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DOES FIFRA LABEL STATE TORT CLAIMS FOR INADEQUATE WARNING "PREEMPTED?" WELCHERT v. AMERICAN CYANAMID, INC.

I. INTRODUCTION

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) gives the Environmental Protection Agency (EPA) broad power to register and regulate the use, sale, and labeling of pesticides. Authority of individual states under the Act is limited by FIFRA section 136v. This section prohibits states from imposing labeling or packaging requirements on pesticides that are in addition to, or different than, the federal requirements.

Despite the statutory provision, courts have split on the issue of whether labeling requirements, imposed by FIFRA, preempt state common law claims. The resolution of state tort claims based on a failure to warn when the disputed label has been approved by EPA evidences this judicial split. The Eighth Circuit's recent decision, Welchert v. American Cyanamid, Inc., exemplifies the recent trend within federal courts. Welchert held that FIFRA section 136v(b) preempts state common law claims for breach of express warranty based on inadequate warning by an EPA-approved label.


4. FIFRA § 24(b), 7 U.S.C. § 136v(b). The preemption provision of § 136v(b) states that "[s]uch 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." Id. § 24(b), 7 U.S.C. § 136v(b).


6. 59 F.3d 69 (8th Cir. 1995).

(313)
II. Facts

In *Welchert*, plaintiffs leased farm land that had been treated with a herbicide by a previous owner. The EPA-approved label on the herbicide instructed that crops could be planted eighteen months after application; however, crops planted by the Welcherts after this period sustained damage as a result of the herbicide. Relying on the language of the label, the Welcherts again planted crops which subsequently suffered growth problems. The Welcherts sued the manufacturer, American Cyanamid, for damages. Plaintiffs asserted a claim for breach of warranty based on the manufacturer's inadequate labeling.

The Court of Appeals for the Eighth Circuit dismissed the claim. The court held that FIFRA, section 136v(b), preempts state common law claims for breach of express warranty premised on a manufacturer's failure to warn via an EPA-approved label. The court followed the Supreme Court's reasoning set forth in *Cipollone v. Liggett Group, Inc.* *Cipollone* analyzed the relationship of federal preemption doctrine to state tort claims for failure to warn in the context of a cigarette labeling statute. A determination that an EPA-approved label is inadequate in a state common law action imposes additional labeling requirements. The *Welchert* court rea-

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7. *Id.* at 70. The Welcherts leased about 38 acres of land. *Id.* Never were they told, nor did they ask, if the land had been treated with chemicals that would interfere with crop growth. *Id.*

8. *Id.* After the Welcherts first experienced problems, they met with a representative of American Cyanamid who confirmed that planting would be safe after 18 months. *Id.*

9. *Id.* The Welcherts actually relied on a label for Pursuit Plus; however, the fields were treated with a different product by American Cyanamid similarly named Pursuit. *Id.*

10. *Id.* at 70-71. After the action was brought in the District Court for the Southern District of Iowa based on diversity jurisdiction, the court found there were disputed fact issues which precluded summary judgement; however, the court held that FIFRA preempted the common law claim for inadequate labeling. *Id.* The case was then transferred to the District Court for the District of Nebraska. *Id.* at 70. Following the Fourth Circuit decision in *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1995), holding express and implied warranties were preempted by FIFRA, the defendant filed a motion for reconsideration of the case. *Id.* The district court found that implied warranty claims were preempted, but express warranty claims were not. *Id.* The district court denied Cyanamid's motion for immediate appellate review, and the jury entered a verdict for the Welcherts for the express warranty claims. *Id.*


soned that liable manufacturers would be required to change their labels to prevent further actions.14

This Note begins by examining FIFRA’s statutory framework, the Supremacy Clause, and federal preemption of state law.15 Next, this Note reviews the judicial split on the issue of whether FIFRA requirements preempt state law claims.16 This Note then discusses the Supreme Court test for preemption articulated in Cipollone, and outlines the present application of this test by various courts.17 This Note continues with a discussion of Welchert and its application of the Cipollone test to find express preemption.18 Finally, this Note critically analyzes the Welchert decision and concludes that the court incorrectly found that FIFRA preempts state common law claims based on a failure to warn.19

III. BACKGROUND

A. FIFRA

FIFRA was enacted in 194720 to protect consumers from products rendered defective by the proliferation of pesticide chemicals.21 FIFRA was amended in 1972 by the Federal Environmental Pesticide Control Act (FEPCA).22 These amendments considerably broadened FIFRA’s scope.

As drafted, FIFRA’s purpose is to prevent harm to consumers and the environment caused by mislabeled or unsafe pesticides.23

14. Id. at 72-73.
15. See infra notes 20-45 and accompanying text.
16. See infra notes 46-62 and accompanying text.
17. See infra notes 63-106 and accompanying text.
18. See infra notes 107-119 and accompanying text.
19. See infra notes 120-153 and accompanying text.
21. See Smith & Coonrod, supra note 2, at 1-2. The original Act was enacted in 1910 to protect consumers from extravagant product claims and to eliminate adulterated poisons, and to regulate the sale of insecticides and fungicides. Id. The Act prohibited the manufacture, sale, or transportation of adulterated or misbranded pesticides. Id. The 1947 Act attempted to provide uniformity to federal and state definitions and labeling and packaging requirements. Id.
23. See Allnutt, supra note 22, at 867-68. In 1972, FIFRA’s purpose shifted from promoting efficient agricultural use to protection of human health and the
The brief legislative history of section 136v emphasizes the statute’s goal of promoting uniformity in labeling. 24 It includes discussion of the need to preempt state and local government legislation, thereby preventing them from placing different labeling and packaging requirements on manufacturers. 25 Furthermore, the legislative history analyzes local government regulation of the use and sale of pesticides. 26 No portion of the legislative history addresses whether state common law tort claims or remedies should be similarly preempted. 27

At the present time, FIFRA authorizes EPA to regulate the use, sale, and labeling of pesticides, and creates a pesticide registration system. 28 Manufacturers must comply with the registration requirements of section 136a and with EPA standards. However, the manufacturer must supply the technical data to EPA for product registration. 29 Furthermore, section 136v expressly outlines state authority under FIFRA, and provides that states may not impose requirements additional to, or different from, EPA requirements. 30

environment. Id. Even with this shift, FIFRA did not specify the proper language to be used on a label. Id. Rather, FIFRA sets forth a general level of sufficiency for labeling language. Id.


26. Originally, the House version of the Act did not permit political subdivisions to regulate the use and sale of pesticides. 117 CONG. REC. 40,068 (1971). See H.R. REP. No. 511, 92d Cong., 1st Sess. 16 (1971). The Senate Agriculture Committee proposed amendments to § 136v(a) to permit regulation by state and local governments that would supplement federal and state regulations. S. REP. No. 838, 92d Cong., 2d Sess. 27-28 (1972), reprinted in 1972 U.S.C.C.A.N. 3993, 4111-12. This amendment was not accepted, and the original House Agriculture Committee language was adopted and passed by the Senate. 118 CONG. REC. 32,263 (1972). See Smith & Coonrod, supra note 2, at 2-4.

27. Smith & Coonrod, supra note 2, at 2-4.


29. See Pellikaan, supra note 5, at 540-41. EPA registers pesticides based upon information and test data supplied by the manufacturers. Id. EPA does not perform independent tests of the pesticides. Id. Manufacturers, therefore, have the opportunity to control the dissemination of the data and present unfavorable data in the best light. Id.

30. FIFRA § 24(a)-(b), 7 U.S.C. § 136v(a)-(b). FIFRA § 136v provides in part: (a) A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter. (b) Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

Id. § 24, 7 U.S.C. § 136v.
Section 136 provides definitions to guide both EPA and the states in following FIFRA mandates; the term "label" is included within this definitional section. In addition, section 136j specifies that failure to include certain necessary information with a product label is "unlawful"; these improperly labeled products are defined as "misbranded." Finally, section 136a(f) notes that registration of the pesticide is prima facie evidence that the pesticide's labeling and packaging comply with FIFRA requirements.

B. The Supremacy Clause and Preemption of State Law

The Supremacy Clause of the United States Constitution declares that where state law conflicts with federal law, the "Laws of the United States . . . shall be the supreme Law of the Land" and any "Laws of any State to the Contrary notwithstanding." The Supreme Court has interpreted this clause to mean that any state law that conflicts directly or indirectly with federal law must yield to

31. FIFRA § 2(p), 7 U.S.C. § 136(p). FIFRA § 136(p)(1) states "[t]he term 'label' means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers." Id. FIFRA § 136(p)(2) defines "labeling" as:

all labels . . .
(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, except to current official publications of the . . . Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.


33. FIFRA § 2(q), 7 U.S.C. § 136(q). FIFRA § 136(q)(1) states in part that a pesticide is misbranded if:

(A) its labeling bears any statement, design, or graphic representation relative thereto or to its ingredients which is false or misleading in any particular;
(B) it is contained in a package or other container or wrapping which does not conform to the standards established by the Administrator pursuant to section 136w(c)(3) of this title; . . .
(F) the labeling accompanying it does not contain directions for use which are necessary for effecting the purpose for which the product is intended and if complied with, together with any requirements imposed under section 136a(d) of this title, are adequate to protect health and the environment . . .

Id. § 2(q)(1), 7 U.S.C. § 136(q)(1).

34. FIFRA § 3(f), 7 U.S.C. § 136a(f). "In no event shall registration of an article be construed as a defense for the commission of any offense under this subchapter [and] . . . registration of a pesticide shall be prima facie evidence that the pesticide, its labeling and packaging comply with the registration provisions of this subchapter." Id. § 3(f)(2), 7 U.S.C. § 136(f)(2).

35. U.S. CONST. art. VI, cl. 2.
Preemption can result from several different situations including an actual conflict between state and federal law, a manifestation of intent by Congress to occupy or otherwise displace state regulation in the field, or a physical impossibility to comply with federal and state law.

State regulations are often upheld by courts, based on the strong weight given to the special interests of the state in protecting and promoting the health, safety, and welfare of its citizens. The Supreme Court has been less willing to find preemption, however, when the state law addresses regulation of police powers normally reserved to the states. When considering issues arising under the Supremacy Clause, a court's analysis "start[s] with the assumption that the historic police powers of the States [are] not to be superseded by . . . [the] Federal Act unless that [is] the clear and manifest purpose of Congress." The Supreme Court's reluctance to preempt state common law is exemplified by *Silkwood v. Kerr-McGee Corp.* In *Silkwood*, the Court upheld an award of state common law damages by distinguishing between common law actions for dam-

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37. *Louisiana Public Service Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 368-69 (1986) (citations omitted)). The court in *Louisiana Public Service* summarized the preemption situations in the following manner:

1) when there is outright or actual conflict between federal and state law;
2) where compliance with both the 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
5) where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

*Id.* (citations omitted).

38. Allnutt, *supra* note 22, at 863 & n.20 (citation omitted). *See Cipollone*, 505 U.S. at 531-33 (Blackmun, J., dissenting). Justice Blackmun reviews the reluctance of the Court to infer preemption of police power regulations in general terms, even though the plurality opinion in *Cipollone* mentions such presumption is used in "ambiguous" cases. *Id.*


40. 464 U.S. 238 (1984). In *Silkwood*, the deceased plaintiff Karen Silkwood worked for the Kerr-McGee plant in Oklahoma which fabricated nuclear reactor fuel rods for nuclear power plants. *Id.* at 241. On several occasions, plaintiff Silkwood was monitored and was found to have been exposed to nuclear contamination. *Id.* at 241-42. Evidence at trial indicated that Kerr-McGee failed to comply with NRC regulations. *Id.* at 243. The claims were submitted to a jury which returned a verdict in favor of Silkwood. *Id.* at 244.
ages and federal regulations that promote safety. The Court ultimately concluded that Congress would not, without express language, remove or foreclose all avenues of judicial remedy for injuries sustained as a result of illegal conduct.

The Supreme Court addressed FIFRA preemption of state regulation of pesticide use by state local governments in Wisconsin Public Intervenor v. Mortier. In this case, the Court held that section 136v(a) does not preempt local regulation of pesticide use, either expressly or impliedly, because the language and the legislative history of the statute fail to show that Congress expressly preempted state laws or intended to occupy the field of regulation. Significantly, the Court found that the objectives of state and local regula-

41. Id. at 250-51. The plaintiff in Silkwood brought a tort action for punitive damages under state law against a nuclear facility which failed to follow safe operation practices. Id. at 243. The Court recognized that the Atomic Energy Act preempted the states from imposing additional safety requirements on the operators of the facility. Id. at 249 (citing Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm’n, 461 U.S. 190, 205 (1983)). The analysis of the legislative history of the Act indicated that Congress had considered the possibility of state common law damage awards, and did not expressly limit such awards. Id. at 250-56. The Court also recognized that there is “[n]o doubt . . . tension between the conclusion that safety regulation is the exclusive concern of federal law and . . . that a State may nevertheless award damages based on its own theory of liability.” Id. at 256. The Court did not regard that Congress’ complete occupation of the field of nuclear safety foreclosed state remedies in future actions, but required a test that questions whether there is an irreconcilable conflict between state and federal laws frustrating the objectives of federal law. Id.

42. Id. at 256-58. See Alnutt, supra note 22, at 863-64.

43. 501 U.S. 597 (1991). In Mortier, the town of Casey, Wisconsin adopted a regulation requiring a permit for pesticide use. Id. at 602-03. After the town’s refusal to grant a permit for aerial spraying of his land, the plaintiff sought a declaratory judgment against the town claiming that the ordinance was preempted by federal law, FIFRA. Id. at 603. The circuit court found that the ordinance was preempted by state statute and FIFRA. Id. at 603-04. The Supreme Court of Wisconsin held that FIFRA preempted the town ordinance based on the statutory language and legislative history. Id. at 604.

44. Id. at 606-16. The majority opinion began its analysis by reviewing the express language of § 136v(a), and found that Congress did not express an intent, within the provision, to preempt local governments from regulating pesticide use. Id. at 606-07. Also, the Court stated that “[t]he exclusion of political subdivisions cannot be inferred from the express authorization to the ‘State[s]’ because political subdivisions are components of the very entity the statute empowers,” and, therefore, the allocation of authority belonged to the states. Id. at 608. Noting the ambiguous nature of the legislative history, the Court concluded that FIFRA’s legislative history could not clearly show that Congress addressed preemption. Id. at 609-10. Finally, the Court rejected the idea of implied preemption because there was no manifestation of Congressional intent to exclusively occupy the field, and there was no conflict between the goals of FIFRA and state regulations. Id. at 611-16.
tion are the same, and that "FIFRA implies a regulatory partnership between federal, state, and local governments."\textsuperscript{45}

C. Court Evaluation of the Preemption Question

1. Early FIFRA Preemption Decisions

Traditionally, the law has recognized that a manufacturer has an obligation to supply adequate information to a consumer to make a product "reasonably safe." A breach of this obligation may take the form of a breach of express or implied warranties for economic loss, or strict liability for personal injury.\textsuperscript{46} In the early years of FIFRA litigation, the circuits were split as to whether FIFRA preempts state breach of express warranty claims for failure to warn, based on EPA-approved labeling materials.\textsuperscript{47}

The issue was first addressed by the Court of Appeals for the District of Columbia in \textit{Ferebee v. Chevron Chemical Co.}\textsuperscript{48} The court concluded that FIFRA does not preempt state tort law claims.\textsuperscript{49} In

\textsuperscript{45} Id. at 616. For a complete discussion of the Mortier decision, see James P. Harrington, \textit{Local Regulation of Pesticide Use and State Failure to Warn Claims: What Does FIFRA Preempt? - Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476 (1991), 11 TEMP. ENVTL. L. 317 (1991).}

\textsuperscript{46} See generally W. Page Keaton et al., \textit{Products Liability and Safety}, 93-158, 315-60 (2d ed. 1989) (discussing the background of failure to warn claims in product liability cases). The "reasonably safe" doctrine was developed because: (1) it is less costly to warn of the danger than to improve quality or provide a label; and (2) there is a duty to market reasonably safe products. \textit{Id.} at 315-16. General policy goals for imposing an obligation to provide adequate warnings include deterrence of unreasonable conduct by the manufacturer and spreading the costs of injury. \textit{Id.} In addition to showing injury, the plaintiff must show that the defendant breached a duty to the plaintiff. See \textit{RESTATEMENT (SECOND) OF TORTS} § 402A (1965). An action for a failure to warn requires the plaintiff to show that: (1) the manufacturer had an affirmative duty to warn of the dangerous condition (duty); (2) the manufacturer breached the duty (breach of duty); and (3) the manufacturer's breach caused the plaintiff's injury (causation). \textit{Id.} The duty to warn generally arises when it would be unreasonable to market the product without the warning (a negligence standard) and causation may either be a proximate cause or causation in fact standard. Tim S. Hall, \textit{Bypassing the Learned Intermediary: Potential Liability for Failure to Warn in Direct-to-Consumer Prescription Drug Advertising}, 2 CORNELL J. L. PUB. POL'Y. 449, 454-56 (1993). A breach occurs when the defendant fails to communicate the warning or if the warning is inadequate in substance. \textit{Id.} at 455. The plaintiff must show the specific danger to warn, the defendant's knowledge of the danger when the warning is given, and an alternative warning. \textit{Id.} Note that unlike other strict liability, the failure to warn still requires that the plaintiff show that the manufacturer knew or had reason to know of the danger at the time the warning label was created. \textit{Id.} Increasingly, courts are faced with cases in which the plaintiff claims that violation of federal regulation shows negligence per se, or the defendant claims that compliance is evidence that the duty to warn was met. See Keaton, supra at 357.

\textsuperscript{47} See Allnut, supra note 22, at 869.


\textsuperscript{49} Id. at 1543.
Ferebee, the deceased plaintiff contracted lung disease from contact with paraquat, a pesticide subject to FIFRA labeling requirements and approved by EPA.\footnote{Hughes: Does FIFRA Label State Tort Claims for Inadequate Warning Preempt, Villanova University Charles Widger School of Law Digital Repository, 1996} The plaintiff’s estate sued the manufacturer, Chevron, on the grounds that the label failed to warn of the danger.\footnote{Id. at 1532-33.} On appeal, Chevron argued that a state jury finding of label inadequacy would constitute an additional labeling requirement in violation of section 136v(b) of FIFRA.\footnote{Id. at 1533.} The Ferebee court rejected Chevron’s preemption argument, distinguishing the “compensatory” state action from the “regulatory” labeling requirements.\footnote{Ferebee, 736 F.2d at 1540-43.} The court reasoned that, while a jury may find liability and award damages, Chevron could still sell paraquat while paying for resulting injuries as part of its cost of doing business.\footnote{Id. at 1541.} Furthermore, Chevron could voluntarily approach EPA, urging it to permit a change of the label.\footnote{Id. at 1543.} This reasoning has been called the “choice

50. Id. at 1532-33. Ferebee was an agricultural worker whose job required him to spray insecticides and herbicides on plants. Id. Ferebee began using paraquat in 1977 about six or seven times monthly between 1978 and 1979, and was exposed to particularly high levels of the chemical on at least two occasions. Id. Decedent’s estate claimed that the exposure caused Ferebee’s pulmonary fibrosis, which eventually caused his death. Id.

51. Id. at 1533. Plaintiff had the burden of proving the following:

1. That paraquat proximately caused Mr. Ferebee’s illness and death;
2. That paraquat is inherently dangerous;
3. That Chevron knew, or should have known at the time it sold the paraquat used by Mr. Ferebee, that the chemical was inherently dangerous;
4. That the resulting duty to provide an adequate warning of the danger was not met;
5. That the inadequacy of the warning proximately caused Mr. Ferebee’s illness and death.

Id. at 1534. In the lower court, the jury found that the plaintiff met the burden; therefore, the circuit court rejected Chevron’s challenges to these jury findings under its limited review. Id. at 1534-36.

52. Id. at 1539. Chevron’s statutory argument was twofold: first, EPA’s approval of the language of the product’s label requires a jury to also find the label adequate; and second, that FIFRA’s labeling provisions preempt state common law actions. Id.

53. Ferebee, 736 F.2d at 1540-43. The Ferebee court distinguished an EPA determination that a label met FIFRA’s requirements from a determination that a label was inadequate for failure to warn in a state tort action. Id. EPA’s determination was primarily aimed at protecting the environment, while damages in tort actions compensate the plaintiff for injuries. Id. at 1540. In these cases, the distinction between meeting FIFRA requirements and fulfilling state tort law may lie in the cost-benefit analysis performed. Id.

54. Id. at 1541. Dual obligations imposed on a manufacturer are permitted by FIFRA § 136v(a). Id. The court found an anomaly under Chevron’s argument that Maryland could ban the product entirely under § 136v(a), but be prohibited by § 136v(b) from providing a means of compensation for injuries sustained. Id.

55. Id. at 1543. The Ferebee court’s analysis focused on tort recovery and promoted the goals of the federal statute by encouraging plaintiffs to bring inadequate or mislabeled products to EPA’s attention. Id. at 1541. The court also ruled
of reaction" test, which posits that a manufacturer has a choice between changing the label and accepting the added costs of the change, or not changing the label and accepting the cost of damage suits. Looking to the state's interest in compensating injured parties and the lack of adequate judicial redress if FIFRA was found to preempt state common law claims, the court held that there was no preemption in this case.

Courts, faced with the FIFRA preemption issue, have subsequently rejected the Ferebee analysis. In Fitzgerald v. Mallinckrodt, Inc., plaintiff claimed that he suffered mercury poisoning as a result of a defectively-labeled fungicide. The United States District Court for the Eastern District of Michigan agreed with the manufacturer's defense that FIFRA section 136v(b) governed the tort claim, and preempted both the state statutory and common law. The court reasoned that, if a jury finds an EPA-approved label inadequate, the manufacturer would be forced to minimize liability by changing its label. Such a grant of authority to a jury would "authorize the state to do through the back door exactly what it cannot through the front."

that tort liability was not an obstacle to accomplishing FIFRA's objectives since "conflict would exist only if FIFRA were viewed not as a regulatory statute aimed at protecting citizens from the hazards of modern pesticides, but rather as an affirmative subsidization of the pesticide industry that commanded states to accept the use of EPA-registered pesticides." Id. at 1542-43.


57. Smith & Coonrod, supra note 2, at 7-8.
59. Id. at 405. Fitzgerald, a greenskeeper, claimed he suffered mercury poisoning from toxic exposure to a fungicide, Calo-Clor, he applied to golf course greens. Id. Fitzgerald claimed that the label should have been better prepared to warn specifically against mercury poisoning. Id.
60. Id. at 407-08. The court held "where plaintiff's claims all involve state law claims based on negligent labeling and failure to warn and where the Court has found state regulation in this area preempted by federal law, the Court shall grant defendant's motion for summary judgment." Id.
61. Id. at 407. The court followed the decision of the First Circuit in Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987). Id.
62. Id. (stating that failure to warn claims would undermine Congressional goals and intent to provide uniform regulations for pesticide labeling).
2. Cipollone v. Liggett Group, Inc.

In 1992, the Supreme Court addressed the issue of federal preemption of state common law warning claims in the case of Cipollone v. Liggett Group, Inc. In Cipollone, the Court interpreted two labeling statutes with wording similar to that of FIFRA: the Federal Cigarette Labeling and Advertising Act of 1965 ("Cigarette Act" or "1965 Act"), and the Cigarette Act in light of its subsequent amendments by the Public Health Cigarette Smoking Act of 1969 ("Cigarette Warning Act" or "1969 Act"). The Court held that the express language of section 5 of each act controlled the scope of preemption of state law. The Court reasoned that while section 5(b) of the 1965 Act preempted only state positive law, section 5(b) as amended by the 1969 Act expressly preempted both state positive law and common law actions based on inadequate labeling.

63. 505 U.S. 504 (1992). Petitioner Rose Cipollone began smoking in 1942 and later developed lung cancer. Id. at 508. Rose Cipollone died in 1984. Id. Prior to their deaths, Rose and her husband filed a complaint alleging that cigarettes manufactured by the defendant caused Rose's cancer. Id. at 509. The complaint was amended after Rose's death. The amended complaint alleged a causal relationship between the defendant's cigarettes and Rose's death based on the manufacturer's failure to warn of the dangers of smoking. Id. Thus, the petitioners contended that the omission constituted a breach of an express warranty. Id. at 509-10. The state failure to warn claims were based on strict liability, negligence, and breach of express warranty. Id. The Supreme Court granted certiorari because the various courts were split as to whether federal statutes preempted state claims similar to the Cipollone's action. Id. at 509. See Muriel C. Brown, Note, The Preemptive Effect of the Federal Cigarette Labeling Act On State Common Law Tort Claims: Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992), 24 TEX. TECH. L. REV. 223 (1993) (providing detailed discussion of Cipollone case).


66. Cipollone, 505 U.S. at 519-20. The federal preemption provision required specific warning language be included in cigarette advertisements. Id.

67. Id. at 528-31. The Court was careful to point out that § 5(b) only preempted state law imposing warning obligations in advertising. Id. at 528. The plaintiff's claims, that the defendant concealed material facts as to the dangers of smoking, were not preempted if the claims relied on a state duty to disclose the dangers through communication channels other than advertising. Id.
The plurality opinion set forth a two-part test for determining whether state law is preempted. First, a court must determine whether the statute, as enacted by Congress, contains a provision defining the preemptive reach of the statute. If Congress has considered the issue of preemption, and a provision exists, the court's inquiry must define the scope of preemption according to the express language of the statute. Second, if there is no express preemption provision, the court must determine if preemption is implied.

In *Cipollone*, the Court began its analysis of the 1965 Cigarette Labeling and Advertising Act by examining the statutory language. The Court found that "Congress spoke narrowly and precisely" in terms of limiting states "from mandating particular cautionary statements." Then the Court noted that the presumption against preemption of state police powers required a conclusion that wording specifically addressing an area of regulation does not automatically preempt an entire field of law. The Court's result also recognized that "no general, inherent conflict between federal pre-emption" and common law actions for damages exists. The Court's analysis of section 5 of the 1969 Act focused on the amendments to the 1965 Act. By amending the statute to bar "requirement[s] or pro-

68. Id. at 516.
69. Id. at 517. The Court states that when Congress includes a provision addressing preemptive scope, and the provision reliably indicates Congressional intent, no Congressional intent should be inferred. Id. (citing Malone v. White Motor Corp., 435 U.S. 497, 505 (1978)). "Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted." Id. (referring to principle of "expressio unius est exclusio alterius"). Since no other provisions of the statute addressed the issue of warning labels, the Court "need[ed] only identify the domain pre-empted by each of those sections." Id.
70. Id. at 517.
71. *Cipollone*, 505 U.S. at 518. Aside from the warning set forth in § 4 of the Act, the preemption provision excluded additional warning statements or obligations relating to smoking of cigarettes. Id.
72. Id.
73. Id. The Court offers an example from the Comprehensive Smokeless Tobacco Health Education Act of 1986, which preempted state imposition of statements relating to use of smokeless tobacco products, but preserved common law actions for damages resulting from use of the products. Id. (citing 15 U.S.C. §§ 4401-08). See also Caroline E. Boeh, Note, *Cipollone* v. Liggett Group, Inc.: One Step Closer to Exterminating the FIFRA Preemption Controversy, 81 Ky. L.J. 749, 765-68 (1992/1993) (summarizing majority analysis). Boeh concludes that while the Court in *Cipollone* addressed preemption, the Court gave little direction to lower courts in how to apply the enunciated test to other statutes, and so the trend toward a split in lower court decisions will continue. Boeh, *supra* at 777.
74. *Cipollone*, 505 U.S. at 520. The parties argued that both acts had the same preemptive effect. Id. The Court rejected these contentions due to the large number of changes made to the 1965 Act. Id. at 520-21.
hition[s] . . . imposed under State Law,” the Court reasoned that Congress intended the statute to sweep broadly, without differentiating between state positive and common law. The Court also rejected the “choice of reaction” test as enunciated by Ferebee. Finally, the Court reached two conclusions about the 1965 and 1969 Acts. First, the Court held that the 1965 Act did not preempt common law damages actions. Second, the Court found that while the 1969 Act preempts common law damages for failure to warn in advertisements, it does not preempt claims for failure to warn, breach of express warranty, or fraudulent misrepresentation.

3. Post-Cipollone Decisions

Courts have, in some instances, held that the state law claims were not preempted. The courts that have reached the issue of

75. Id. at 521. The plurality opinion gives great weight to the “plain meaning” of the words “[no] requirement or prohibition” in the statute, reasoning that these words are broad in scope and encompass any obligations imposed by states including common law actions. Id. Recognizing that the legislative history of the 1969 Act was primarily concerned with state positive law, the Court concluded that the plain language of the statute controls, unless there is language to the contrary. Id. at 521-22. The Court then analyzed whether requirements or prohibitions in advertising in the 1969 Act preempted the failure to warn, breach of express warranty, and fraudulent misrepresentation claims. Id. at 523-30. The failure to warn claim was preempted because state common law damages were an obligation imposed by the 1969 Act; meanwhile, claims based on testing and research were upheld. Id. at 524-25. Further, the Court concluded that breach of express warranty claims were not duties imposed by the state, but rather voluntary obligations undertaken and self-imposed by the manufacturer. Id. at 525-27. Consequently, the claims for breach of express warranty were not preempted. Id. at 526-27. Similarly, the fraudulent misrepresentation claims were not preempted because state prohibitions on false statements were not obligations relating to advertising. Id. at 527-30. For a complete discussion of Cipollone including the history of the preemption defense in the tobacco product context, see Brown, supra note 63, at 223.

76. Id. at 521-23. The petitioner offered the “choice of reaction” test by claiming that common law damages do not impose obligations on the manufacturer. Id. at 521. Rejecting this argument, the Court stated that state laws can be imposed in both positive law and common law rules. Id. For a discussion of the “choice of reaction” test, see supra notes 54-56 and accompanying text.

77. Id. at 530-31. Justices Blackmun, Kennedy, and Souter dissented against the Court’s decision holding preemption by the 1969 Act. Id. at 531. According to the dissent, the underlying principles used to find no preemption by the 1965 Act should govern a finding of no preemption by the 1969 Act; moreover, Supreme Court precedent mandated such a result. Id. at 531-34. The dissent required a clear statement by Congress for a federal statute to preempt state law. Id. at 535-39.

78. Id. at 531.

preemption, however, may be divided into two categories: jurisdictions that hold that the statute expressly preempts claims, and jurisdictions that hold that the statute impliedly preempts claims. This division has been illustrated by two FIFRA preemption decisions remanded by the Supreme Court in light of Cipollone v. Upjohn Co. (Papas II), which found express preemption, and Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc. (Arkansas-Platte II), which found implied preemption.

In 1991, the United States Court of Appeals for the Eleventh Circuit addressed FIFRA preemption of common law claims for inadequate warning in Papas v. Upjohn Co. (Papas I). Papas I held that FIFRA impliedly preempts common law tort actions based on inadequate labeling. The court concluded that the language of section 136v acted as a powerful limit on state power over labeling. However, due to its uncertainty as to Congressional intent, the court failed to find an express preemption and instead examined the possibility of implied preemption. The Eleventh Circuit found implied preemption based on the strong words of the statute, reasoning that the effects on the manufacturer of the jury find-

Co., 775 F. Supp. 1339 (D. Mont. 1991), aff'd, 993 F.2d 676 (9th Cir. 1993). However, these Montana decisions have been overruled by the Tenth Circuit. Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, 981 F.2d 1177 (10th Cir.) (Arkansas-Platte II), cert. denied, 114 S. Ct. 60 (1993).

80. See Pellikaan, supra note 5, at 542-45. Pellikaan has surveyed the cases and found three types of holdings: FIFRA § 136v(b) creates express preemption, FIFRA § 136v(b) creates an implied preemption, and FIFRA § 136v(b) creates no preemption. Id.


84. 981 F.2d 1177 (10th Cir.), cert. denied, 114 S. Ct. 60 (1993).


86. Papas I, 926 F.2d at 1026.

87. Id. at 1023-24. The Eleventh Circuit followed the familiar two part analysis: (1) look to the express words of the statute; (2) if the statute is unclear, look to implied preemption. Id. While the court noted that the specific language of FIFRA regarding labeling may expressly preempt, the court recognized that "Congress has long demonstrated an aptitude for expressly barring common law actions when it so desires." Id. at 1024 (quoting Taylor v. General Motors Corp., 875 F.2d 816, 824 (11th Cir. 1989)). Since the court was uncertain of express preemption, the inquiry moved to implied preemption. Id.
ing.\textsuperscript{88} coupled with the detailed EPA requirements for labeling, indicated Congress's intent to occupy the field of labeling regulation.\textsuperscript{89}

On remand from the Supreme Court, the Court of Appeals reexamined the issue of express preemption based on the test enunciated in \textit{Cipollone.}\textsuperscript{90} The court compared the similarity of the labeling provisions of FIFRA to the 1969 Act and examined the term "requirements."\textsuperscript{91} The court similarly found that state law "re-

\begin{itemize}
\item \textsuperscript{88} \textit{Id.} at 1025-26. \textit{Papas I} was significant because of an extensive discussion of the effect of a jury award on FIFRA regulation. See, e.g., \textit{Arkansas-Platte I}, 959 F.2d at 161 (noting \textit{Papas I} decision based on implied preemption and following Eleventh Circuit reasoning that jury-awarded damages directly conflict with federal law). First, the court noted that a jury finding of label inadequacy results in a direct conflict with EPA's decision that the label is adequate. \textit{Papas I}, 926 F.2d at 1025. However, the court focused on language that "the EPA Administrator determine[s] the reasonableness of the risks to man . . . with respect to labeling of pesticides." \textit{Id.} (emphasis in original). In fact, the court rejected the idea that an exception should exist when the manufacturer fails to provide EPA complete information on the pesticide because:

Given the FIFRA regulatory scheme, it would be up to the EPA—and not a jury—to determine first (1) whether the information provided was incomplete or inaccurate; (2) whether the omitted information is significant enough to mandate a change in the label; and (3) how, if at all, the label should be corrected. \textit{Id.} at 1027 n.8. However, in a previous citation, the court recognized that a product can be "misbranded" and this mistake can subject the manufacturer to various penalties if the label does not contain information adequate to protect health and the environment. \textit{Id.} at 1024 n.3 & n.4. The EPA Administrator can initiate an action to enforce the adequacy of labeling as part of the registration procedures. FIFRA § 3(c)(2)(B), 7 U.S.C. § 136a(c)(2)(B). An inadequate label can also be considered "misbranded," an unlawful practice, and possibly judicially enforced by other parties in the district courts. See FIFRA §§ 12(1)(E) & 16, 7 U.S.C. §§ 136j(1)(E) & 136n.

Further, the court noted that a jury finding of an inadequate label would require the manufacturer to change information in the label to prevent further damages. \textit{Papas I}, 926 F.2d at 1025. The result would be to frustrate FIFRA's purpose of uniformity in labeling. \textit{Id.}

\item \textsuperscript{89} \textit{Papas I}, 926 F.2d at 1024-25. The extensive language as reviewed in the express preemption section, as well as the detailed EPA labeling requirements, lend support for preemption in the field of labeling. \textit{Id.} Commentators initially supported the analysis of \textit{Papas I} as a rebuttal to the Ferebee decision. See generally Norman E. Siegal, \textit{FIFRA and Preemption: Can State Common Law and Federal Regulations Coexist?} \textit{Papas v. Upjohn Co.}, 926 F.2d 1019 (11th Cir. 1991), 41 J. Urb. Contemp. L. 257 (1992) (deciding that \textit{Papas I} court's finding of implied preemption buttressed position in \textit{Fitzgerald} and eliminated burdens placed on manufacturers).

\item \textsuperscript{90} \textit{Papas II}, 985 F.2d at 517-18. Once again, the court in \textit{Papas II} rejected the contention that “misbranding” should preempt the manufacturer's defense, stating only an EPA Administrator may change the labeling requirement. \textit{Id.} at 518 n.2. Consequently, the express preemption arises if the plaintiff shows that the pesticide labeling is inadequate. The labeling must then meet standards different from those promulgated by EPA. \textit{Id.} at 518.

\item \textsuperscript{91} \textit{Id.} at 518. The \textit{Cipollone} found the term "requirements" to sweep broadly. \textit{Id.}
\end{itemize}
requirements" did not suggest a difference in Congressional intent between preempting state positive and common law, holding that common law damages were "requirements" within the meaning of section 136v(b).92

In 1992, the United States Court of Appeals for the Tenth Circuit considered the same issue in *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.* (*Arkansas-Platte I*).93 In *Arkansas-Platte I*,94 the Tenth Circuit followed the reasoning of the Eleventh Circuit in *Papas I*, finding implied preemption.95 On remand from the Supreme Court, the Tenth Circuit in *Arkansas-Platte II* affirmed its holding in *Arkansas-Platte I* by applying the *Cipollone* test.96 The court's analysis highlighted the fact that the only common ground between statutes in this case and *Cipollone* was the issue of preemption.97 The court then restated its analysis and position set forth in *Arkansas-Platte I*, that a common law duty is no different than positive law in its purpose and effect; thus, the court found that com-

92. Id.


94. The plaintiff in *Arkansas-Platte I* purchased defendant's property which previously was a wooden fence treatment facility, and claimed injuries to the health of employees from poisoning contamination from pentachlorophenol (a chemical used in wood treatment). *Arkansas-Platte I*, 959 F.2d at 159.

95. Id. at 161. The court cited with approval the analysis of the Eleventh Circuit in *Papas I*. Id. The court examined the "choice of reaction" test of *Ferebee*, and rejected its analysis. Id. at 162. The flaw of *Ferebee*, the court noted, was that a label cannot be adequate for EPA purposes and inadequate for state common law purposes at the same time. Id. However, the court rejected the argument of *Silkwood* that no irreconcilable conflict existed between state and federal standards in state damage actions by noting that FIFRA, unlike the Atomic Energy Act, contains a section addressing preemption. Id. at 163. Instead, the court looks to the dicta of *Mortier*, recognizing that "with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur." Id. (emphasis in original) (citing Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 614 (1991)). The Tenth Circuit followed the Supreme Court's dicta in *Mortier* as interpreting FIFRA to not occupy the field of pesticide regulation entirely, leaving some power to the states in the regulation of pesticide use, and no power to the states over pesticide labeling. Id. In so holding, the court overruled several district court cases following *Ferebee*. See id. at n.6.

96. *Arkansas-Platte II*, 981 F.2d at 1179-80.

97. Id. at 1178. The court did not believe that the remand encompassed the holding of *Arkansas-Platte I*, but felt that augmentation of the record was necessary. Id. The discussion focused on the issues that "requirement" can include state positive and common law, and EPA and jury findings relating to label adequacy both relate to the manufacturer's duty to warn. Id. Common law and EPA regulation are distinguished, however, by their standards: the common law standard is retrospective and generic, measuring consequences of past action, while FIFRA's warning scheme is "prospective and specific." Id. at 1179.
mon law liability is a "requirement" within the meaning of section 136v(b).98

Some courts fail to differentiate between express and implied preemption.99 A few court decisions hold that although the statute may preempt state law claims, a defendant is estopped from asserting the preemption defense if the manufacturer engaged in some inequitable conduct.100 In Burke v. Dow Chemical Co.,101 the court refused to grant the defendant's motion for summary judgment based on the preemption defense.102 The court did not expressly decide whether there was express or implied preemption, but recognized that FIFRA indicates Congress's intent to leave states expansive power to regulate pesticides; moreover, the question of whether EPA was misled by defendants remained.103 Further, the

98. Id. at 1179. The court stated that it was applying the test enunciated in Cipollone and that the test supported the previous decision. Id.

99. See Worm v. American Cyanamid, 5 F.3d 744 (4th Cir. 1993). The plaintiffs in Worm used the herbicide "Scepter" on their fields, which continued to affect crop growth beyond the period specified as safe for planting. Id. at 745-46. Compare Welchert 59 F.3d at 69-70, with Worm, 5 F.3d at 745-76 (essentially same fact pattern in Worm as in Welchert). The Fourth Circuit in Worm found that FIFRA preempts state common law claims for breach of express and implied warranties, or any other state action, for failure to warn. Id. at 749. While the Fourth Circuit acknowledged the analysis of Cipollone, the court sidestepped the issue of whether the preemption was express or implied by citing both Papas II and Arkansas-Plate II. Id. at 748. The basis for the decision stems from Cipollone's discussion that warranty claims under the 1969 Act were not from voluntary action by the manufacturer which creates a duty to the public because EPA mandated the label. Id. at 748. The "involuntary action" and the award of state common law damages considered an "additional or different" requirement, which led the court to dismiss the Worm's claims as preempted by FIFRA. Id.


101. 797 F. Supp. at 1128. The defendants in Burke produced chemicals used in pesticides, and an intermediary packaged these chemicals as "Rid-A-Bug Flea and Tick Killer" for use by consumers. Id. at 1131. The product was registered and labeled in accordance with EPA standards. Id. The plaintiff in Burke used "Rid-A-Bug" to exterminate pests and was exposed to the chemicals, causing her children to be born brain-damaged. Id.

102. Id. at 1140.

103. Id. at 1140-41. The court approved of the policy discussion of Ferebee. Id. at 1138-40. The court analysis looked to Cipollone, which requires clear and express preemption if the statute contains a preemption clause, and also noted the Supreme Court's reluctance to read express preemption from Congressional silence, as noted in Mortier and Ouellette. Id. at 1136-37. Concluding that § 136v(b) does not expressly state that common law damages are preempted, the court then discussed Cipollone's analysis of the word "requirement" in the 1965 and 1969 Acts and FIFRA's use of "requirement." Id. at 1137. The decision of Cipollone cautioned that Ferebee's analysis differentiating common law claims and labeling regulation might be incorrect, but also noted that Cipollone's subtle distinctions may create manufacturer liability for failure to warn of conditions known at the time of fixing the EPA label. Id. at 1140. The court also noted EPA's dependence on the integ-
court in Roberson v. E.I. DuPont De Nemours Co. extended Burke and held that FIFRA preempts tort claims based upon failure to warn, inadequate labeling, or inadequate packaging. However, the defendant would be estopped from asserting preemption if it withheld material information from EPA during the product registration process.

IV. Analysis

A. Narrative Analysis

In Welchert v. American Cyanamid, Inc., the Court of Appeals for the Eighth Circuit addressed the issue of whether or to what extent FIFRA section 136v(b)’s prohibition against additional state imposed labeling requirements preempts a state cause of action. Welchert involved a state tort action for breach of express warranty based on an inadequate warning. The court recognized that FIFRA creates a comprehensive scheme for the regulation of pesticide labeling and packaging. Additionally, the court noted that the objectives and purposes of FIFRA were to strengthen and increase EPA authority to provide comprehensive and uniform regulation of pesticide sale, use, and labeling.

After citing section 136v, the court reviewed the Supreme Court decision in Cipollone and found that the cigarette labeling
statute in *Cipollone* was similar to FIFRA. The court cited with approval *Cipollone's* language that obligations imposed on a manufacturer by an express warranty arise from voluntary contractual commitments and are not equivalent to express requirements under a federal labeling statute. Adhering to the *Cipollone* test, the *Welchert* court found express preemption because section 136v specifically addresses the power reserved to the states.

Adopting the reasoning of the Fourth Circuit's decision, *Worm v. American Cyanamid*, the *Welchert* court noted the almost identical fact pattern to the action before it. Relying on *Worm*, the *Welchert* court found that FIFRA preempts state law claims when EPA sets labeling requirements. The court's determination was based on the theory that an express warranty was given voluntarily by the manufacturer, and the manufacturer could not have voluntarily offered the promise upon which the Welchert's claim was made. The Eighth Circuit recognized that finding liability under a state tort action would require a manufacturer to change its labeling to avoid future liability; this would act as a state-imposed labeling requirement in violation of the express language of the statute. Finally, the court noted that to hold otherwise would permit state court decisions to dictate future labeling requirements

111. *Id.* at 71-72. Despite similar wording, the preemption provision of the 1969 Act was more narrowly tailored to advertising and promotion. *Id.* Further, the *Welchert* court noted that *Cipollone's* holding allowed claims for breach of express warranty. *Id.* at 71.


113. *Id.* at 72. The court adopted the test outlined in *Cipollone* by citing with approval the analysis in *Worm*. *Id.*

114. 5 F.3d 744 (4th Cir. 1993). The Fourth Circuit in *Worm* followed the preemption reasoning of *Papas II*, 985 F.2d at 516 and *Arkansas Platte II*, 981 F.2d at 1177. *Id.* at 748. These two holdings are, however, based on different reasoning. The court in *Papas II* found express preemption and in *Arkansas Platte II* implied preemption. *See supra* notes 79-98 and accompanying text. As a result, the *Worm* court only found preemption, not whether it was implied or express, even though the Fourth Circuit mentioned the *Cipollone* decision.


116. The *Worm* court also noted that *Cipollone* upheld claims for breach of express warranty since such state law actions do not create obligations imposed by state law. *Worm*, 5 F.3d at 748-49. *See Cipollone*, 505 U.S. at 525-27. The *Worm* court focused on the concept that express or implied warranties require voluntary disclosures, but the only disclosures made by the defendant were those contained in the EPA-approved label. *Worm*, 5 F.3d at 749. The analysis concludes that statements made by a manufacturer on an EPA-approved label are "involuntary." *Id.*

117. *Welchert*, 59 F.3d at 72. The court held that § 136v preempts state tort law claims based on inadequate warning, as long as the warning was not voluntarily made. The court further determined that a warrantor should only be held liable for contracts voluntarily made. *Id.* at 73.

118. *Id.* at 72-73.
in spite of the Congressional mandate to EPA to regulate labeling.\textsuperscript{119}

B. Critical Analysis

The Eighth Circuit in \textit{Welchert} correctly decided that the proper analysis of FIFRA focuses on whether the Act contains an \textit{express} preemption of the common law state tort claim.\textsuperscript{120} However, the court misapplied the test by deferring to the \textit{Worm} decision,\textsuperscript{121} which failed to analyze whether the preemption is express or implied.\textsuperscript{122}

As \textit{Cipollone} mandates, when there is an express provision addressing preemption, the court's task is to define the scope intended by Congress and not to search for implied preemption.\textsuperscript{123} Textualism dictates that any interpretation must adhere to the plain meaning of the statutory language.\textsuperscript{124} The "express meaning" should satisfy the underlying policy concerns that a jury finding of liability will interfere with operation of the federal statute, frustrate

\textsuperscript{119} Id. at 73.

\textsuperscript{120} See id. at 71-72. The court reached this conclusion by following the analysis set forth in \textit{Cipollone}. \textit{Id.; see Cipollone}, 505 U.S. at 516-17. Because FIFRA contains an express provision setting forth state authority, it is proper for a court to search for an express preemption of state common law tort claims.

\textsuperscript{121} See \textit{Welchert}, 59 F.3d at 72-73.

\textsuperscript{122} See \textit{Worm}, 5 F.3d at 747-49. The Fourth Circuit, in \textit{Worm}, cited both \textit{Papas II} (holding express preemption), and \textit{Arkansas-Platte II} (holding implied preemption). The court asserted that FIFRA must preempt the common law claim because either analysis reaches the result. \textit{Id}.

\textsuperscript{123} Id. Courts that have determined that FIFRA contains an implied preemption, such as in \textit{Arkansas-Platte II}, have incorrectly followed the analysis required by the \textit{Cipollone} decision. \textit{See Allnutt, supra} note 22, at 872-73.

\textsuperscript{124} See Jeffrey R. Stern, \textit{Preemption Doctrine and the Failure of Textualism in Cipollone v. Liggett Group}, 80 Va. L. Rev. 979 (1994) (discussing court's recent adherence to textualism, influenced by Justice Scalia, and summarizing arguments against these methods). Commentators recognize textualism's goals of consistency and predictability, and that extra-textual sources such as legislative history are easily manipulated. \textit{Id} at 986. However, critics argue that the courts often are confronted with statutory language which is unclear, as exemplified by the Cigarette Act's words "requirements" and "prohibitions." \textit{Id} at 989-1008. In such a situation, the court generally does not articulate the "background norms" in addition to legislative or statutory language used to support the court's "finding" of the express meaning of the words. \textit{Id}.

In this case, the analysis must focus on the meaning of "requirement." \textit{See Cipollone}, 505 U.S. at 535-36 (Blackmun, J., dissenting). In dissent, Blackmun argues that the Court did not follow the established rule of looking at the common meaning of statutory language. \textit{Id}. After examining dictionary definitions, he concluded that "requirements" and "prohibitions" are not express words indicating an intent to include common law tort claims, but only refer to positive state enactments. \textit{Id}.
the statute's goals, or create an unfair result. Further, ambiguities should be resolved against preemption. The Court in Mortier followed this method of analysis in rejecting implied preemption. Consequently, review of the express statutory language, the plaintiff's tort action, and the relation to these policy requirements is a necessary part of the analysis.

1. FIFRA as Applied to the Failure to Warn Claim

FIFRA section 136v clearly states that it addresses "Authority of States." The plain language of section 136v(b) does not explicitly address preemption of state common law claims, so the issue becomes whether "requirements for labeling of packaging in addition to or different from those required under this subchapter" should be broadly interpreted to include all state positive and common law claims. Therefore, the traditional tools or methods of statutory construction, such as noscitur a sociis, dictate examination of other sections.

125. Stern, supra note 124, at 991-94. Commentators believe that it is impossible to screen out judicial bias; judges use "practical reason" to balance competing factors. Id. at 990-92. Those courts which claim that the statutory language is express and ordinary meaning controls, however, falsely claim adherence to strict textualism and in fact hide substantive choices. Id. at 992.

Judges also use "background norms" to support the express meaning of the words of a statute, and debates about statutory language really focus on the balancing of these background norms. Id. Professor Cass Sunstein classifies these preexisting norms into three categories: constitutional norms (avoiding an unconstitutional result and promoting interests of the disadvantaged), institutional norms (narrowly construing statutes and favoring judicial review), and interpretive norms (promoting consistency and coherence in regulation and protecting values). Id. at 994 nn.71-73.

126. See supra notes 38-45, 72-75 and accompanying text.

127. See supra notes 44-46 and accompanying text. The Mortier Court looked to the express words of the statute, followed by a review of legislative history to find a clear manifestation of Congressional intent to preempt claims. Mortier, 501 U.S. 597, 606-10 (1991). Only then did the court look to whether FIFRA created an implied preemption: whether the statute is so comprehensive as to preempt state action, whether state action is in conflict with the statute, or whether state action would frustrate the Act's purpose. Id. at 611-14.


129. Id.

130. The meaning of a word is or may be known from accompanying words. BLACK'S LAW DICTIONARY 1060 (6th ed., 1990). Under this canon of statutory construction, the meaning of the words may be determined from the context in which they are used within the statute. Id.
Section 136(q) defines the concept of a "misbranded" pesticide.\textsuperscript{131} Under FIFRA, misbranding is unlawful,\textsuperscript{132} and registration is not a defense.\textsuperscript{133} Moreover, registration is only prima facie evidence that the pesticide's labeling and packaging has met the requirements of the registration.\textsuperscript{134} Reading these sections together, the statute anticipates that a registered pesticide may not have adequate labeling despite manufacturer compliance with the federal requirements. However, the statute also indicates that a manufacturer cannot rely on the EPA-approved label as a defense.\textsuperscript{135}

2. Relation of Failure to Warn Claim with Statutory Misbranding

A plaintiff can petition the EPA, or possibly utilize a previous independent action under the statute, to declare the pesticide misbranded.\textsuperscript{136} Preemption may not be an issue for a court if the pesti-

\textsuperscript{131} FIFRA § 2(q)(1)(G), 7 U.S.C. § 136(q)(1)(G). A label is deemed misbranded when it does not contain adequate warnings or cautions which, if complied with, would prevent harm to health and the environment.


\textsuperscript{133} FIFRA § 2a(f)(2), 7 U.S.C. § 136a(f)(2).

\textsuperscript{134} Id.

\textsuperscript{135} Id.

\textsuperscript{136} The plaintiff could bring both the state common law action, and could also petition the EPA Administrator to enforce the statutory prohibition against misbranding under FIFRA. See FIFRA § 25, 7 U.S.C. § 136w. See also Almond Hill Sch. v. United States Dept. of Agric., 768 F.2d 1030, 1037 (noting that complaint for violation under statute may be filed with Administrator who refers complaint for investigation). Before allowing the state case to proceed, the federal court would defer to the EPA decision on the issue of misbranding, and then inform the jury in the state action that the labeling was found to violate the federal statute. An unfavorable determination of EPA administrative action may be reviewed in federal court. See Environmental Defense Fund, Inc. v. Castle, 631 F.2d 922 (D.C. Cir.), cert. denied, 449 U.S. 1112 (1980). FIFRA § 136n(c) gives jurisdiction to federal district courts to enforce and prevent violations. See FIFRA § 16(c), 7 U.S.C. § 136n(c).

The courts have almost universally agreed that FIFRA does not create a private right of action. See Rodriguez v. American Cyanamid Co., 858 F. Supp. 127 (D. Ariz. 1994) (summarizing holdings of various courts of appeal denying private right of action under FIFRA). Courts have found that the comprehensive enforcement scheme of FIFRA indicate Congress intended EPA enforcement to be exclusive. Almond Hill Sch., 768 F.2d 1030, 1035 (9th Cir. 1985). The test for whether Congress intended to create a private right of action is:

(1) whether the plaintiff is one of the class for whose 'especial' benefit the statute was enacted; (2) whether there is any indication of legislative intent to create or deny such remedy; (3) whether such remedy is consistent with the purpose of the act; and (4) whether the cause is one traditionally relegated to state law.

Fiedler v. Clark, 714 F.2d 77, 79 (9th Cir. 1983) (citing Cort v. Ash, 95 S. Ct. 2080, 2087-88 (1975); holding that FIFRA does not create private right of action). After reviewing FIFRA's legislative history, the court concluded that congress considered and rejected a private right of action. Id.
cide was first declared misbranded in a separate federal action.\textsuperscript{137} In the subsequent state action, the plaintiff must show injury, causation, and intent; moreover, the jury in the state action could consequently find a breach of warranty based on inadequate labeling, without actually determining that the label itself was inadequate.\textsuperscript{138} Courts should not equate the entire state tort claim as a state-imposed labeling requirement on the manufacturer since inadequacy of the label is only one element of the plaintiff’s prima facie case.\textsuperscript{139} The \textit{Welchert} court, and other courts finding preemption, incorrectly cut off claims where the manufacturer’s label is inadequate by EPA standards. The issue is clearly not the inadequacy of the label, rather, it is the intent of the manufacturer.

3. Application of the Presumption Against Preemption

\textit{Cipollone} expressly states that the presumption against preemption is strong — statutes should be construed narrowly against preemption.\textsuperscript{140} \textit{FIFRA} does not allow a manufacturer to use an EPA-approved label as a defense. However, the Act allows federal civil and criminal penalties for non-compliance.\textsuperscript{141} Since the manufacturer provides the labeling information, it is unlikely that Congress intended that courts find the pesticide to be mislabeled and yet only subject the manufacturer to minor penalties.\textsuperscript{142} Such a find-

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The statute is unclear as to the method by which any action may be brought, even though it does address jurisdictional issues. \textit{FIFRA} §§ 2 & 16; 7 U.S.C. § 136a, n, in conjunction with other sections, allow the Administrator to bring agency action against a manufacturer to end registration or change labeling. \textit{Id.} The plaintiff who has sustained injury may notify the EPA Administrator for review of the registration. \textit{FIFRA} §§ 2, 16; 7 U.S.C. § 136a, d. The only section addressing penalties is § 136l, which authorizes penalties to be imposed by the Administrator. \textit{Id.} § 14, 7 U.S.C. § 136l. The issue of whether section 136l may preempt actions by other parties for enforcement of the statute remains unanswered. A plaintiff who is injured by the misbranded product would appear to have standing, has a remedy (change in the label), and falls within the jurisdiction of the federal court. \textit{See id.} § 16(a), (c), 7 U.S.C. § 136n(a), (c).

\textsuperscript{137} The plaintiff in such a case faces the burden of a strong presumption in favor of adequate labeling. \textit{See FIFRA} § 2(a)(f)(2), 7 U.S.C. § 136a(f)(2).

\textsuperscript{138} For intent, the plaintiff usually must show that the manufacturer knew or should have known of the danger. \textit{See supra} note 46.

\textsuperscript{139} Courts making this equation needlessly confuse the idea of states specifying additional labeling requirements on a package with a finding of liability in a state tort claim. \textit{See supra} note 46.

\textsuperscript{140} \textit{Cipollone} v. Liggett Group, Inc., 505 U.S. 504, 516-17.

\textsuperscript{141} \textit{FIFRA} § 14(a)-(b), 7 U.S.C. § 136a(a)-(b).

\textsuperscript{142} \textit{Id.} A mislabeled pesticide product could potentially cause millions of dollars in damage to both property and persons. \textit{See Keaton, supra} note 46, at 3 (summarizing injuries from consumer products including pesticides based on Department of Health, Education and Welfare estimates). \textit{See also} Roberson v. E.I. DuPont de Nemours, 863 F. Supp. 929, 930-31 (W.D. Ark. 1994) (noting facts of
ing would extinguish the only means of judicial redress, effectively eliminating the victims' compensation. Similarly, the legislative history makes no reference to preemption of state law tort claims. Requiring narrow reading of statutes would not bar valid claims. Where a manufacturer knew, or should have known, of the potential danger due to inadequate labeling, plaintiffs claims may be appropriately asserted.

4. State Common Law Claims are Supported by FIFRA Policies

The remaining issue is whether it is fair for a manufacturer to assert reliance on EPA approval of the pesticide label as a defense. First, the “known or should have known” requirement weighs heavily against allowing a manufacturer to assert reliance. As the court in Ferebee explained, FIFRA’s purpose was “regulatory,” while state tort actions are “compensatory.” Also, manufacturers have historically carried the burden of risk associated with inadequate labeling, and regulatory compliance with federal standards has not been an absolute defense.

As articulated in Burke and Roberson, a manufacturer should not be permitted to assert the preemption defense if it knew that labeling claims were invalid. Inadequate labeling, when the manufacturer knew or should have known of the danger, contradicts the registration requirements of the statute. Manufacturers

EPA stop order in which numerous batches of contaminated herbicide manufactured between 1988 and 1989 were sold to farmers).

143. See Allnutt, supra note 22, at 874-75 (noting Ferebee’s conclusion that Congress would not leave state power to ban pesticides while prohibiting states from compensating victims of mislabeled pesticides).

144. As Cipollone discussed, and the courts in Worm and Welchert relied on, the obligations imposed on a manufacturer in an action for breach of express or implied warranty arise from voluntary assertions made by the manufacturer. See supra note 75 and accompanying text. However, a manufacturer who knows of a danger but does not disclose that danger breaches the duty because he has “voluntarily” decided not to disclose the information. Roberson v. E. I. DuPont de Nemours & Co., 863 F. Supp. 929, 933 (W.D. Ark. 1994). Extending this line of reasoning, a manufacturer which does not disclose information to EPA during the registration process has substituted its judgment for that of the agency as to the information contained on the label. This failure to disclose is contrary to the statutory mandate. Id. at 933-34.


146. See Keaton, supra note 46, at 357-58.
149. Burke, 797 F. Supp. at 1133-37; Roberson, 863 F. Supp. at 933-34.
150. Burke, 797 F. Supp. at 1133-37; Roberson, 863 F. Supp. at 931.
should continue to be liable for state law claims, since most of the information on an EPA-approved label is provided by the manufacturer. Although the warning label is mandated by FIFRA, withholding material information is a voluntary action. As Cipollone states, the obligations arising from voluntary actions by the manufacturer are not imposed by state law, and are therefore not preempted. The policy reasons — encouraging manufacturers to provide correct information, and protecting the integrity of EPA's labeling system — are strong support for estoppel of preemption claims in failure to warn cases.

V. IMPACT

The Welchert court's analysis for express preemption was appropriate; however, the court, in its analysis, should have more closely followed the test developed in Cipollone and Mortier. This analysis leads to the conclusion that FIFRA does not preempt all state law tort claims based on failure to warn. Certainly, the proper analysis of FIFRA preemption would be a narrow interpretation of the statutory language. Even so, the broadest interpretation should allow preemption only in those cases where the plaintiff has exhausted statutory remedies; most notably, attempting to have the pesticide declared misbranded. Welchert, finding broad statutory preemption, continues the trend of the vast majority of circuits. These courts find preemption of all state claims for breach of warranty without adequately analyzing the issue. This trend threatens to unnecessarily cut off valid claims and extinguish plaintiffs' only means of redress for injury by intentional, reckless, or negligent acts by manufacturers. Such insulation from damages discourages manufacturers from completely investigating adverse affects of their products.

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151. Burke, 797 F. Supp. at 1133-37; Roberson, 863 F. Supp. at 933-34.
152. See supra note 75 and accompanying text.
153. Roberson, 863 F. Supp. at 932-34. The control that the manufacturer has over the process and the need to encourage manufacturers to provide accurate labeling are strong reasons in support of preventing the manufacturer from asserting reliance on EPA-approved labels. Id.
154. See supra notes 43-45, 120-127 and accompanying text.
155. See supra notes 123-153 and accompanying text.