Warning! Federal Preemption May Be Hazardous to Plaintiff Pesticide Cases

INTRODUCTION

In pesticide litigation, federal preemption is a defense to negligence and strict liability based on failure to warn. The preemption defense protects the uniformity of regulation intended by the Supremacy Clause of the Constitution by preventing juries from passing judgment on pesticide labeling and warnings. If a jury decides that a product improperly warns of danger, a pesticide manufacturer may be forced to change that label to prevent future liability. Labeling changes based on state court decisions may destroy national uniformity, create the possibility of over-warning, and severely restrict the availability of pesticide products. On the other hand, the preemption defense may deny injured workers compensation for injuries caused by mislabeling.

I. SUPREMACY CLAUSE AND THE FEDERAL PREEMPTION DOCTRINE

The preemption doctrine is created by Article VI, Clause 2 of the United States Constitution, which states:

> [the] Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State the contrary notwithstanding.

Thus, federal law takes precedence over state law. The general principle is subject, however, to a determination that Congress intended that federal law supersede state law.[1]

Congressional intent may be manifested in a number of ways.[2] Congress may preempt state authority by using express terms.[3] Alternatively, preemption can be found from a "scheme of federal regulation so

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[1] Fidelity Federal Savings & Loan Association v. De La Cuesta, 458 U.S. 141, 152 (1982).

[2] *Id.* at 152-153.

[3] Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

pervasive as to make reasonable the inference that Congress left no room to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws of the subject;" or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose."[4]

Even if Congress has not intended to displace state regulation, state law may be preempted to the extent that it conflicts with federal law.[5] Conflict occurs when "compliance with both federal and state regulations is a physical impossibility,"[6] or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[7]

II. Federal Insecticide, Fungicide and Rodenticide Act

The basis for the preemption defense in pesticide labeling is the Federal Insecticide, Fungicide and Rodenticide Act.[8] Preemption suggests that uniformity of pesticide labeling must be maintained in order to protect the public from inconsistent warnings and protect businesses from liability that may result from inconsistent enforcement of label contents.

In 1910, the Federal Insecticide Act controlled the manufacture, sale or transportation of various chemicals.[9] The language contained within the Act gives an indication of Congressional intent to establish uniform

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[4] Fidelity Federal Savings & Loan Association v. De La Cuesta, 458 U.S. 151, 153 (1982) (quoting Rice v. Santa Fe Elevator Corporation, 331 U.S. 218, 230 (1947)).

[5] Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963).

[6] 373 U.S. at 142-143.

[7] 458 U.S. 151, 153 (quoting Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963)).

[8] This Act is commonly known as FIFRA. Pesticide labeling requirements are authorized and regulated by 7 U.S.C. § 136 (1947) and 40 C.F.R., Chapter 1, Part 156-162 (1988). The Environmental Protection Agency (hereinafter EPA) enforces these regulations which require the label contents to include the name, brand or trademark under which the product is sold, information regarding the registrant, various ingredient information, directions for use and warning or precautionary statements. The regulations require certain size type be used for the directions and warnings or labels and require specific placement of the warning label. The actual content of the label is directly related to the category of toxicity which applies to any particular pesticide. The details of these different toxicity categories are beyond the scope of this article. However, a review of the regulations is necessary to understand their comprehensive and pervasive nature.

[9] Insecticide Act of 1910, ch. 191, 36 Stat. 331 (1910).

regulation and cooperation by the states.[10] Congress noted:

> . . . that the introduction into any state or territory or the District of Columbia from any other state or territory or the District of Columbia, or from any foreign country, of any insecticide, . . . which is adulterated or misbranded within the meaning of this act is hereby prohibited . . .[11]

In 1947, Congress enacted FIFRA, emphasizing the need for uniform regulation:

> The secretary is authorized to cooperate with any other department or agency of the Federal Government and with the official agricultural or other regulatory agency of any state, or any state, territory, district, possession or any political subdivision thereof, in carrying out the provisions of this act and in securing *uniformity of regulations*.[12]

In 1972, FIFRA was rewritten, reinforcing federal preemption. The labeling provisions within section 136v of 7 U.S.C. provide:

> (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 Act.
> (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 Act.[13]

The accompanying Senate Report[14] states:

> Subsection (b) *preempts* any state labeling or packaging requirements differing from such requirements under the Act.[15]
> Subsection (b) *preempts* any state or local government labeling or packaging requirements differing from such requirements under the Act.[16]

III. Judicial Interpretation of the Preemption Defense

The first pesticide preemption case was *Ferebee v. Chevron Chemical Company*.[17] Ferebee, an agricultural worker, sued Chevron, the manufacturer of paraquat, alleging that he contracted pulmonary fibrosis from exposure to the pesticide. Ferebee alleged that Chevron should

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[10] *Id.*

[11] *Id.*

[12] Federal Insecticide, Fungicide, Rodenticide Act of 1947, ch. 125, Pub. L. No. 80-104 (emphasis added).

[13] 7 U.S.C. § 136v (1947).

[14] Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516 (July 19, 1972) 1972 U.S. Code Cong. and Admin. News (86 Stat.) 997.

[15] Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516 (June 7, 1972) 1972 U.S. Code Cong. and Admin. News (86 Stat.) 997 (emphasis added).

[16] *Id.*

[17] 736 F.2d 1529 (D.C. Cir. 1984).

have warned of such a possibility. Chevron contended that its label was approved by the EPA, and federal law preempted state law actions against Chevron. The *Ferebee* court rejected Chevron's arguments, stating:

> The fact that EPA has determined that Chevron's label is adequate *for purposes of FIFRA* does not compel the jury to find that the label is also adequate *for purposes of state tort law* as well. The purpose of FIFRA and those of state tort law may be quite distinct. FIFRA aims at insuring that, from a cost-benefit point of view, paraquat as labeled does not produce 'unreasonable adverse effects on the environment.' [citations]. State tort law, in contrast, may have broader compensatory goals; conceivably, a label may be inadequate under state law if that label, while sufficient under a cost-benefit standard, nonetheless fails to warn against any significant risk.[18]

The *Ferebee* court found a clear distinction between FIFRA's intent to establish labeling requirements and the compensatory purpose of common law causes of action:

> Damage actions typically, however, can have *both* regulatory and compensatory aims. Moreover, these aims can be distinct; it need not be the case, as Chevron apparently assumes, that the company can be held liable for failure to warn only if the company could actually have altered its warning. Chevron *can* take steps to alter its label . . . The verdict itself does not command Chevron to alter its label — the verdict merely tells Chevron that, if it chooses to continue selling paraquat in Maryland, it may have to compensate for some of the resulting injuries. That may in some sense impose a burden on the sale of paraquat in Maryland, but it is not equivalent to a direct regulatory command that Chevron change its label. Chevron can comply with both federal and state law by continuing to use the EPA approved label and by simultaneously paying damages to successful tort plaintiffs such as Mr. Ferebee.[19]

FIFRA did not preempt common law causes of action under the normal theories of preemption because Congress had not explicitly preempted state damage actions. Instead, Congress precluded states from mandating changes in the EPA-approved labels. The court also found that compliance with both federal and state law could not be characterized as impossible since Chevron could continue to use the EPA-approved labels and at the same time, pay damages to successful tort plaintiffs. Alternatively, the court indicated Chevron could petition the EPA to allow a more comprehensive label.[20]

Finally, the court found that such state damages actions did not stand

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[18] *Id.* at 1540 (emphasis in original).
[19] *Id.* at 1540-1541 (emphasis in original).
[20] *Id.* at 1542-1543.

as an obstacle to accomplishing FIFRA's purposes. A conflict in purpose would only exist if FIFRA were interpreted not as a regulatory statute designed to protect citizens from the hazards of pesticides, but as a subsidization of the pesticide industry which commanded states to accept the use of EPA registered pesticides.[21]

The *Ferebee* court narrowly interpreted the preemptive language of both the Act and the legislative history. The court noted:

> Federal legislation has traditionally occupied a limited role as the floor of safe conduct; before transforming such legislation into a ceiling on the ability of states to protect their citizens, and thereby radically adjusting the historic federal-state balance, courts should wait for a clear statement of congressional intent to work such an alteration.[22]

By recognizing a plaintiff's right to maintain a cause of action for damages, the *Ferebee* court threatened the preemption defense in pesticide cases.

The first challenge to *Ferebee* was in *Fitzgerald v. Mallinckrodt Inc.*[23] where the plaintiff suffered toxic exposure from defendant's product, Calo-Clor. Fitzgerald was employed as a greenskeeper at a golf course. As he poured pesticide from a twenty-five pound drum onto a measuring scale, the chemical spilled onto his protective clothing. Plaintiff brushed off his clothes, washed his hands and face, and returned to work. Later that evening, he became sick. His wife took him to the hospital, where he was diagnosed to have mercury poisoning. Fitzgerald sued the pesticide manufacturer, claiming that if the warning label had been prepared differently, he would not have been injured. The manufacturer moved for summary judgment, contending that FIFRA preempted the plaintiff's state common law cause of action based on failure to warn.

The *Fitzgerald* court posed the question: "Did Congress intend for federal regulation to supersede state law?" The parties agreed that the EPA, under FIFRA, regulated the sale and labeling of the defendant's product.

> While typically defining whether Congress intended to preempt state law is a difficult, haphazard process, in the instant statute, Congress has expressly stated its intent to preempt any state labeling or packaging requirements different from or additional to those mandated by FIFRA. Section 136v(b) provides: 'Such state shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from

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[21] *Id.*

[22] *Id.*

[23] 681 F. Supp. 404 (E.D. Mich. 1987).

those required under this subchapter.'[24]

The court rejected the *Ferebee* analysis and relied on *Palmer v. Liggett Group*, which found preemption under the Federal Cigarette Labeling and Advertising Act.[25] The *Fitzgerald* court concluded that where the federal government has preempted state regulation, compensation based in state common law is also preempted. The *Palmer* court, quoted verbatim in the *Fitzgerald* decision, referred to the Cigarette Act and noted:

> The preemption clause of the Act expressly prohibits 'state law' not merely 'statutory law' from imposing any 'requirement or prohibition' different from the Act's warning label.[26] If a manufacturer's warning that complies with the Act is found inadequate under a state tort theory, the damages awarded and verdict rendered against it can be viewed as state regulation: the decision effectively compels the manufacturer to alter its warning label to conform to different state law requirements as 'promulgated' by a jury's finding . . . this challenge to the federal warning label's sufficiency — and the confusion it would engender — surely contravenes the Act's policy of uniform labeling.[27]

In *Palmer*, the lower court had ruled that any monetary damage award would not compel a manufacturer to change its label because the "choice of how to react is left to the manufacturer."[28] However, the "choice of reaction" was discussed in practical terms by the *Palmer* court:

> This 'choice of reaction' seems akin to the free choice of coming up for air after being under water. Once a jury has found a label inadequate under state law, and the manufacturer liable for damages for negligently employing it, it is unthinkable that any manufacturer would not take steps to minimize its exposure to continued liability. The most obvious change it can take, of course, is to change its label. Effecting such a change in the manufacturer's behavior and imposing such additional warning requirements is the very action preempted.[29]

The *Fitzgerald* court found this analysis compelling and applied it directly to FIFRA preemption. The court found an express intent to preclude common law causes of action for failure to warn.

> Allowing recovery under state tort law where Congress has preempted state law would effectively authorize the state to do through the back door

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[24] *Id.* at 406.

[25] 15 U.S.C.A. §§ 1331-1340 (1970).

[26] 15 U.S.C.A. § 1334 (1970).

[27] 681 F. Supp. at 407, (quoting Palmer v. Liggett Group, Inc., 825 F.2d 620, 627 (1st Cir. 1987)).

[28] *Id.*

[29] 681 F. Supp. at 407, (quoting Palmer v. Liggett Group, Inc. at 627-628).

> exactly what it cannot do through the front. FIFRA expressly provides that no state may impose 'any requirement for labeling or packaging in addition to or different from those required under the Act.' [citation]. As the *Palmer* court noted, any state law tort recovery based on a failure to warn theory, would abrogate Congress' intent to provide uniform regulations governing the labeling of pesticides.[30]

Fitzgerald and *Ferebee* created a conflict. *Ferebee* found policy reasons for allowing plaintiffs to recover; *Fitzgerald* assessed the practical effect of jury verdicts as *de facto* "regulation" expressly preempted by FIFRA.

IV. Beyond *Ferebee* and *Fitzgerald*

Villari v. Terminex International, Inc.[31] involved an action against an exterminator in which plaintiff alleged contamination of his home with termiticides and failure to warn. In pre-trial motions, the exterminator, relying on *Fitzgerald*, moved to exclude all evidence related to failure to warn. In *Fitzgerald*, the plaintiff contended that he would not have been injured if the warning label had been prepared in a different manner.[32] The *Villari* court found a significant difference between the claims in *Fitzgerald* and those currently before the court:

> The plaintiffs [in this action] do not assert that their injuries were the result of the defendant's failure to comply with federal regulations regarding the labeling and packaging of defendant's pesticides. Rather, their claim is that the defendant had an obligation, under state common law, to insure that an appropriate warning reached not only the employees who handled the pesticides, but also the plaintiffs themselves as the ultimate consumers of the pesticides.[33]

The *Villari* court found no conflict with FIFRA's prohibition of state labeling or packaging requirements because the defendant's liability was unrelated to the manner in which the product was labeled or packaged. Under the plaintiff's theory, liability attached as a result of defendant's failure to relay the warning that FIFRA requires sellers to affix to their products. Since the defendant had a duty to inform plaintiffs of any health risks created by the termiticide spill, the *Villari* court concluded:

> Success by the plaintiff would provide no incentive to the defendant or any other seller of termiticides to alter its labeling or packaging. Rather, such success should, as its only effect, encourage compliance with state regula-

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[30] 681 F. Supp. at 407.
[31] 692 F. Supp. 568 (E.D. Penn. 1988).
[32] 681 F. Supp. at 405.
[33] 692 F. Supp. at 577-578.

> tions concerning the sale and use of pesticides, a result wholly consistent with section 136 of FIFRA.[34]

The *Villari* analysis strictly limits the preemption defense to those situations where the injured party was the user of the pesticide and had the opportunity to read the questioned warning label. If the plaintiff can establish that, through some fault not his own, the manufacturer's warning did not reach him, the preemption defense will fail.

This limitation seems reasonable. Where the issue of warning involves an intermediary like the pesticide applicator in *Villari*, there is no need for the preemption argument. Only the manufacturer (registrant) is subject to the provisions of FIFRA. Only the manufacturer can rely on compliance with those regulations as a defense to the "failure to warn" cause of action. The pesticide applicator is not subject to FIFRA or EPA labeling requirements, therefore, the applicator cannot benefit from any preemptive protection.

In an attempt to expand this protection to the applicator and better define warning requirements, New York state now requires the property owner be supplied certain information, including a list of the chemicals to be applied, as well as any warnings which appear on the EPA approved label. The applicator must also provide further warnings and safety information. Signs must also be posted on the perimeter of the property to be sprayed. In some cases, the applicator must publish a notice.[35]

New York State Pesticide Coalition v. Jorling[36] upheld these regulations. In this case, plaintiff challenged the law, arguing that FIFRA preempted any warnings different from those prescribed by the Act.[37] The court rejected this contention, finding that the warnings were not "labeling", but were part of the "sale and use" provisions of the Act.[38] Since the "sale and sue" portion of the Act specifically allows a state to create additional regulation,[39] the preemption argument failed.[40]

Noting an important distinction between "labeling" and warnings in general, the court explained:

> FIFRA 'labeling' is designed to be read and followed by the end user. Generally, it is conceived as being attached to the immediate container of

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[34] *Id.* at 578.

[35] New York Environmental Conservation Law, N.Y. COMP. CODES R. & REGS. Title 6, § 325 (1987).

[36] 874 F.2d 115 (2nd Cir. 1989).

[37] *Id.* at 118.

[38] *Id.*

[39] 7 U.S.C. § 136v(a) (1947).

[40] 874 F.2d at 120.

> the product in such a way that it can be expected to remain affixed during the period of use. [citation]. By contrast, the target audience of the New York notification program is those innocent members of the general public who may unwittingly happen upon an area where strong poisons are present as well as those who contract to have pesticides applied. The mere proximity of the warning, for example, notices posted around an enclosed field or copies of the EPA's labeling information provided to the contracting parties, does not transform the admonition into 'labeling' within the meaning of FIFRA.[41]

By construing the term "labeling" to include only the message actually affixed to the pesticide product, the court characterized all other messages as "sale and use".[42] This is a broad generalization in light of the FIFRA definition of "labeling," which includes all written, printed or graphic matter that accompanies the pesticide.[43] In upholding the regulations based on an expressed need to protect the public, the *Jorling* court limited the scope of the term "labeling" to something less than intended by the simple language of the Act. "Labeling" specifically includes more than just the piece of paper attached to the pesticide product.[44]

The interpretation of "labeling" was also discussed in *Cox v. Velsicol Chemical Corporation*.[45] Here, plaintiffs were family members of a pest control operator who died from lung cancer developed as a result of his exposure to chlordane. Plaintiffs contended that the manufacturer failed to give proper warning of the potential risks involved in the use of its product.[46] The manufacturer moved for summary judgment, claiming FIFRA preempted any common law cause of action for failure to warn.[47] *Cox* followed *Ferebee* and denied summary judgment based on federal preemption.[48]

The *Cox* decision was based on the court's belief that FIFRA estab-

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[41] 874 F.2d at 119. *See also*, CALIFORNIA HEALTH & SAFETY CODE § 25249 (Proposition 65); CALIFORNIA CODE OF REGULATIONS § 12601; "Final Statement of Reasons" for that section for a discussion of the distinction between "label warnings" controlled by FIFRA and other "general" warnings which may not be subject to preemption.

[42] 874 F.2d at 119.

[43] 7 U.S.C. § 136¶ (1947); *see supra* note 13.

[44] *See e.g., supra* note 9; D-Con Company, Inc. v. Allenby, 728 F. Supp. 605 (N.D. Cal. 1989) and Chemical Specialties Manufacturers Assoc., Inc. v. Allenby 728 F. Supp. 605 (N.D. Cal. 1990) for a similar discussion regarding California's Proposition 65 warnings.

[45] 704 F. Supp. 85 (E.D. Penn. 1989).

[46] *Id.* at 86.

[47] *Id.* at 85.

[48] *Id.* at 87.

lishes minimum standards for warning. This conclusion was reached by comparing the Cigarette Labeling Act requirements to the FIFRA requirements:

> FIFRA, which applies to some 40,000 different herbicide and pesticide formulations, imposes an entirely different type of regulatory scheme from that established under the Cigarette Labeling Act. Under FIFRA, each manufacturer drafts a warning label for each product for EPA approval. Thus, two manufacturers of the same regulated product may use different labels of their own choosing, provided only that they obtain prior EPA approval . . . . In contrast, the Cigarette Labeling Act explicitly (i) applies to cigarettes only; (ii) mandates the precise language of the label; and (iii) prohibits any state from regulating any aspect of cigarette warnings.[49]

By focusing on the manufacturer's ability to petition the EPA for label changes, the *Cox* court ignored the preemptive language within the Act.[50] A manufacturer must also use the prescribed warning contained in the regulations, dependent upon the category of pesticide.[51] According to *Cox*, there is no express preemption of warnings, but merely a prohibition on making direct changes to a pesticide label without first obtaining EPA approval.[52]

The liberal approach to preemption continued in *Kennan v. Dow Chemical Company.*[53] The widow of the deceased sued the pesticide manufacturer for failure to warn, claiming her husband had contracted a fatal blood disease as a result of his exposure to PCP.[54] Rejecting *Ferebee*, and following the *Fitzgerald* analysis, the *Kennan* court concluded:

> . . . a state court jury verdict would have the effect of 'regulating' the content of a warning label. Since FIFRA *expressly* preempts state law regulation of pesticide labeling, plaintiff's state law claims fail to the extent that they are based on defendant's failure to warn.[55]

The *Kennan* court found express preemption under FIFRA, but implied preemption was the basis for the court's decision in *Fisher v. Chevron Chemical Company.*[56] The court found that plaintiff's tort claims were not expressly preempted because FIFRA did not specifically prohibit common law causes of action; however, the court decided

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[49] *Id.* at 86.
[50] *Id.* at 87.
[51] *See supra* note 9.
[52] 704 F. Supp. at 87.
[53] 717 F. Supp. 799 (M.D. Fla. 1989).
[54] *Id.* at 802.
[55] *Id.* at 806, 807 (emphasis added).
[56] 716 F. Supp. 1283 (W.D. Mo. 1989).

that allowing common law claims based on failure to warn would "conflict" with the provisions of FIFRA.[57]

CONCLUSION

The arguments made in *Ferebee* and *Fitzgerald* cannot be reconciled. The statutes have suffered from diametrically opposed interpretation; the policy reasons protecting plaintiffs under the *Ferebee* analysis, versus the *Fitzgerald* contention that uniformity of regulation is required by the Supremacy Clause of the Constitution.

Until the debate is settled by the Supreme Court, failure to warn, in negligence or strict liability (design defect), will remain an effective claim against a defendant pesticide manufacturer. However, uniformity of regulation *and* compensation of victims may be possible. Congress has the ability to limit manufacturer liability by placing a ceiling on the amount of damages a plaintiff might receive. The manufacturer could absorb the costs of limited suits, while pursuing necessary label changes on a national scale and the injured plaintiff would be adequately compensated. Many states have adopted similar legislation to protect the medical profession from unlimited exposure.[58]

Until a compromise can be legislated, the Constitution and Supremacy Clause must remain the ultimate authority. A pesticide manufacturer who provides all warnings required by law must be able to invoke the protection intended by federal preemption. The victim may still have redress against a pesticide distributor or applicator for independent negligence; therefore, recovery is not entirely foreclosed.

Admittedly, federal preemption presents an obstacle to plaintiffs but the spirit, intent and authority of the Constitution must not be eroded even though harmful to plaintiff pesticide cases against pesticide manufacturers.

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[57] *Id.* at 1287-1289.

[58] *See* CAL. CODE CIV. PRO. § 667.7 (Deering 1983) and CAL. CIV. CODE § 3333.2 (Deering 1984) limiting recovery from health care providers.