally, courts should specifically enforce a state law duty on the part of applicators and pesticide users to distribute EPA approved warnings to all foreseeable bystanders.

Finally, much of the power for protection from the harmful and sometimes deadly effects of pesticides remains in the hands of the EPA itself, as well as in state agencies regulating the registration of pesticides within their borders. The EPA should include stringent notification requirements, in the form of user agreements, as was done in the *StarLink Litigation*, when approving the registration of any restricted and limited use pesticides. Similarly, states, through their individual registration processes, should then mirror these restrictions to impose a duty on manufacturers to ensure that warnings are passed on to foreseeable parties affected beyond the immediate purchaser.

Only when federal and state legislatures, judiciaries, and agencies work together will the public be provided with the necessary warnings for protection from the continued use of "economic poisons," and will the goal of FIFRA, namely "the protection of human health and the environment from the risks posed by pesticides"[231] be achieved.

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[230] *See supra* note 65 and accompanying text.

[231] *See supra* note 37 and accompanying text.