

# THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT: A NEW LOOK AT PREEMPTION AFTER BATES

## I. INTRODUCTION

The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”) is a significant piece of legislation that has put the Federal Government in a position to effectively govern the way pesticides are sold and used in this country.<sup>1</sup> The role of pesticides in agriculture has transformed this vital American industry. “Since their introduction, farmers have been able to produce bigger crops on less land” and “productivity has increased anywhere between 20 and 50%.”<sup>2</sup>

FIFRA defines a pesticide as “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, [and] any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant . . . .”<sup>3</sup> Pesticides protect consumers from harmful organisms while helping farmers to grow food.<sup>4</sup> However, pesticides by their nature, and despite all their benefits, are inherently dangerous and are not without risks.<sup>5</sup> Without a heightened degree of care by the manufacturer, and adequate usage instructions for those who apply them, pesticides can have detrimental effects on persons and property.<sup>6</sup>

Through FIFRA, Congress has given the Environmental Protection Agency (“EPA”) the ability to directly regulate pesticides.<sup>7</sup> While this serves the purpose of providing clarity and uniformity by avoiding a multiplicity of standards across the fifty states, other matters are subject

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<sup>1</sup> See 7 U.S.C.A. § 136 (West 1996).

<sup>2</sup> *Benefits of Pesticides*, CROP LIFE INTERNATIONAL, [http://www.croplife.org/public/benefits\\_of\\_pesticides](http://www.croplife.org/public/benefits_of_pesticides) (last updated Dec. 12, 2010).

<sup>3</sup> 7 U.S.C.A. § 136(u).

<sup>4</sup> *Benefits of Pesticides*, *supra* note 2.

<sup>5</sup> *Id.*

<sup>6</sup> ELIZABETH C. BROWN ET AL., A PRACTITIONER’S GUIDE TO THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT 9 (Environmental Law Institute eds., 2001).

<sup>7</sup> *Id.* at 10.

to uncertainty. A topic of great confusion in courtrooms across the country is the amount of power states have to protect their citizens when they suffer adversely from the use or exposure to pesticides. The validity of a federal statute cannot be questioned by the enforcement of a state law, according to the Supremacy Clause of the United States Constitution.<sup>8</sup> This barrier to enforce state laws in light of superseding federal statutes, is known as preemption and is the root of the controversy behind FIFRA.

The history of pesticide litigation has been inconsistent. Originally, those injured by pesticides were not obstructed from bringing their state tort actions against pesticide manufacturers.<sup>9</sup> This remained true even after 1972 when FIFRA was amended to its present form.<sup>10</sup> It was not until the Supreme Court ruling in *Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992), which addressed federal regulations regarding the labeling of cigarette packages, that the pendulum swung in the favor of preemption and, consequently, in opposition to those seeking compensation for injuries caused by pesticides.<sup>11</sup> Not until the recent Supreme Court ruling in *Bates v. Dow Agrosciences*, 544 U.S. 431 (2005), was there any concrete interpretation of the scope of FIFRA.<sup>12</sup> This Comment will discuss the long road that preceded *Bates*, the effect that decision has had on subsequent litigation, and analyze whether *Bates* is sufficient to promote the greater public policy concerns surrounding the application of pesticides.

## II. HISTORY OF PESTICIDE LEGISLATION

The federal government began regulating pesticides with the Insecticide Act of 1910.<sup>13</sup> The purpose of the Act was to prohibit the sale of fraudulently labeled pesticides; however, it contained no requirements with respect to standards or registration by manufacturers.<sup>14</sup> FIFRA was enacted in 1947 and had two main goals: to establish requirements for the pesticide label and to establish registration requirements for manufacturers.<sup>15</sup> Under this act, the United States Department of Agriculture was charged with oversight of FIFRA's regulatory components.<sup>16</sup> Although

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<sup>8</sup> U.S. CONST. art. VI, cl. 2.

<sup>9</sup> *Bates v. Dow Agrosciences*, 544 U.S. 431, 440-441 (2005).

<sup>10</sup> *Id.*

<sup>11</sup> *See generally* *Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992).

<sup>12</sup> *See generally* *Bates*, 544 U.S. at 431.

<sup>13</sup> BROWN, *supra* note 6, at 10.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

the Act brought sweeping reform to pesticide regulation, the Secretary of Agriculture was still limited in regulating which pesticides went to market and what unwanted effects, if any, were caused by those pesticides.<sup>17</sup>

In 1972, reforms were made that transformed FIFRA into what it is today.<sup>18</sup> The Federal Environmental Pesticide Control Act (“FEPCA”) brought greater attention to the adverse effects of pesticides on the environment.<sup>19</sup> FEPCA also expanded the strength of, what was then, the newly created EPA.<sup>20</sup> These expanded powers included the required registration of pesticides, which would be reviewed by the EPA.<sup>21</sup> A number of small changes were made to FIFRA in the years following the 1972 Act.<sup>22</sup> These changes addressed the beneficial economic impact of pesticide use.<sup>23</sup> For example, they allowed the EPA to conditionally register pesticides and ensure that the concerns of the agricultural industry were taken into account before making decisions to deny registration to certain pesticides.<sup>24</sup>

### III. AN OVERVIEW OF THE FEDERAL INSECTICIDE FUNGICIDE RODENTICIDE ACT

FIFRA gives the EPA authority to regulate pesticides through registration of the compound itself and by setting requirements for the contents of the label.<sup>25</sup> The general purpose of pesticide labels is to inform the user of the proper way to use the pesticide as well as the hazards associated with its use.<sup>26</sup> FIFRA provides a number of requirements for a label to be valid. A pesticide label must include the name of the product, the producer, net contents, and registration numbers for the product and the manufacturer.<sup>27</sup> The label must also contain a list of the active and inert ingredients by name and percentage of weight.<sup>28</sup>

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<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*; Federal Environmental Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat. 973, (codified as amended at 7 U.S.C.A. §§ 136-136y (West 1996)).

<sup>20</sup> *See* *Bates v. Dow Agrosciences*, 544 U.S. 431, 437 (2005).

<sup>21</sup> BROWN, *supra* note 6, at 10.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> 7 U.S.C.A. § 136a (West 1996).

<sup>26</sup> BROWN, *supra* note 6, at 16.

<sup>27</sup> 40 C.F.R. § 156.10(a)(1) (West 2009).

<sup>28</sup> 40 C.F.R. § 156.10(g)(4).

The critical label requirements are those that warn the user of associated dangers and instructions on proper use.<sup>29</sup> Warnings located “on the front panel” must include text alerting the user to the toxicity of the contents.<sup>30</sup> Detailed warnings are required for any specific dangers that the pesticide may pose to the environment, humans, or property.<sup>31</sup> The extensive FIFRA label requirements actually help manufacturers defend against liability claims when they assert that those claims should be preempted by FIFRA.<sup>32</sup>

FIFRA also details requirements for what directions must be provided for end-users.<sup>33</sup> The directions must be written so that the average person, who will be using the pesticides or supervising those who will be using them, can understand them.<sup>34</sup> The directions must be conspicuous and easy to read.<sup>35</sup> Directions must be provided to ensure protection of workers who will be exposed to the pesticide, as well as protection of those that may enter the affected area.<sup>36</sup> Additionally, it must expressly state that it is a violation of federal law to use the product in a manner that is inconsistent with its labeling.<sup>37</sup>

Another important provision of FIFRA’s labeling requirements is the misbranding provision.<sup>38</sup> Under this provision, FIFRA prohibits the making of any misleading marketing statements.<sup>39</sup> Comparative statements, for example, that could lead a user to perceive the pesticide to be safer than it really is must not be included in the label.<sup>40</sup>

Under FIFRA, the EPA is charged with enforcement through either civil or criminal channels.<sup>41</sup> Civil actions can range from statutorily set fines to seizure of the product or injunctions against the violating party.<sup>42</sup> These actions are specifically aimed at the violator, and the remedy depends on the egregiousness of their conduct as well as the extent of their

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<sup>29</sup> 40 C.F.R. § 156.60 (2011 through Jan. 6); 40 C.F.R. § 156.10(i)(1).

<sup>30</sup> 40 C.F.R. § 156.64(a) (2011 through Jan. 6).

<sup>31</sup> 40 C.F.R. § 156.10(a)(1)(vii).

<sup>32</sup> BROWN, *supra* note 6, at 17.

<sup>33</sup> 40 C.F.R. § 156.10(i)(1)(i).

<sup>34</sup> *Id.*

<sup>35</sup> 40 C.F.R. § 156.10(i)(1)(ii).

<sup>36</sup> 40 C.F.R. § 156.10(i)(2)(viii).

<sup>37</sup> 40 C.F.R. § 156.10(i)(2)(ii).

<sup>38</sup> 7 U.S.C.A. § 136(q) (West 1996).

<sup>39</sup> 7 U.S.C.A. § 136(q)(1)(a).

<sup>40</sup> 40 C.F.R. § 156.10(a)(5)(iv) (2011 through Jan. 6).

<sup>41</sup> 7 U.S.C.A. § 136l (West 1996).

<sup>42</sup> *Id.*; 7 U.S.C.A. § 136k(b) (West 1996).

knowledge.<sup>43</sup> This is significant because none of the EPA's enforcement methods directly compensate a party that was harmed by pesticides.

#### IV. AUTHORITY AND THE SUPREMACY CLAUSE

The Supremacy Clause of Article VI, paragraph two of the United States Constitution declares that federal laws are the "supreme law of the land."<sup>44</sup> The Tenth Amendment provides that all powers not vested in the federal government are left to the states.<sup>45</sup> Therefore, states preserve their sovereignty and the power to create their own laws. However, when federal and state law conflict, federal law will supersede.<sup>46</sup>

FIFRA places state authority into two separate areas. First, states may regulate the sale and use of pesticides.<sup>47</sup> Second, states may establish regulations for labeling pesticides.<sup>48</sup> Authority vested to the states, however, is not without limitations. In regulating the sale and use of pesticides, state regulations may be stricter than what FIFRA allows, but these regulations may not ease state restrictions below what is required under FIFRA.<sup>49</sup> The authority of the states to regulate pesticide labels is restricted even further. States may not create labeling requirements that are in addition to, or different than, those prescribed under FIFRA.<sup>50</sup> In contrast to the sale and use of pesticides, states do not have discretion to impose more burdensome requirements as to what a label must contain than what FIFRA requires.<sup>51</sup> Therefore, the states have no ability to offer appreciably greater protection through additional label warnings to the end-user. The limitations on labeling have been at the center of an ongoing debate of what exactly Congress intended when enacting FIFRA, and what preemptive effect they sought for section 136v(b) to have.

Federal preemption can be either express or implied.<sup>52</sup> Congress can expressly preempt all law in a given field by clearly stating their intent to do so.<sup>53</sup> If it is determined that preemption is explicit, then the scope of

<sup>43</sup> 7 U.S.C.A. § 136l.

<sup>44</sup> U.S. CONST. art. VI, cl. 2.

<sup>45</sup> U.S. CONST. amend. X.

<sup>46</sup> *McCulloch v. Maryland*, 17 U.S. 316, 427 (1819).

<sup>47</sup> 7 U.S.C.A. § 136v(a) (West 1996).

<sup>48</sup> 7 U.S.C.A. § 136v(b).

<sup>49</sup> 7 U.S.C.A. § 136v(a).

<sup>50</sup> 7 U.S.C.A. § 136v(b).

<sup>51</sup> *Id.*

<sup>52</sup> *BROWN*, *supra* note 6, at 78.

<sup>53</sup> *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

that preemption is limited to the language of the federal statute.<sup>54</sup> Also, where explicit preemption is found, it does not prevent the examination of whether there was implicit preemption.<sup>55</sup>

The Court in *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), held that state powers should not be preempted unless Congress intended to do so.<sup>56</sup> The court identified three ways of implicitly determining Congress' intent.<sup>57</sup> First, Congress intended the federal regulation to preempt if it is so expansive that there is no room left for state regulation.<sup>58</sup> Second, the regulation preempts if the federal interest is so great, then it can be presumed that state law is preempted.<sup>59</sup> Third, preemption is appropriate if the objective of the federal law is primarily to occupy the field of regulation.<sup>60</sup>

The court in *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 714 (1985) found that in order to determine whether an entire field has been occupied by federal law, the intent of "underlying the federal scheme" must be examined.<sup>61</sup> Other circumstances that can establish an implied preemption is where state and federal law conflict.<sup>62</sup> One example is where state law "stands as an obstacle" to the objectives of Congress.<sup>63</sup> Another example is where compliance with both federal and state law would be impossible.<sup>64</sup> In *Hurley v. Lederle Laboratory Division of American Cyanamide*, 863 F.2d 1173, 1179 (5th Cir. 1983) the court found that manufacturers could not comply with both state and federal labeling regulations, and therefore the state regulations were preempted.<sup>65</sup> Similarly, the court in *Cosmetic, Toiletry & Fragrance Ass'n Inc. v. Minnesota*, 575 F.2d 1256, 1257 (8th Cir. 1978) upheld the district court's reasoning that enforcing state laws would stand as an obstacle to the "full effectuation of the federal purpose."<sup>66</sup> As a check on preemp-

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<sup>54</sup> *Mitchell v. Collagen Corp.*, 67 F.3d 1268, 1275 (7th Cir. 1995).

<sup>55</sup> *Id.*

<sup>56</sup> *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Hillsborough County v. Automated Medical Laboratories*, 471 U.S. 707, 714 (1985).

<sup>62</sup> *Rice*, 331 U.S. at 230.

<sup>63</sup> *Hillsborough County*, 471 U.S. at 713.

<sup>64</sup> *Florida Lime & Avocado Growers Inc. v. Paul*, 373 U.S. 132, 142-143 (1962).

<sup>65</sup> *Hurley v. Lederle Laboratory Division of American Cyanamide*, 863 F.2d 1173, 1179 (5th Cir. 1983).

<sup>66</sup> *Cosmetic, Toiletry & Fragrance Ass'n Inc. v. Minnesota*, 575 F.2d 1256, 1257 (8th Cir. 1978); *Cosmetic, Toiletry & Fragrance Ass'n Inc. v. Minnesota*, 440 F.Supp 1216, 1224 (D.Minn. 1977).

tion, however, the Supreme Court noted in *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) that the presumption shall be that the state law is not preempted when examining whether a given federal law preempts a state law.<sup>67</sup> In other words, the power of states to enact their own enforcements should not be taken away unless it can be determined that Congress has clearly decided to do so.

## V. STATE TORT LAW CLAIMS

It is clear from the language of FIFRA that Congress intended to prevent the states from setting their own regulations apart from those in FIFRA.<sup>68</sup> However, it is not clear if any attempt by individuals seeking compensation via state tort law from injuries stemming from pesticide use is also preempted, if such compensation would cause a manufacturer to change their labels. The early history of cases considering the question of preemption did so in favor of upholding the right of state action by limiting the scope by which FIFRA preempts.<sup>69</sup>

In *D-con Co. v. Allenby*, F.Supp. 605, 607 (N.D. Cal. 1989), the court held that a state labeling regulation for point of sale signage was not preempted by FIFRA.<sup>70</sup> The court reasoned that the definition of a label should be construed more narrowly.<sup>71</sup> In a subsequent case against the same manufacturer, *Chemical Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941, 946 (9th Cir. 1992), the issue of whether to maintain a narrow interpretation of what constituted a label was further developed in consideration of what the consequences would be of holding otherwise.<sup>72</sup> The court held that "to interpret the label more broadly may include even the price label on the shelf or the brand logo."<sup>73</sup>

*New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 116 (2d Cir. 1989) involved a state law that required a warning to the public of where pesticides had been applied.<sup>74</sup> In that case, the court decided that the state law in question was not preempted.<sup>75</sup> The court held that the state regulations were not labeling regulations, but rather a regulation on sale and use which, as mentioned before, is a power delegated to the

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<sup>67</sup> *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

<sup>68</sup> 7 U.S.C.A. § 136v(b) (West 1996).

<sup>69</sup> See *infra* section V.

<sup>70</sup> *D-con Co. v. Allenby*, 728 F.Supp. 605, 607 (N.D. Cal. 1989).

<sup>71</sup> *Id.*

<sup>72</sup> *Chemical Specialties Mfrs. Ass'n v. Allenby*, 958 F.2d 941, 946 (9th Cir. 1992).

<sup>73</sup> *Id.*

<sup>74</sup> *New York State Pesticide Coalition, Inc. v. Jorling*, 874 F.2d 115, 116 (2d Cir. 1989).

<sup>75</sup> *Id.* at 119.

states by FIFRA, and therefore permissible.<sup>76</sup> The court's reasoning was that labeling is for protecting end-users, those who actually use the product, and regulations for sale or use are to protect the public.<sup>77</sup> Although state regulations were involved in these cases, those regulations were not aimed directly at the pesticide label and therefore the resulting tort judgments would not be considered labeling requirements, regardless of whether or not they motivated the manufacturer to inevitably change their label.

A pivotal case in the preemption debate was *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984).<sup>78</sup> Ferebee's children brought this suit on their deceased father's behalf.<sup>79</sup> Ferebee contracted pulmonary fibrosis after long term skin exposure to Paraquat, a pesticide manufactured by the defendant.<sup>80</sup> The plaintiffs argued that Chevron's failure to put an adequate warning on the pesticide label caused the injury.<sup>81</sup> The jury returned a verdict in favor of Ferebee.<sup>82</sup> On appeal, Chevron argued that EPA approval under FIFRA required the jury to find that the label was adequate and that FIFRA preempted the plaintiff's state-law claim based on inadequate labeling.<sup>83</sup> The D.C. Circuit Court of Appeals rejected both points.<sup>84</sup> The EPA determined the label to be adequate in terms of FIFRA, but that finding does not compel the jury to find the label adequate, "for purposes of state tort law as well."<sup>85</sup> The court held that the aim of FIFRA, by applying a cost benefit point of view, is that "[P]araquat as labeled does not produce 'unreasonable adverse effects on the environment.'"<sup>86</sup> Alternatively, state tort law has a different set of goals. A label may be insufficient under state law if it fails to warn against a significant risk, but at the same time it may be sufficient under the federal law's cost-benefit approach.<sup>87</sup> Furthermore, the court reasoned that Congress, by enacting FIFRA, did not intend to preempt state tort damages, but rather to prevent states from making changes to EPA approved labels.<sup>88</sup> Therefore, any idea of express pre-

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984).

<sup>79</sup> *Id.* at 1532.

<sup>80</sup> *Id.* at 1532-1533.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 1539.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 1540.

<sup>86</sup> *Id.* at 1539.

<sup>87</sup> *Id.* at 1540.

<sup>88</sup> *Id.* at 1542.

emption was rejected.<sup>89</sup> As to implied preemption, the court held that Congress neither occupied the entire field of pesticide labeling, nor was the defendant in a double bind, unable to both comply with FIFRA and pay damages.<sup>90</sup> Chevron could continue paying damages while at the same time complying with EPA labeling standards, or they could petition the EPA for a more detailed label.<sup>91</sup>

In *Ciba-Geigy Corp v. Alter*, S.W.2d 136, 138 (Ark. 1992), the plaintiff sustained damage to his crop because of Dual-8e, a herbicide manufactured by Ciba.<sup>92</sup> Ciba argued that plaintiff's claims were preempted by FIFRA, as they were premised on inadequate labeling.<sup>93</sup> The court agreed with *Ferebee* that FIFRA neither expressly, nor impliedly preempted state claims for inadequate labeling.<sup>94</sup> The court's reasoning in *Ciba*, however, deviated from *Ferebee*.<sup>95</sup> FIFRA failed to preempt not because the defendant could comply with the EPA and state laws while paying jury awarded damages, but rather because the defendant could petition the EPA to make changes in the label and thereby conform to both state and federal law.<sup>96</sup>

The court in *Fitzgerald v. Mallinckrodt, Inc.*, F.Supp. 404, 407 (E.D. Mich. 1987) disagreed with the reasoning in *Ferebee*.<sup>97</sup> The court held that FIFRA preempts conflicting state common law.<sup>98</sup> The plaintiff, a maintenance worker at a golf course, was injured after accidental exposure to a mercury-based fungicide.<sup>99</sup> He contended that if the warning label had "been prepared differently he would not have been injured in the same manner."<sup>100</sup> In rejecting *Ferebee*, the court followed *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627 (1st Cir. 1987), a preemption case involving cigarette labeling.<sup>101</sup> *Palmer* held that an adverse decision effectively forces a manufacturer to alter its warning label to conform to different state law requirements as set forth by the jury's verdict.<sup>102</sup> Such an outcome would be inconsistent with the goal of uniform labeling as

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Ciba Geigy Corp v. Alter*, 834 S.W.2d 136, 138 (Ark. 1992).

<sup>93</sup> *Id.* at 141.

<sup>94</sup> *Id.* at 143.

<sup>95</sup> *Id.* at 144.

<sup>96</sup> *Id.*

<sup>97</sup> *Fitzgerald v. Mallinckrodt, Inc.*, 681 F.Supp. 404, 407 (E.D. Mich. 1987).

<sup>98</sup> *Id.* at 408.

<sup>99</sup> *Id.* at 405.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 407; *Palmer v. Liggett Group Inc.*, 825 F.2d 620, 621 (1st Cir. 1987).

<sup>102</sup> *Palmer*, 825 F.2d at 627.

set forth by FIFRA.<sup>103</sup> Therefore, state tort actions were preempted equally along with state regulations.

In *Papas v. Upjohn Co.*, 926 F.2d 1019, 1020 (11th Cir. 1991), which was the first circuit court decision on label preemption since *Ferebee*, the plaintiff, a kennel worker at a humane society facility, became ill from exposure to pesticides used on animals to get rid of fleas.<sup>104</sup> The plaintiff brought claims for negligence, breach of warranty, and strict product liability for failure to warn.<sup>105</sup> The failure to warn claim was dismissed as being preempted by FIFRA.<sup>106</sup> The court held that FIFRA occupied the field of pesticide labeling, and that federal law is insurmountable even by state tort action.<sup>107</sup>

The Supreme Court's decision in *Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992), would have long lasting effects in the debate over preemption and would effectively shut the door on plaintiffs seeking a remedy for their injuries.<sup>108</sup> In *Cipollone*, the federal law in question was the Cigarette Labeling and Advertising Act of 1965 ("CLAA").<sup>109</sup> This statute prohibited state laws from regulating cigarette labels in any way.<sup>110</sup> The Court held that Congress had expressly preempted the realm of cigarette labeling by the enacting CLAA.<sup>111</sup> Not only was any state statutory law preempted, but state common law as well.<sup>112</sup> The Court reasoned that any tort damages were equivalent to state legislation imposing labeling requirements, and thereby state requirements can be imposed just as easily through an award for damages.<sup>113</sup> The logic behind this reasoning was premised on inducement, which would be the basis of a number of subsequent decisions.<sup>114</sup> For example, a jury decision that held a manufacturer liable for the injuries of the plaintiff would induce the manufacturer to alter its label to avoid further damage awards.<sup>115</sup> Therefore, even if the cause of action is not directed at the label, but the outcome of the jury decision would cause the manufacturer to change its label, then the

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<sup>103</sup> *Fitzgerald*, 681 F.Supp. at 407.

<sup>104</sup> *Papas v. Upjohn Co.*, 926 F.2d 1019, 1020 (11th Cir. 1991).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1024.

<sup>107</sup> *Id.* at 1025.

<sup>108</sup> *Cipollone v. Liggett Group Inc.*, 505 U.S. 504 (1992).

<sup>109</sup> *Id.* at 510.

<sup>110</sup> 15 U.S.C.A. §1334 (West 2009).

<sup>111</sup> *Cipollone*, 505 U.S. at 531-532.

<sup>112</sup> *Id.* at 521.

<sup>113</sup> *Id.*

<sup>114</sup> See generally *Cipollone*, 505 U.S. at 521.

<sup>115</sup> See generally *id.*

jury decision has accomplished what a similar state statute would have done.<sup>116</sup>

Among the appellate decisions in accord with the reasoning of *Cipollone* was *Arkansas-Platte Gulf Partnership v. Dow Chemical Co.*, 981 F.2d 1177 (10th Cir. 1993).<sup>117</sup> Initially the tenth circuit, prior to the rendition of the *Cipollone* decision, held that the plaintiff's claims were preempted by FIFRA.<sup>118</sup> The case was then remanded back to the appellate court to be decided in light of *Cipollone*.<sup>119</sup> The tenth circuit held that *Cipollone* did not affect its holding, and that FIFRA had the same preemptive effect as the cigarette labeling statute in *Cipollone*.<sup>120</sup> In *Papas v. Upjohn*, 985 F.2d 516 (11th Cir. 1993) ("*Papas v. Upjohn II*") the trial court was similarly asked to reconsider its earlier decision by the Eleventh Circuit Court of Appeals to conform to *Cipollone*.<sup>121</sup> The trial court held that though its analysis changed in light of *Cipollone*, the outcome did not.<sup>122</sup>

The idea that FIFRA was an express preemption of state law by Congress was a dominant theme after *Cipollone*. In fact, all nine appellate decisions that followed *Cipollone* ruled that FIFRA preempted state tort claims.<sup>123</sup> They reasoned that those claims would create requirements in addition or different to those imposed by FIFRA, as prohibited by section 136v(b) of that statute.<sup>124</sup>

## VI. THE BATES DECISION

It was not until 2005 that the Supreme Court directly addressed the issue of whether FIFRA preempts state tort actions.<sup>125</sup> In *Bates*, a group of peanut farmers brought a suit for damage caused to their crop by Strongarm, an herbicide manufactured by Dow.<sup>126</sup> Strongarm was conditionally registered by the EPA in March of 2000, in time for the upcoming growing season for the peanut farmers.<sup>127</sup> The farmers complained that

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<sup>116</sup> See generally *id.*

<sup>117</sup> *Arkansas-Platte Gulf P'ship v. Dow Chemical Co.* 981 F.2d 1177 (10th Cir. 1993).

<sup>118</sup> *Arkansas-Platte Gulf P'ship v. Dow Chemical Co.* 959 F.2d 158, 164 (10th Cir. 1992).

<sup>119</sup> *Arkansas-Platte Gulf P'ship*, 981 F.2d at 1178.

<sup>120</sup> *Id.* at 1178-1179.

<sup>121</sup> *Papas v. Upjohn*, 985 F.2d 516, 517 (11th Cir. 1993).

<sup>122</sup> *Id.* at 518.

<sup>123</sup> BROWN, *supra* note 6, at 84.

<sup>124</sup> *Id.*; 7 U.S.C.A. § 136v(b) (West 1996).

<sup>125</sup> See generally *Bates v. Dow Agrosciences*, 544 U.S. 431 (2005).

<sup>126</sup> *Id.* at 434.

<sup>127</sup> *Id.* at 434-435.

“Dow knew, or should have known,” that the herbicide would have an adverse affect in soil with a pH of 7.0 or greater.<sup>128</sup> After applying the Strongarm to their crops in western Texas, where the soil had a pH of 7.2 or above, as is typical for that region, the growth of their crops was severely stunted and weed growth was not controlled.<sup>129</sup> The label made the claim that “Strongarm is recommended in all areas where peanuts are grown.”<sup>130</sup> This representation was made in separate sales presentations as well.<sup>131</sup> The following year, Dow obtained Strongarm’s registration with a revised label containing a warning to not use Strongarm on soils with a pH of 7.2 or greater.<sup>132</sup>

The district court granted summary judgment in favor of Dow, ruling that the farmers’ claims were preempted by section 136(v)(b) of FIFRA.<sup>133</sup> The court of appeals affirmed.<sup>134</sup> That court held that the claims made during the sales presentations “by Dow’s agents did not differ” from those made on the label.<sup>135</sup> Since the off-label representations simply repeated what was already on the label, they were immune from any state regulation or tort action as well.<sup>136</sup> The court of appeals held that success by the plaintiffs based upon the sales presentations would “give Dow a ‘strong incentive’ to change its label”<sup>137</sup>

In examining the history of FIFRA, the Supreme Court paid special notice to two distinct areas of the statute: FIFRA’s misbranding provision and Congress’ intentions for the EPA.<sup>138</sup> Originally, FIFRA was simply a labeling statute; however, it was amended to provide greater regulatory authority to the EPA after increasing environmental and health concerns.<sup>139</sup> Among the current authority provided to the EPA is FIFRA’s misbranding provision.<sup>140</sup> A label is considered misbranded if it contains a statement that is “false or misleading in any particular” way, including statements related to claimed benefits.<sup>141</sup> Another element to determine if a label is misbranded is if it “does not contain adequate in-

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<sup>128</sup> *Id.* at 435.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 436.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 438.

<sup>139</sup> *Id.* at 437.

<sup>140</sup> *Id.* at 438.

<sup>141</sup> *Id.*; 7 U.S.C.A. § 136(q)(1)(a) (West 1996).

structions for use.”<sup>142</sup> Lastly, a label is misbranded if it “omits any necessary warning or cautionary statements.”<sup>143</sup> Therefore, FIFRA did provide specific elements of what constitutes an insufficient label. Another change in FIFRA that the Court paid attention to was an amendment made in 1978.<sup>144</sup> That amendment allowed the EPA to waive certain requirements as to a pesticide’s efficacy.<sup>145</sup> The reasoning was that the EPA should be focused on health and safety, and too many resources were being diverted to the efficacy of pesticides instead.<sup>146</sup> The Court found ample grounds to make a change in the established practice of FIFRA preemption rulings.<sup>147</sup> What the Court established was that not only did FIFRA contain language that clearly defined an inadequate label, but also that Congress intended for public health and safety to be a top concern for the EPA.<sup>148</sup>

The Court noted that after their prior ruling in *Cipollone*, lower courts had begun ruling that FIFRA preempted state tort actions, but that those courts had too quickly applied that decision in concluding that all failure to warn claims were preempted by FIFRA.<sup>149</sup> CLAA was different from FIFRA, in that CLAA prohibited any state regulations, where FIFRA prohibits only those regulations that are different or in addition to federal law.<sup>150</sup> Therefore, state labeling requirements that are equivalent and fully consistent with FIFRA are not preempted.<sup>151</sup>

The Supreme Court thereby introduced a new parallel requirements test, essentially reopening a door to plaintiffs that had been shut for a number of years. Now, there was at least a theory by which individuals could present their claims and possibly recover for their injuries. The Court held that nothing prevents states “from making the violation of a federal labeling or packaging requirement a state offense, thereby imposing its own sanctions on pesticide manufacturers who violate federal law.”<sup>152</sup> Furthermore, “imposition of state sanctions for violating state rules that merely duplicate federal requirements is equally consistent with” Title 7 of the United States Code, section 136(v).<sup>153</sup> It was further

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<sup>142</sup> *Bates*, 544 U.S. at 438.

<sup>143</sup> *Id.*; 7 U.S.C.A. § 136(q)(1)(f-g).

<sup>144</sup> *Bates*, 544 U.S. at 440.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 441-442.

<sup>148</sup> *Id.* at 440.

<sup>149</sup> *Id.* at 446.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 442.

<sup>153</sup> *Id.*

held that the language in the federal and state statute need not be identical; rather this interpretation was to be left for the trial courts to determine whether the respective duties are equivalent.<sup>154</sup>

The Supreme Court also disapproved the prior reasoning of the lower courts that had established the wide scope with which FIFRA preempted. "Requirements," as included in section 136(v)(b), was broadly interpreted.<sup>155</sup> Any outcome of a successful lawsuit against a pesticide manufacturer that may induce them to change their label was considered a requirement.<sup>156</sup> In contrast, the Court decided that "an occurrence that merely motivates an optional decision does not qualify as a requirement."<sup>157</sup> They held that courts, including the court of appeals in this case, were wrong in concluding that since a jury verdict might induce the manufacturer to make changes to its label that it should be viewed as a requirement.<sup>158</sup> In addition, only those common law or state laws for labeling or packaging could be preempted.<sup>159</sup> Therefore, other verdicts apart from a preempted failure to warn claim, such as for a design defect, regardless of whether or not they motivate the manufacturer to make label changes, would not be preempted.<sup>160</sup> This determination was in stark contrast to what courts had previously held. Besides failure to warn, a plaintiff's other causes of action such as negligent design, defective manufacturing or design, breach of warranty were all open to preemption, if a court decided that it was somehow tied to the pesticides labeling. Unfortunately for the plaintiff, this is an argument that could easily be made, and one that courts were ready to accept.

The Supreme Court's interpretation of Congressional intent supported their theory of preemption.<sup>161</sup> They held it was unlikely that FIFRA contained a provision that would preempt claims equivalent to FIFRA's misbranding provision.<sup>162</sup> If Congress intended to do so, they would have expressed such a prohibition more clearly.<sup>163</sup> Furthermore, it is unlikely that Congress would intend to give manufacturers complete immunity from injured parties, through the language in section 136v(b).<sup>164</sup>

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<sup>154</sup> *Id.* at 454.

<sup>155</sup> *Id.* at 443.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 445.

<sup>158</sup> *Id.* at 443.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 444.

<sup>161</sup> *Id.* at 449.

<sup>162</sup> *Id.* at 450.

<sup>163</sup> *Id.* at 449.

<sup>164</sup> *Id.* at 450.

The Court also weighed a number of policy considerations in making their decision.<sup>165</sup> They realized that there were interests on either end of the spectrum that needed to be addressed. One concern was that over-application of the parallel requirements test could place undue financial hardship on the manufacturer.<sup>166</sup> As mentioned before, pesticides do provide numerous benefits to the public as well as pose risks.<sup>167</sup> However, the risks to the public of complete preemption go beyond mere financial hardship.<sup>168</sup> Individuals deserving of compensation would be left without recourse. The most convincing of the Court's policy arguments is the impact of state tort actions would have on FIFRA itself.<sup>169</sup> On the surface it would seem that stripping FIFRA of the unchallenged authority, which it possessed for many years, would undermine the statute and the ability of the EPA to have the final word on pesticide labeling.<sup>170</sup> In other words, state tort claims would create a chaotic standard for labeling varying with each jury verdict. To the contrary, the Court held that state claims would further the aim of FIFRA because they actually shed light on adverse effects unknown to the EPA, and allow the agency to make revisions to what gets registered.<sup>171</sup>

Pulling back the reins on FIFRA preemption would not only restore a rightful means of remedy to deserving parties, as had been the case before *Cipollone*, but also further the evolution of policy making to accomplish the original purpose of FIFRA as set forth by Congress. The Court re-opened the door to tort actions that were not specifically aimed at the label. In an action for breach of warranty, for example, "the manufacturer should be required to make good on a claim that they made voluntarily," as this says nothing about the sufficiency of the manufacturer's label.<sup>172</sup> Similarly, design and manufacturing claims would not require manufacturers to change their label either.<sup>173</sup>

Applying this reasoning to the *Bates* case, the Court held that the petitioner's claims for design defect, negligence, manufacturing defects, and breach of express warranty are not requirements for labeling or packaging.<sup>174</sup> None of these would require Dow to change their label "in any

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Benefits of Pesticides, supra* note 2.

<sup>168</sup> *Bates*, 544 U.S. at 450.

<sup>169</sup> *Id.* at 451.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 444.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

particular way.”<sup>175</sup> The breach of warranty claim asked only that Dow “make good” on oral representations made by its agents.<sup>176</sup> “Because this common law rule does not require the manufacturer to make an express warranty,” or include anything in particular in that warranty, it does not impose a requirement for “labeling or packaging.”<sup>177</sup> Furthermore, the Court held that oral representations do not fall within the definition of “labeling” under FIFRA.<sup>178</sup> As mentioned before, the ruling of the lower court that a finding of liability would induce Dow to make changes to its label was rejected.<sup>179</sup> FIFRA only prohibits requirements, which are rules that must be followed, not merely events that may motivate “an optional decision.”<sup>180</sup> As to the petitioner’s failure to warn claim, the Court remanded that action back to the lower court to compare Texas’ labeling provisions with FIFRA’s misbranding provision, and determine if they were equivalent.<sup>181</sup> The Court noted that in determining equivalence, the jury should be instructed that “nominally equivalent labeling requirements are genuinely equivalent,” and “on the relevant FIFRA misbranding standards.”<sup>182</sup>

In summary, the *Bates* decision boils down to a two part test. The first part of the test is to determine whether the state claim would create a requirement.<sup>183</sup> Again, the Court disqualified the expansive interpretation of “requirement.”<sup>184</sup> Mere inducements, the Court decided, would not be considered requirements subject to preemption.<sup>185</sup> The second part of the test is whether the requirements are in addition to or different than those prescribed under FIFRA.<sup>186</sup> Here, the Court invalidated notions that any requirement by the state will satisfy this prong and that if the state requirements are parallel or equivalent then there will be no preemption.<sup>187</sup>

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 444-445.

<sup>178</sup> *Id.* at 445 n.17.

<sup>179</sup> *Id.* at 445.

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 453.

<sup>182</sup> *Id.* at 454.

<sup>183</sup> *See supra* text accompanying note 151.

<sup>184</sup> *See supra* text accompanying note 153.

<sup>185</sup> *See supra* text accompanying note 156.

<sup>186</sup> *See supra* text accompanying note 152.

<sup>187</sup> *See supra* text accompanying note 149.

VII. PREEMPTION AFTER *BATES*

Shortly after the *Bates* decision, the new outlook on preemption was challenged. A group of blueberry farmers from New Jersey brought suit against the manufacturer of an insecticide.<sup>188</sup> They claimed that when the insecticide was combined, or tank mixed, with particular fungicides, the resulting mix damaged their blueberry plants.<sup>189</sup> They brought claims for strict liability, negligence, fraud, breach of warranty, and breach of New Jersey Consumer Fraud Act.<sup>190</sup> In the first instance of this case, *Mortellite v. Novartis Crop Protection, Inc.*, 278 F.Supp.2d 390, 392 (D.N.J. 2003), the Court granted summary judgment in favor of the manufacturer, holding that all of the farmers' claims were preempted under FIFRA.<sup>191</sup> This decision was rendered before *Bates* had been decided. The Judge's resolution was in line with current precedent that even claims that were not themselves directed at the label would be preempted if they might induce the manufacturer to change their label.

On appeal, the Third Circuit Court of Appeals largely vacated the lower court's holding.<sup>192</sup> The case came before the appellate court after the *Bates* decision had been rendered.<sup>193</sup> The Court sought to address the preemption questions in a manner that was in harmony with the Supreme Court decision and wanted the district court to do so as well on remand.<sup>194</sup> Specifically, the court ruled, as in *Bates*, strict liability, negligent testing, and breach of express warranty claims are not preempted by FIFRA.<sup>195</sup> Furthermore, claims based on oral representations were not preempted, while claims based on written representations would only be preempted to the extent that they would be considered "labels" under FIFRA.<sup>196</sup>

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<sup>188</sup> *Mortellite v. Novartis Crop Prot., Inc.*, 278 F.Supp.2d 390, 392 (D.N.J. 2003).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 393.

<sup>191</sup> *Id.* at 402.

<sup>192</sup> *Mortellite v. Novartis Crop Prot. Inc.*, 460 F.3d 483, 494 (3d Cir. 2006).

<sup>193</sup> *Id.* at 486.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 491.

On remand, the district court, now having the *Bates* decision as a guidepost, set to address the farmers' complaints once again.<sup>197</sup> The court noted that in their 2003 decision, prior to *Bates*, that the plaintiffs' claims were preempted under the inducement test.<sup>198</sup> However, since this test was invalidated, the court applied the new two-part test from the *Bates* decision.<sup>199</sup> That test provided that in order "to determine that a state statutory or common law claim is preempted by FIFRA ... the statute or common law rule must create a requirement for labeling or packaging and ... the labeling or packaging requirement must be in addition to or different from those required under FIFRA."<sup>200</sup>

As the appellate court instructed, claims based upon written materials would only be preempted if they were considered labeling under FIFRA.<sup>201</sup> In this case, the plaintiffs alleged misrepresentations made on a brochure were separate from the actual pesticide label.<sup>202</sup> Under FIFRA, labeling also includes any material that "accompanied" the pesticide.<sup>203</sup> Plaintiffs argued that since the brochure was spatially separate from the pesticide label, it should not be considered as accompanying.<sup>204</sup> The court held that "because the representations in the brochure are consistent with the label, that the product was safe for use on blueberries, preemption still results."<sup>205</sup>

This seems inconsistent with *Bates*. Much like Dow's agents that made representations to the peanut farmers that were also on the label, the brochures here made representations that were also on the label.<sup>206</sup> However, unlike the instant case, *Bates* held that since the agents' representations were not a part of the federally regulated label, the manufacturer should be held account-

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<sup>197</sup> See generally *Indian Brand Farms, Inc. v. Novartis Crop Prot. Inc.*, No. 99-2118, 2007 WL 4571087 (D. N.J. Dec. 20, 2007).

<sup>198</sup> *Id.* at \*1.

<sup>199</sup> *Id.*

<sup>200</sup> See *supra* text accompanying note 148.

<sup>201</sup> *Mortellite*, 460 F.3d at 491.

<sup>202</sup> *Indian Brand Farms, Inc.*, 2007 WL 4571087 at \*5.

<sup>203</sup> 7 U.S.C. § 136(p)(2) (1996).

<sup>204</sup> *Indian Brand Farms, Inc.*, 2007 WL 4571087 at \*5.

<sup>205</sup> *Id.* at \*7.

<sup>206</sup> *Bates*, 544 U.S. 441 at 445; *Indian Brand Farms, Inc.*, 2007 WL 4571087 at \*7.

able for those statements which they made voluntarily.<sup>207</sup> Here, the brochure contained assurances that the insecticide, Diazinon, was safe for use on blueberry plants.<sup>208</sup> Equally, the Dow agents made statements that Strongarm was safe for all places where peanuts are grown.<sup>209</sup> Both statements were found to be printed on the actual label as well.<sup>210</sup> The district court once again chose to expand FIFRA preemption well beyond its intended purpose. Although manufacturers should not be required to make changes to the actual label, or that which is a clear extension of the label accompanying the product and is directed at the specific end user, manufacturers should be held liable for statements they make apart from the label that have the purpose of marketing their product to potential customers.

As to the claims based upon oral representations, summary judgment on those claims was granted in favor of the defendants since the evidence was not clear as to what exactly was orally communicated to farmers by agents of Novartis.<sup>211</sup> Regarding the plaintiffs' failure to warn claim, the court held that it would be considered a requirement.<sup>212</sup> As held in *Bates*, both state statute and common law can establish requirements.<sup>213</sup> Accordingly, the other element of the *Bates* two prong test is whether the State law was in addition or different to requirements in FIFRA.<sup>214</sup> The plaintiffs contended that the requirements under the New Jersey Product Liability Act ("NJPLA") are parallel to those enforced under FIFRA.<sup>215</sup> The district court disagreed, but did not state why.<sup>216</sup>

The second prong of the *Bates* test deserved more of an analysis by the district court. The court's decision comports more with the attitude, which prevailed prior to *Bates* and was consistent with *Cipollone*, that a failure to warn claims would inherently cre-

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<sup>207</sup> See *supra* text accompanying note 170.

<sup>208</sup> *Mortellite v. Novartis Crop Prot., Inc.*, 278 F.Supp.2d 390, 401 (D.N.J. 2003).

<sup>209</sup> *Bates*, 544 U.S. at 435.

<sup>210</sup> *Id.*

<sup>211</sup> *Indian Brand Farms, Inc.*, 2007 WL 4571087 at \*7.

<sup>212</sup> *Id.* at \*8.

<sup>213</sup> *Bates*, 544 U.S. at 432.

<sup>214</sup> See *supra* text accompanying note 148.

<sup>215</sup> *Indian Brand Farms, Inc.*, 2007 WL 4571087 at \*9.

<sup>216</sup> *Id.*

ate requirements in addition to or different from those in FIFRA. The *Bates* court carefully described FIFRA's misbranding provision, with which the state law should have been compared to more closely.<sup>217</sup> NJPLA places a duty to warn if a product is not reasonably fit for its intended or foreseeable purpose, so that products are not put into the stream of commerce unless they are reasonably safe for use.<sup>218</sup> Novartis, under the state law, had a duty to warn if Diazinon was not fit for mixing with fungicides, a foreseeable and longstanding practice.<sup>219</sup> This requirement parallels the FIFRA misbranding provision in two ways. Under FIFRA "a label is misbranded if it omits any necessary warning or cautionary statements."<sup>220</sup> The adverse affect on blueberry plants that would manifest as a result of "tank mixing," a foreseeable use, constitutes a necessity for a warning to the farmer. Additionally, a label is misbranded under FIFRA if it contains false statements related to claimed benefits.<sup>221</sup> This is equivalent to a product that is not reasonably fit for its intended use. By asserting that Diazinon was safe for blueberry plants, it would be assumed that application on blueberry plants is the intended use. Here, Diazinon was not fit for its intended use if it was intended to be used in a tank-mixed application. The issue of equivalence of the NJPLA with FIFRA's misbranding provision was one that should have at least survived the motion for summary judgment.<sup>222</sup> An issue remains as to the material fact of equivalence, and whether a jury could return a verdict for the plaintiffs. Moreover, as mentioned in *Bates*, nothing in FIFRA precludes the states from providing remedies for violation of a federal law.<sup>223</sup>

The case went once again in front the Third Circuit Court of Appeals.<sup>224</sup> The court rejected the lower court's claim that the

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<sup>217</sup> See *supra* text accompanying notes 138-141.

<sup>218</sup> NJPLA, N.J. STAT. ANN. § 2A:58C-2 (West 2010).

<sup>219</sup> *Id.*

<sup>220</sup> See *supra* text accompanying note 141.

<sup>221</sup> 7 U.S.C. § 136(q)(1)(a) (1996).

<sup>222</sup> FED. R. CIV. P. 56 (West 2010) (The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law).

<sup>223</sup> *Bates v. Dow Agrisciences*, 544 U.S. 431, 432 (2005).

<sup>224</sup> *Indian Brand Farms, Inc. v. Novartis Crop Prot. Inc.*, No. 08-4484, 2010 WL 3122815 (3d Cir. Aug. 10, 2010).

written representation, in the form of a product brochure, constituted a label.<sup>225</sup> The lower court reasoning was based on the fact that information on the label was repeated in the brochure.<sup>226</sup> This court, as did the lower court, addressed whether the brochure accompanied the actual product label.<sup>227</sup> The circuit court cited a history of case law establishing that “accompanying” should be understood to mean the content rather than proximity of the material.<sup>228</sup> The lower court also used the same interpretation of “accompanying,” provided in those same cases, as the basis of an argument holding the brochure to be considered a label.<sup>229</sup> However, as the circuit court pointed out, those “same decisions also speak persuasively to the necessity of constraining the scope of ‘accompanying’ if Congress’s intent is to be served.”<sup>230</sup> FIFRA was intended to establish uniformity of labeling not to “regulate sales literature generally and the legal obligations that can arise therefrom.”<sup>231</sup> The court found that the function of the brochure was to promote a new product, and that it did not contain directions for use that would be required and customary for a label.<sup>232</sup>

With regard to the failure to warn claims, the court reexamined the second prong of the *Bates* test.<sup>233</sup> Where the trial court simply dismissed the idea that the language in FIFRA and the New Jersey Products Liability Act were equivalent,<sup>234</sup> the court here held that the New Jersey law “does not appear to us to impose a duty inconsistent with or in addition to the duty imposed by the text of the warning provisions of FIFRA’s misbranding requirements.”<sup>235</sup> As such, the district court’s decision preempting the failure to warn claim was reversed.<sup>236</sup>

The case has now been remanded back to the district court a second time so that the plaintiffs’ claims based on the written representations of

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<sup>225</sup> *Id.* at \*1.

<sup>226</sup> *Indian Brand Farms, Inc. v. Novartis Crop Prot. Inc.*, No. 99-2118, 2007 WL 4571087, at \*7 (D. N.J. Dec. 20, 2007).

<sup>227</sup> *Indian Brand Farms, Inc.*, 2010 WL 3122815 at \*6.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at \*8.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at \*12.

<sup>234</sup> See *supra* text accompanying notes 213-214.

<sup>235</sup> *Indian Brand Farms, Inc.*, 2010 WL 3122815 at \*12.

<sup>236</sup> *Id.* at \*17.

Novaritis made in their marketing brochure, as well as their claim for a failure to warn, may move forward and survive preemption.<sup>237</sup>

#### VIII. CONCLUSION

*Bates* has corrected a long standing fallacy of preemption as it relates to FIFRA. For over a decade before *Bates*, pesticide manufacturers were able to escape liability by hiding behind their label.<sup>238</sup> Although the over-expansive nature of this defense was finally limited by the Supreme Court, *Indian Farms* is an indication of what actual reform can be expected from the change in interpretation provided by *Bates*. The long standing tradition of pesticide manufacturers to avoid liability may not be corrected as quickly as the *Bates* decision would suggest.

Overall, *Bates* has brought back balance to the regulation of an important agricultural tool.<sup>239</sup> By swinging the pendulum away from the monopoly of success pesticide manufacturers have enjoyed, these manufacturers will once again be required to operate with the knowledge that they may be held liable for damages caused by their products. As a result, society benefits from more responsible pesticide manufacturers and the ability to be compensated for damages resulting from when those pesticides cause adverse effects, especially those previously unknown.

SAM BRAR

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<sup>237</sup> *Id.*

<sup>238</sup> See *supra* text accompanying note 11.

<sup>239</sup> See *supra* text accompanying note 2.