PRODUCT SAFETY—FOOD AND DRUG LAWS: HOW *BATES* CHANGED THE FACE OF PREEMPTION

Bates v. Dow Agrosciences, L.L.C., 544 U.S. 431 (2005)

I. FACTS

In 2000, Dow Agrosciences (Dow) manufactured and marketed a new pesticide called Strongarm.[1] The Environmental Protection Agency (EPA) conditionally granted Dow permission to sell this pesticide on March 8, 2000, right before the Texas peanut growing season.[2] According to the label on the pesticide and the statements made by Dow's agents, Strongarm was "recommended in all areas where peanuts are grown."[3]

For the 2000 growing season, peanut farmers in west and northwest Texas used Strongarm.[4] Many of the farmers that used Strongarm claimed that it "stunted the growth of peanut plants," caused a reduced production of peanuts, and increased the cost of harvesting the peanuts.[5] The farmers reported the problems they were having to Dow.[6] In response to the farmers' complaints, Dow sent its own experts to inspect the crops.[7] The farmers alleged that Strongarm was damaging their crops because the pesticide was not suited for soil with a pH of 7.2 or higher.[8] The farmers sent demand letters to Dow stating that Strongarm had been misrepresented to them and expressing their intention to sue in state court for a variety of claims.[9]

Dow sued asking for declaratory judgment that "FIFRA preempts the farmers' state law claims," that the "Strongarm label limited the farmers' remedies to the purchase price of the product," and the disclaimer barred all

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1. Bates v. Dow Agrosciences, L.L.C., 544 U.S. 431, 434 (2005). A pesticide is a weed killer. *Id.* Strongarm is actually an herbicide, but is classified as a pesticide under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). 7 U.S.C. § 136(u) (2000).

2. *Bates*, 544 U.S. at 434-35. The peanut crop is generally planted around May 1. *Id.* at 435. Peanut plants need to be planted after the last frost of the spring and are harvested after the first fall frost. The Gardener's Network, http://www.gardenersnet.com/vegetable/pnut.htm (last visited Jan. 8, 2006).

3. *Bates*, 544 U.S. at 435.

4. Dow Agrosciences, L.L.C. v. Bates, 332 F.3d 323, 325 (5th Cir. 2003).

5. *Id.*

6. *Bates*, 544 U.S. at 435.

7. *Id.*

8. *Id.* "The term 'pH' . . . refers to the acidity of the soil." *Id.* Dow reregistered the label for Strongarm for the 2001 growing season. *Id.* When Dow reregistered the label, the EPA approved a separate label for use in the states of New Mexico, Oklahoma, and Texas that read "Do not apply Strongarm to soils with a pH of 7.2 or greater." *Id.*

9. *Id.*

other claims.[10] The farmers counterclaimed with a number of different charges.[11] The district court granted summary judgment in favor of Dow on the farmers' breach of implied and express warranty claims.[12] The district court also granted summary judgment in favor of Dow and based that decision on the preemption clause in the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).[13] The farmers appealed the court's decision, and the Fifth Circuit affirmed.[14]

The Fifth Circuit held that each of the farmer's state claims were preempted under § 136v(b) of FIFRA.[15] Specifically, the court held that the state's labeling requirements that related to the product's effectiveness were within FIFRA's express preemption clause.[16] The Fifth Circuit also held that the farmers' claims were related to the Strongarm label, so those claims were preempted by FIFRA.[17] The court further held that the farmers' claims, based on breach of warranty, fraud, and the Texas Deceptive Trade Practices Act (DTPA) that regulated statements made by the Dow retailers, were based on information contained on the label; therefore, the statements were within the scope of FIFRA.[18] Finally, the Fifth Circuit held that the farmers' defective design and negligence claims were disguised failure to warn claims and that the failure to warn claims are preempted by FIFRA.[19] The Fifth Circuit's decision was in accordance with the majority of the federal circuits, but conflicted with other court decisions and with the view of the EPA.[20] For these reasons, the Supreme Court granted certiorari to resolve the conflict.[21]

The Supreme Court held that even though FIFRA may not provide a federal remedy to those injured as a result of a violation of FIFRA's

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10. *Dow Agrosciences*, 332 F.3d at 325. Dow argued that the farmers' claims were preempted by FIFRA, that the farmers' remedies were limited to the purchase price of Strongarm, and the label on Strongarm barred claims based on a warranty of representation. *Id.*

11. *Id.* at 325-26. The farmers brought claims alleging strict liability, negligence, fraud, breach of warranty, and violation of the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA). *Bates*, 544 U.S. at 435-36.

12. Dow Agrosciences, L.L.C. v. Bates, 205 F. Supp. 2d 623, 627 (N.D. Tex. 2002).

13. *Id.* at 628.

14. *Dow Agrosciences*, 332 F.3d at 325.

15. *Id.* at 329. Section 136v(b) provides that a "[s]tate shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." 7 U S.C. § 136v(b) (2000).

16. *Dow Agrosciences*, 332 F.3d at 331.

17. *Id.*

18. *Id.* at 331-32. The DTPA requires potential plaintiffs to give notice of their intention to bring suit to the company that will be the defendant. Bates v. Dow Agrosciences, L.L.C., 544 U.S. 431, 435 (2005).

19. *Dow Agrosciences*, 332 F.3d at 332-33.

20. *Bates*, 544 U.S. at 436-37.

21. *Id.* at 437.

labeling requirements, the states are not precluded from providing a remedy.[22] The Court held that two conditions must be met before a state law is preempted by FIFRA.[23] The first condition is that the state law "must be a requirement 'for labeling or packaging.'"[24] The second condition is that the state law "must impose a labeling or packaging requirement that is 'in addition to or different from those required under this subchapter.'"[25]

II. LEGAL BACKGROUND

The government started regulating the sale and use of pesticides with enactment of the Insecticide Act of 1910, which dealt with labeling and shipping of pesticides.[26] In 1947, FIFRA was enacted as a licensing and labeling statute.[27] Congress amended FIFRA in 1972 and gave authority to the EPA to regulate pesticide use, sales, and labeling.[28] A circuit split has since developed over the enforcement of FIFRA.[29]

A. INSECTICIDE ACT OF 1910

The first effort toward regulation of poisonous substances was the Insecticide Act of 1910 (the Act).[30] The Act stated, "[I]t shall be unlawful for any person to manufacture . . . any insecticide . . . or fungicide which is adulterated or misbranded . . . ."[31] Additionally, the Act addressed the labeling[32] and shipping of the poisonous substances in interstate commerce.[33] Most of the cases that arose under the Act involved the labeling and shipping of the substances.[34]

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22. *Id*. at 448.

23. *Id*. at 444.

24. *Id*. The requirement for "labeling or packaging" is in reference to the language of 7 U.S.C. § 136v(b) (2000). *Id*.

25. *Bates*, 544 U.S. at 444. The "in addition to or different from" language comes from 7 U.S.C. § 136v(b). *Id*.

26. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 990 (1984).

27. *Id*. at 990-91.

28. Taylor AG Indus. v. Pure-Gro, 54 F.3d 555, 559 (9th Cir. 1995).

29. *Bates*, 544 U.S. at 436-37.

30. *See Ruckelshaus*, 467 U.S. at 990 (discussing the progression of the regulation of pesticides and stating that the Insecticide Act of 1910 was the first of such legislation).

31. Insecticide Act of 1910, ch. 191, 36 Stat. 331, 331 (codified as 7 U.S.C. §§ 135-135k (2000)).

32. *Id*. at 333. Misbranding on the label is referenced in section 8. *Id*.

33. *Id*. at 331. Shipment is referenced in section 2. *Id*.

34. *See, e.g.*, West Disinfecting Co. v. Plummer, 44 App. D.C. 345, 354-55 (1916) (finding that the product was misrepresented to the plaintiff as harmless, and the container had no label on it warning that the product was dangerous); United States v. Powers-Weightman-Rosengarten Co., 211 F. 169, 170-71 (S.D.N.Y. 1913) (holding that shipments made within the state which do not

Tort litigation against the manufacturers of dangerous substances outside of the Act commenced.[35] Most of the tort litigation centered on negligence claims against the sellers of the poisonous substances[36] and the fact that the substances were not labeled.[37] The general rule at this time was that "the manufacturer or compounder of articles for the market containing deadly ingredients or qualities owes a duty to those" who may come into contact with the product to "convey notice of the danger."[38]

In *Mossrud v. Lee*,[39] a farmer purchased "Quack Grass Destroyer" (Destroyer) from a farm supply dealer.[40] The manufacturer furnished labels to the dealer to place on the jugs of Destroyer when they were sold, but instead the dealer placed his own smaller labels on the jugs.[41] The dealer also failed to tell the farmer about the dangers to livestock from use of Destroyer.[42] The farmer and his sons applied Destroyer to a field, and a few days after the application they let the cattle into the field to graze.[43] Eight cattle died from ingesting Destroyer that had been applied to the field.[44] The *Mossrud* court held that selling a poisonous substance without making the person buying the substance aware of its dangerous propensities is "expressly prohibited . . .[,] and [a] violation of the prohibition" is punished as a misdemeanor.[45]

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pass the state's borders are not regulated by the Insecticide Act of 1910, because the shipment needs to exit the state borders according to the language of the statute).

35. *Ruckelshaus*, 467 U.S. at 990.

36. *West Disinfecting Co.*, 44 App. D.C. at 355.

37. McCrossin v. Noyes Bros. & Cutler, Inc., 173 N.W. 566, 567 (Minn. 1919); *see also* White v. Nat'l Bank of Commerce, 278 P. 915, 917 (Cal. Dist. Ct. App. 1929) (holding that statements made to plaintiff "were not mere opinions" but were misrepresentations that were actionable as misrepresentations when plaintiff relied on those statements and used a pesticide on citrus trees which then harmed the trees).

38. *McCrossin*, 173 N.W. at 567. The court went on to state that this notice was "generally done by naming or properly labeling the package in which the articles [were] marketed." *Id.*

39. 157 N.W. 758 (Wis. 1916).

40. *Mossrud*, 157 N.W. at 758.

41. *Id.* The labels which were provided stated in large letters "'Quack Grass Destroyer,' 'Poison,' with a picture of a human skull and cross-bones, . . . directions for appl[ication], . . . and a warning to keep it away from stock." *Id.* The smaller labels stated "'Poison,' with a picture of a human skull and cross-bones, and written under it were the words 'Quack Grass Destroyer.'" *Id.*

42. *Id.* The farmer later sent his sons on two separate occasions to the farm supply store to buy more Destroyer. *Id.* The jugs containing Destroyer were not labeled, and the seller did not mention the dangerous propensities to either son. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 759.

B. ENACTMENT OF THE FEDERAL INSECTICIDE, FUNIGICIDE, AND RODENTICIDE ACT

Congress's next effort at regulation of dangerous substances was the enactment of FIFRA.[46] Like the Insecticide Act of 1910, FIFRA was "primarily a licensing and labeling statute" when it was enacted in 1947.[47] Under FIFRA, all pesticides sold in interstate or foreign commerce had to be registered.[48] FIFRA "only prohibited interstate commerce in unregistered pesticides"; it did not regulate intrastate commerce.[49] To register the dangerous substance, "[m]anufacturer[s] only had to show that common use of the product would not be 'injurious to man, vertebrate animals, or desirable vegetation.'"[50]

In *Chemical Specialties Manufacturers Ass'n v. Lowery*,[51] a nonprofit organization made up of suppliers, packagers, and marketers of pressurized products (the Association) brought suit in federal district court against the Commissioner of the Fire Department of the City of New York.[52] The Association requested declaratory and injunctive relief to prohibit the city from regulating pressurized products that were already regulated by the Federal Hazardous Substances Act (FHSA) and FIFRA.[53] The Commissioner published a proposed set of regulations, primarily involving classification and labeling, to deal with products in pressurized containers, or aerosols.[54]

The Association argued that the labeling requirements were in conflict with FIFRA and that the regulations would require labels on the products that were in conflict with the requirements of FIFRA.[55] The Second Circuit stated that "FIFRA contains no explicit expression of congressional intent to preempt local regulation of products within the Act, the City Regulations must fall only if they are in irreconcilable conflict with the labeling

46. Ruckelshaus v. Monsanto Co., 467 U.S. 986, 990-91 (1984).

47. *Id*. at 991.

48. *Id*. The Secretary of Agriculture registered a pesticide when it met the standards of the 1947 Act. *Id*. The standards which had to be met dealt with proper labeling, warnings, and claims of efficacy. *Id*.

49. *See* James M. Graves, Ciba-Geigy Corporation v. Alter: *Federal Preemption, FIFRA, and Compensatory Damages in Arkansas*, 48 ARK. L. REV. 577, 584 (1995) (discussing the historical development of preemption).

50. *Id*. (citing S. REP. NO. 838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993).

51. 452 F.2d 431 (2d Cir. 1971).

52. *Chem. Specialties*, 452 F.2d at 433.

53. *Id*.

54. *Id*. Some of the labeling requirements provided that the aerosols might need to be labeled "extremely flammable, flammable, or combustible." *Id*.

55. *Id*.

requirements of the FIFRA."[56] In this case, the court stated that there may have been an irreconcilable conflict between the labeling requirements of the city and those of FIFRA, but there had not been enough facts presented to make that determination.[57]

The court quoted the Supreme Court: "[T]he constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter."[58] The court then hypothesized that since federal laws were beginning to take over areas that were traditionally regulated by states, "the Supreme Court may move toward a somewhat broader position on preemption than it held a decade ago."[59] Eleven months after this decision, Congress amended FIFRA.[60]

C. 1972 AND 1978 AMENDMENTS TO FIFRA

On October 21, 1972, Congress amended FIFRA.[61] FIFRA now "regulates pesticide use, sales, and labeling, and grants enforcement authority to the EPA."[62] As amended, FIFRA also imposes environmental safety as a new criterion for registration, which it had never done before.[63]

The amended FIFRA provides a regulatory scheme to control the content and format for labeling pesticides.[64] Under FIFRA, a manufacturer which sells a pesticide has to register that pesticide with the EPA.[65] The manufacturer must submit a statement to the EPA containing the certain criteria to be considered in the labeling process.[66] After meeting the labeling criteria, the product will be labeled if the product "perform[s] its intended function without unreasonable adverse effects on the

56. *Id*. at 439.

57. *Id*. at 440.

58. *Id*. at 439-40 (quoting Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Employees of Am. v. Lockridge, 403 U.S. 274, 285-86 (1971)).

59. *Id*. at 440.

60. 7 U.S.C. §§ 136-136(y) (2000).

61. 7 U.S.C. §§ 136-136(y). FIFRA was changed "from a labeling law into a comprehensive regulatory statute." Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984).

62. Taylor AG Indus. v. Pure-Gro, 54 F.3d 555, 559 (9th Cir. 1995).

63. *Ruckelshaus*, 467 U.S. at 992.

64. Am. Cyanamid Co. v. Geye, 79 S.W.3d 21, 24 (Tex. 2002).

65. 7 U.S.C. § 136a(a).

66. *Id*. § 136a(c). The first criterion needed in the statement is "a complete copy of the labeling of the pesticide, a statement of all claims to be made for it and any directions for its use." *Id*. § 136a(c)(1)(C). The second criterion is that a complete formula of the pesticide must be furnished. *Id*. § 136a(c)(1)(D). The third criterion is that the manufacturer provide "a full description of the tests made and the results thereof upon which the claims are based." *Id*. § 136a(c)(1)(F).

environment."[67] If the pesticide is not labeled in accordance with FIFRA, it will be deemed "misbranded" and could lose its registration with FIFRA.[68] Because it is unlawful under [FIFRA] to sell a pesticide that is registered but nevertheless misbranded, manufacturers have a continuing obligation to adhere to FIFRA's labeling requirements.[69]

In 1978, Congress once again amended FIFRA and allowed the EPA to waive the requirement of considering the efficacy of label claims.[70] The EPA used the new waiver almost immediately.[71] The EPA is now able to register a pesticide without determining that the pesticide's composition warrants the proposed claims of efficacy, including damage to crops and property.[72] EPA officials noted that this waiver would most likely be used for "agricultural pesticides, due to the high level of knowledge concerning pesticidal efficacy that prevails in the agricultural community" and the expertise of the Department of Agriculture.[73]

D. PREEMPTION AND THE CIRCUIT SPLIT

Since the United States Supreme Court's decision in *McCulloch v. Maryland*,[74] it has been well settled that "state law that conflicts with federal law is 'without effect.'"[75] There are three ways that preemption can occur: (1) express preemption by a federal law; (2) implied preemption when the Court infers congressional intent to preempt; and (3) where there is actual conflict between a federal and a state law, the federal law preempts the state law.[76] FIFRA contains two clauses that have been the subject of

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67. *Id*. § 136a(c)(5)(C).

68. *Id*. § 136(q)(1)(A)-(H). A pesticide is deemed misbranded if: (1) it has any statements or designs that are misleading; (2) the packaging does not conform to standards set out in FIFRA; (3) it is an imitation of or sold under the name of another pesticide; (4) the label is missing the registration number that it was given; (5) words required by the Act to be conspicuous are not conspicuous; (6) the directions for use are not on the label; (7) there is no warning; or (8) if for export, it does not say "Not for use in the U.S." *Id*.

69. 7 U.S.C. §§ 136j(a)(1)(E), 136a(f)(1)-(2).

70. Etcheverry v. Tri-Ag Serv., Inc., 993 P.2d 366, 375 (Cal. 2000). Congress reasoned that by waiving the consideration of efficacy, the EPA would be able to focus on the health and safety aspects of pesticides. *Id*.

71. Daniel M. Barolo, Director, Office of Pesticide Programs of the EPA, Pesticide Regulation (PR) Notice 96-4 (June 3, 1996), *available at* http://www.epa.gov/opppmsdl1/PR_Notices/pr96-4.html.

72. *Id*.

73. *Id*.

74. 17 U.S. 316 (1819).

75. Dow Chem. Co. v. Ebling, 753 N.E.2d 633, 637 (Ind. 2001) (citing Maryland v. Louisiana, 451 U.S. 725, 746 (1981)).

76. *See* Celeste M. Steen, *FIFRA's Preemption of Common Law Tort Actions Involving Genetically Engineered Pesticides*, 38 ARIZ. L. REV. 763, 769-70 (1996) (discussing FIFRA and preemption).

preemption litigation.[77] The first clause provides that states are authorized through FIFRA to "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."[78] The second clause, the express preemption clause, provides 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 [Act]."[79]

Even though preemption has been employed by past courts, "federal preemption of state common law tort claims is a recent development."[80] When the courts started deciding whether a federal law with a preemption clause preempted state law in conflict with the federal law, the circuits began to disagree.[81] The majority of circuit courts held that failure to warn claims were preempted to the extent that they required a change to the label on the product.[82] The remaining minority of courts, including several high state courts and the EPA, did not agree with these holdings.[83]

1. *The Pivotal Decisions that Chipped Away at the Preemption Doctrine*

One of the first cases deciding the preemption issue was *Ferebee v. Chevron Chemical Co*.[84] In that case, Richard Ferebee was an agricultural worker for the United States Department of Agriculture (USDA).[85] Ferebee contracted pulmonary fibrosis from long-term exposure to paraquat, an herbicide distributed solely by Chevron.[86] Ferebee claimed that there was not sufficient warning on the label and that the paraquat was the proximate cause of his pulmonary fibrosis.[87] The jury found in favor of Ferebee and awarded damages.[88] The D.C. Circuit, on appeal, affirmed the trial courts

77. *See, e.g.*, Kuiper v. Am. Cyanamid Co., 131 F.3d 656, 661-62 (7th Cir. 1997) (discussing the preemption clauses of FIFRA).

78. 7 U.S.C. § 136v(a) (2000).

79. *Id*. § 136v(b).

80. Steen, *supra* note 76, at 770.

81. MacDonald v. Monsanto Co., 813 F. Supp. 1258, 1259 (E.D. Tex. 1993).

82. *See* Kuiper, 131 F.3d at 662 (listing the circuits holding that failure to warn claims were preempted: First, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits).

83. *See, e.g.*, Etcheverry v. Tri-Ag Serv., Inc., 993 P.2d 366, 367 (Cal. 2000) (stating that a majority of courts, including many federal circuit courts, have concluded that state failure to warn claims are preempted by FIFRA).

84. 736 F.2d 1529 (D.C. Cir. 1984).

85. *Ferebee*, 736 F.2d at 1531.

86. *Id*. at 1531-32.

87. *Id*. at 1533.

88. *Id*. at 1532.

decision.[89] The court stated, "The fact that EPA has determined that Chevron's label is adequate for purposes of FIFRA does not compel a jury to find that the label is also adequate for purposes of state tort law as well."[90] In enacting FIFRA, the goal was to ensure that labeled products do not "produce 'unreasonable adverse effects on the environment.'"[91] States may have broader compensatory goals that make a label approved by the EPA inadequate under state standards.[92]

The *Ferebee* court stated that "the company can be held liable for failure to warn only if the company could actually have altered its warning."[93] The court noted that states are not allowed to impose more labeling requirements, but are allowed to impose harsher use constraints than the EPA.[94] The court also found that explicit preemption exists when compliance with a state law and federal law at the same time would be impossible.[95]

The *Ferebee* court held that Congress has not preempted state damage actions; rather, Congress has simply prohibited states from changing EPA-approved labels.[96] The court also stated that generally damage actions have been the province of the states.[97] As a result, the court held that there is no preemption based on the inadequacy of the EPA-approved label.[98] Next, the *Ferebee* court explained that compliance with state and federal law was not impossible because Chevron could continue to use the label that was EPA-approved and pay damages to those harmed.[99] The alternative to this was for Chevron to petition the EPA to make a more comprehensive label.[100] Finally, the state damage actions did not interfere with FIFRA's purposes.[101] The D.C. Circuit noted that traditionally federal legislation of this type has been considered the lowest level of regulation that is permitted, and that the states have the option to raise that level as they see fit.[102] Next, the Supreme Court dealt with the Public Health Cigarette Smoking Act of 1969, which had a preemption clause that was similar to

89. *Id*. at 1543.
90. *Id*. at 1540.
91. *Id*. (internal quotations omitted)
92. *Id*.
93. *Id*. at 1541.
94. *Id*.
95. *Id*. at 1542.
96. *Id*.
97. *Id*.
98. *Id*.
99. *Id*.
100. *Id*.
101. *Id*.
102. *Id*. at 1543.

FIFRA's, and the Court came to a decision that was similar to that in *Ferebee*.[103]

In *Cipollone v. Liggett Group, Inc.*,[104] the Court addressed the issue of the preemptive effect on federal statutes, and in particular the Federal Cigarette Labeling and Advertising Act of 1965 and the Public Health Cigarette Smoking Act of 1969.[105] The majority opinion held that "when [a] provision provides a 'reliable indicium of congressional intent with respect to state authority there is no need to infer congressional intent to pre-empt [sic] state laws from the substantive provisions' of the legislation."[106] The majority said that provisions need to be construed "in light of the presumption against the pre-emption [sic] of state police power regulations."[107]

In *Cipollone*, there was also a plurality opinion that dealt with some of the petitioner's claims based on state law.[108] The plurality stated that the phrase "no requirement or prohibition" within the preemption section of the Act swept broadly and showed no distinction between the common law and positive enactments.[109] The plurality argued that the broad reading of the word "requirement" included common law damage actions.[110] The next important case in the area of preemption was *Medtronic, Inc. v. Lohr*.[111]

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103. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 530-31 (1992) (holding that claims based on federally mandated warnings do not preempt claims based on warranty, fraud, and misrepresentation).

104. 505 U.S. 504 (1992). The plaintiff in *Cipollone* developed cancer after smoking cigarettes for a long period of time. *Cipollone*, 505 U.S. at 509. Plaintiff's claims were broken down into five categories: (1) design defect claims, (2) failure to warn claims, (3) express warranty claims, (4) fraudulent misrepresentation claims, and (5) conspiracy to defraud claims. *Id*. at 509-10.

105. *Id*. at 513-16. The 1969 Act contained a preemption section. Public Health Cigarette Smoking Act of 1969, 15 U.S.C. § 1334 (2000). Section 1334(a) stated that "[n]o statement relating to smoking and health, other than the statement required [by section 4 of the Act], shall be required on any cigarette package." *Id.* § 1334(a). Section 1335(b) stated that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act." *Id.* § 1335(b). The 1969 Act was modified by § 1335(b) to state that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act]." *Id.* § 1334(b).

106. *Cipollone*, 505 U.S. at 517 (internal citations omitted). The Court used the canon of construction "*expressio unius est exclusio alterius*." *Id*. This phrase means that to express or include one thing implies the exclusion of the other. BLACK'S LAW DICTIONARY 620 (8th ed. 2004).

107. *Cipollone*, 505 U.S. at 518.

108. *Id*. at 524-25.

109. *Id*. at 521.

110. *Id*. at 522.

111. 518 U.S. 470 (1996). In this case, the plaintiff sued the manufacturer of a pacemaker on theories of negligence and strict liability when that pacemaker failed. *Medtronic*, 518 U.S. at 480-81.

In *Medtronic*, Medtronic argued that Lohr's claims were preempted by the Medical Devices Act.[112] The Supreme Court began by restating its holding in *Cipollone*: the inquiry begins "with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[113] The Court expressed disbelief that Congress would eliminate all claims for those injured by illegal conduct without mentioning it in the statute.[114]

The Court distinguished *Cipollone* by saying that the statute at issue here concerned "conflicting state statutes and regulations rather than the general duties enforced by common-law actions."[115] In addition, nothing in the statute at issue denied damages for violations of common law duties that paralleled federal requirements.[116] The Court concluded that preemption should occur "only where a particular state requirement threatens to interfere with a specific federal interest."[117] After *Cipollone* and *Medtronic*, the lower courts failed to establish uniformity regarding preemption decisions.[118]

2. *The Courts That Held for No Preemption of State Law Claims*

Along with *Ferebee*, there were a number of cases that have held against preemption under FIFRA; one such case was *American Cyanamid Co. v. Geye*.[119] Geye, a peanut farmer, mixed two of American Cyanamid's products in accordance with labels and advertisements and then used the mixture on his peanut plants.[120] The peanut crop was inhibited, which

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112. *Id.* at 481. The relevant section of the Act is § 360k, which states,

> Except as provided in subsection (b) of this section, no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—(1) which is different from, or in addition to, any requirement applicable under this chapter to the device.

Medical Devices Act, 21 U.S.C. § 360k(a) (2000).

113. *Medtronic*, 518 U.S. at 485. The court stated, "'[T]he purpose of Congress is the ultimate touch-stone' in every pre-emption [sic] case." *Id.*

114. *Id.* at 487.

115. *Id.* at 489.

116. *Id.* at 495. The Court further said that "[t]he regulations promulgated by the FDA expressly support the conclusion that [the statute] 'does not preempt State or local requirements that are equal to, or substantially identical to, requirements imposed by or under this act.'" *Id.* at 496-97.

117. *Id.* at 500.

118. *See, e.g.*, Netland v. Hess and Clark, Inc., 284 F.3d 895, 901 (8th Cir. 2002) (holding the claims were preempted under FIFRA because the claims were directed to the label of the product); Am. Cyanamid Co. v. Geye, 79 S.W.3d 21, 29 (Tex. 2002) (holding FIFRA does not preempt common law claims because the EPA did not regulate the particular damage the claim arose under).

119. 79 S.W.3d 21 (Tex. 2002).

120. *Am. Cyanamid Co.*, 79 S.W.3d at 23.

reduced the yield, so Geye sued American Cyanamid.[121] The trial court dismissed Geye's claims, stating that they were preempted by FIFRA, but the court of appeals reversed that holding.[122] The Texas Supreme Court reviewed the decision and affirmed the court of appeals.[123]

The court of appeals based its decision in large part on an opinion letter issued by the EPA.[124] The letter described the labeling process and openly stated that the EPA chose to waive the collection of efficacy data.[125] The court of appeals also based its decision on the fact that the EPA did not collect efficacy data, which persuaded the court that the EPA also did not regulate label claims based on the uncollected data.[126] Although the Texas Supreme Court did not agree with the court of appeals' heavy reliance on the opinion letter issued by the EPA, the court found that the letter, taken together with the evidence that the EPA did not collect efficacy data, was enough to weigh against preemption of Geye's claim.[127]

The Texas Supreme Court acknowledged its minority position, but distinguished the facts of this case from others taking the majority position.[128] The court said that in this case, there was no review and approval process for the type of application that was used by Geye.[129] In the absence of such a process, there was no federal regulation, and without federal regulation, there could be no preemption.[130]

Another case that held for no preemption was *Silkwood v. Kerr-McGee Corp*.[131] Karen Silkwood worked at a plant that manufactured plutonium fuel pins for nuclear power plants.[132] Karen was contaminated by plutonium and died of causes unrelated to the contamination.[133] Although Karen died of unrelated causes, the contamination was so extensive that many of her personal belongings had to be destroyed and she was sent to a special

121. *Id.* Geye claimed breach of express and implied warranty, strict liability, and violation of DTPA. *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 28. The opinion letter was issued to "correct a misunderstanding regarding the FIFRA label approval process." Barolo, *supra* note 70.

125. Barolo, *supra* note 71.

126. *Am. Cyanamid Co.*, 79 S.W.3d at 27-28.

127. *Id.* at 28.

128. *Id.*

129. *Id.* at 29.

130. *Id.* The court said, "EPA has chosen not to evaluate whether a product will be toxic to the crops it was intended to assist [and] [b]ecause [of this] . . . the EPA does not regulate a product's labeling claims on the subject." *Id.*

131. 464 U.S. 238 (1984).

132. *Silkwood*, 464 U.S. at 241.

133. *Id.*

clinic to determine the extent of the damage to her vital organs.[134] Her father sued under common law tort principles for the contamination and death of his daughter.[135] The father was awarded $505,000 in actual damages and $10 million in punitive damages.[136]

The issue before the United States Supreme Court was whether punitive damages were preempted.[137] The Court found that punitive damages have long been a part of the tort system, and there was no evidence that Congress intended to abolish these actions with the enactment of the statute at issue.[138] Hence, there was no preemption of the claims.[139]

3. *The Courts Finding Preemption of State Law Claims*

Although states have "broad authority to regulate pesticides . . . it [is] unlawful for states to . . . 'impose . . . any requirement for labeling or packaging in addition to or different from those required under this Act [FIFRA].'"[140] Many of the courts that found preemption of state law claims based such findings on the failure to warn and the effect of the failure to warn on FIFRA's labeling policy.[141] One such case was *Kuiper v. American Cyanamid Co*.[142]

In *Kuiper*, American Cyanamid produced an herbicide, followed FIFRA's regulations and registered the herbicide, and then sold the herbicide to the general public.[143] The Kuipers bought and used the herbicide on their fields, and followed the label and its instructions for planting their follow crops.[144] The follow crop that the Kuipers planted did not grow well, so they had their fields inspected.[145] After speaking with a representative from American Cyanamid, the Kuipers tried the herbicide again.[146]

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134. *Id.* at 242.
135. *Id.* at 243.
136. *Id.* at 245.
137. *Id.* at 246.
138. *Id.* at 255.
139. *Id.*
140. Barolo, *supra* note 71.
141. *E.g.*, Grenier v. Vermont Log Bldgs., Inc., 96 F.3d 559, 564 (1st Cir. 1996). In *Grenier*, the defendant argued that FIFRA permits a failure to warn claim that is not based on labeling or packaging. *Id.* The First Circuit concluded that Congress's intention was for the label to inform the buyer of dangers. *Id.* Because the defendant had not even attempted to assert any claim based on anything but the label, the claim was preempted. *Id.*
142. 131 F.3d 656 (7th Cir. 1997).
143. *Kuiper*, 131 F.3d at 658.
144. *Id.* at 659. The label said that it was safe to plant corn as a follow crop eleven months after applying the herbicide to the field. *Id.* "A 'follow crop' is the crop that a farmer plants in a field following the previous planting season." *Id.*
145. *Id.*
146. *Id.*

When the second follow crop did not grow well, they complained to American Cyanamid and negotiated a settlement.[147] American Cyanamid only paid for one of the bad crops, so the Kuipers filed suit.[148] The district court granted summary judgment in favor of American Cyanamid holding that FIFRA preempted the Kuipers' claims.[149]

The Kuipers argued that FIFRA only preempts state law claims which challenge the product's label, and their claim was that American Cyanamid made misrepresentations which were not on the label.[150] The Seventh Circuit stated that its "task [was] to 'identify the domain expressly pre-empted' [sic] by the statutory language by determining whether the legal duty that [was] the predicate of the plaintiffs' state law damages actions constitute[d] a 'requirement for labeling or packaging in addition to or different from those required under [FIFRA].'"[151] The court held that the statements made by the independent dealer of the pesticide were just reiterations of what was already printed on the label.[152] Therefore, the Kuipers challenged the label and their claim was preempted.[153] The Seventh Circuit stated that even if the EPA wrongly approved the herbicide's label and it was misbranded, the claims would still be preempted because they would be challenging the label.[154]

Another case that followed this rationale was *Netland v. Hess & Clark, Inc*.[155] Netland's mother purchased a pesticide from the feed store because the clerk said it would work for horses, and she then gave the pesticide to her son to spray the horses.[156] Netland became ill from the pesticide and required medical attention.[157] Netland sued Hess for strict liability, failure to warn, negligence, and breach of warranty.[158] The district court held that all of Netland's claims were preempted by FIFRA because they challenged the label on the pesticide.[159]

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147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 660-61.
151. *Id.* at 662 (quoting Cipollone v. Liggett Group, Inc., 505 U.S. 504, 517, 524 (1992)).
152. *Id.* at 663.
153. *Id.*
154. *Id.* at 666.
155. 284 F.3d 895 (8th Cir. 2002).
156. *Netland*, 284 F.3d at 896-97.
157. *Id.* at 897. Netland was diagnosed with aplastic anemia, for which he was treated with high doses of steroids and had to have around thirty-five blood transfusions. *Id.* He also had to have a hip replaced, and his other hip was at risk of needing replacement. *Id.*
158. *Id.*
159. *Id.* at 898.

Netland appealed the decision, and the Eighth Circuit affirmed.[160] Netland argued that his strict liability and negligence claims did not fall in the area of FIFRA's preemption.[161] The Eighth Circuit held that the claims were merely failure to warn claims against the pesticide's label.[162] Netland also argued that his defective design claims were not preempted by FIFRA.[163] The court agreed with Netland that if the product is defectively designed or manufactured, there is a common law claim.[164] However, "'if the state law claim is premised on inadequate labeling or a failure to warn,' which results in the imposition of additional or different labeling requirements," the claim is preempted.[165]

The California Supreme Court also concluded that FIFRA preempts certain state law claims.[166] In *Etcheverry v. Tri-Ag Services, Inc.*,[167] the plaintiffs used two of Tri-Ag's products on their walnut trees, as recommended by a Tri-Ag employee.[168] The use of the combination of products caused $150,000 in damage to the walnut crop.[169] Plaintiffs sued Tri-Ag on a number of counts, and Tri-Ag moved for summary judgment, arguing that the claims were preempted by FIFRA.[170] The trial court granted summary judgment in favor of Tri-Ag, and on appeal, the court of appeals reversed.[171] The California Supreme Court decided to hear the case and reversed the court of appeals.[172]

The California Supreme Court first analyzed the *Cipollone* decision and its effect on FIFRA.[173] The court read *Cipollone* as creating a plurality view that the language of the "Public Health Cigarette Smoking Act of 1969 preempted state law failure-to-warn actions."[174] In comparing the preemption language of FIFRA with that of the Public Health Cigarette

160. *Id.* at 901.
161. *Id.* at 899.
162. *Id.*
163. *Id.* at 899-900.
164. *Id.* at 900.
165. *Id.* (quoting Nat'l Bank of Commerce v. Dow Chem. Co., 165 F.3d 602, 608 (8th Cir. 1999)).
166. *See, e.g.*, Etcheverry v. Tri-Ag Serv., Inc., 993 P.2d 366, 367 (Cal. 2000) (holding that FIFRA preempts state failure to warn claims).
167. 993 P.2d 366 (Cal. 2000).
168. *Etcheverry*, 993 P.2d at 368.
169. *Id.*
170. *Id.* at 369.
171. *Id.* The court of appeals relied on *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), and *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir. 1984). *Etcheverry*, 993 P.2d at 369.
172. *Etcheverry*, 993 P.2d at 374, 378.
173. *Id.* at 369.
174. *Id.*

Smoking Act, the court found no significant distinction.[175] The court also noted that two federal circuit courts had held that FIFRA was functionally equivalent to the Public Health Cigarette Smoking Act.[176]

The court then discussed the D.C. Circuit's decision in *Ferebee*.[177] The court stated that "reliance on *Ferebee* is misplaced because it is no longer good law," since the decision predated the Supreme Court's decision in *Cipollone*.[178] The court observed that federal courts have called *Ferebee*'s analysis of FIFRA's preemption "sophistry" and "silly" in light of *Cipollone*.[179] Finally, the court said that when Congress wants to preempt state authority, but leave common law intact, it knows how to accomplish the task.[180]

The California Supreme Court then recounted the decision in *Medtronic*. The court determined that *Medtronic* was distinguishable because in that case, Congress gave the Federal Food and Drug Administration (FDA) a role in determining the scope of preemption.[181] Congress gave the FDA authority to expressly preempt state regulations.[182] The *Etcheverry* court held that *Medtronic* was not applicable because Congress did not give the EPA the same authority to regulate under FIFRA as the FDA.[183]

Finally, the California Supreme Court looked at the specific facts of the case before it.[184] The court stated, "When a claim, however couched, boils down to an assertion that a pesticide's label failed to warn of the damage plaintiff allegedly suffered, the claim is preempted by FIFRA."[185] The court then remanded the case to the court of appeals for reconsideration.[186]

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175. *Id.* at 370.
176. *Id.* at 371.
177. *Id.*
178. *Id.* at 371-72.
179. *Id.* at 372.
180. *Id.* The court used the example of the Comprehensive Smokeless Tobacco Health Education Act of 1986 where Congress provided a section that states, "Nothing in this chapter shall relieve any person from liability at common law or under State statutory law to any other person." *Id.*
181. *Id.* at 373.
182. *Id.*
183. *Id.* at 373-74.
184. *Id.* at 376.
185. *Id.* at 377.
186. *Id.* at 378.

E. SUMMARY OF LEGAL BACKGROUND

Beginning with the Insecticide Act of 1910, the government has regulated poisonous substances.[187] In 1947, Congress enacted FIFRA, a licensing and labeling statute, which required all pesticides sold in interstate commerce to be registered.[188] In 1972, FIFRA was amended to regulate pesticide use, sales, and labeling.[189] Since the 1972 amendment, FIFRA has become a comprehensive regulatory scheme rather than just a labeling law.[190] Throughout the different regulatory schemes that have been in place, the courts have had differing opinions regarding how the preemption clauses in the statute should be interpreted.[191] Because of the conflict between the circuits, the United States Supreme Court granted certiorari to hear arguments for and against preemption.[192]

III. ANALYSIS

In *Bates v. Dow Agrosciences, L.L.C.*,[193] Justice Stevens wrote the opinion of the Court, joined by Chief Justice Rehnquist, Justice O'Connor, Justice Kennedy, Justice Souter, Justice Ginsburg, and Justice Breyer.[194] The Court held that two conditions must be met before a state law is preempted by FIFRA.[195] First, "it must be a requirement 'for labeling or packaging.'"[196] Second, "it must impose a labeling or packaging requirement that is 'in addition to or different from those required under this subchapter.'"[197] The Court held that even though FIFRA may not provide a federal remedy to those injured as a result of a violation of FIFRA's labeling requirements, the states are not precluded from providing a remedy.[198] Justice Breyer concurred in the judgment, but wrote separately

187. 7 U.S.C. §§ 135-135k (2000).

188. Ruckelshaus v. Monsato Co., 467 U.S. 986, 991 (1984).

189. Taylor AG Indus. v. Pure-Gro, 54 F.3d 555, 559 (9th Cir. 1995).

190. *Ruckelshaus*, 467 U.S. at 991.

191. *See*, *e.g.*, Netland v. Hess and Clark, Inc., 284 F.3d 895, 901 (8th Cir. 2002) (holding the claims preempted under FIFRA because the claims were directed to the label of the product which is preempted under the statute); Am. Cyanamid Co. v. Geye, 79 S.W.3d 21, 29 (Tex. 2002) (holding FIFRA does not preempt common law claims because the EPA did not regulate the particular damage the claim arose under); Etcheverry v. Tri-Ag Serv.. Inc., 993 P.2d 366, 367 (Cal. 2002) (holding that FIFRA preempts state law failure to warn claims).

192. Bates v. Dow Agrosciences, L.L.C., 544 U.S. 431, 436 (2005).

193. 544 U.S. 431 (2005).

194. *Bates*, 544 U.S. at 433.

195. *Id.* at 444.

196. *Id.* There is a language requirement for labels and packaging under FIFRA. 7 U.S.C. § 136v(b) (2000).

197. *Bates*, 544 U.S. at 444. There is also specific language saying "in addition to or different from." 7 U.S.C. § 136v(b).

198. *Bates*, 544 U.S. at 448.

to reiterate the importance of measuring state law requirements against EPA regulations which give content to misbranding standards.[199] Justice Thomas wrote a dissent, arguing that the majority opinion went too far and the Court should have just looked to the ordinary meaning of FIFRA's preemption clause, 7 U.S.C. § 136v(b).[200]

A. THE MAJORITY OPINION

The majority began its opinion by discussing the history of poisonous substance regulation.[201] The Court stated that, before 1910, states had almost exclusive control over regulation of poisonous substances.[202] A brief history was then given regarding the federal government's attempts at regulation in this area.[203] The Court traced the different acts that have regulated poisonous substances, ending with FIFRA, in its current version.[204]

The Court recognized that FIFRA, as it was amended in 1972, transformed "from a labeling law into a comprehensive regulatory statute."[205] The Court noted that although FIFRA was enacted over three decades ago, "this Court has never addressed whether that statute pre-empts [sic] tort and other common-law [sic] claims arising under state law."[206] The Court went on to state that arguments that common law claims "were pre-empted [sic] by § 136v(b) either were not advanced or were unsuccessful."[207] The Court stated that only after its decision in *Cipollone* did the state and federal courts begin making decisions holding that § 136v(b) preempted claims like those in *Cipollone*.[208]

The *Bates* Court began its analysis by citing *Wisconsin Public Intervenor v. Mortier*,[209] noting that "FIFRA was not 'a sufficiently comprehensive statute to justify an inference that Congress had occupied the field to the exclusion of the States.'"[210] The Court stated that there was "ample room" within FIFRA for states to regulate beyond federal efforts.[211]

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199. *Id.* at 454-55 (Breyer, J., concurring).
200. *Id.* at 455-57 (Thomas, J., dissenting).
201. *Id.* at 437-40 (majority opinion).
202. *Id.* at 437.
203. *Id.* at 437-38.
204. *Id.*
205. *Id.* at 437 (quoting Ruckelshaus v. Monsanto Co., 467 U.S. 986, 991 (1984)).
206. *Id.* at 440.
207. *Id.* at 441.
208. *Id.*
209. *Id.* at 441. The Court held that 7 U.S.C. § 136 does not preempt the regulation of pesticides by the local governments. *Id.*
210. *Id.* at 441-42 (quoting Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 607 (1991)).
211. *Id.* at 442.

The Court said that under FIFRA, states have authority to review pesticide labels for compliance with applicable federal and state regulations.[212] There was nothing in FIFRA that prevents a state from making the violation of FIFRA a state offense.[213]

Next, the Court examined the actual text of the preemption clause in FIFRA.[214] After reviewing the preemption clause, the Court concluded that coverage of the statute is limited to states and applies only to "requirements."[215] The Court then held that two conditions must be met before a state law is preempted by FIFRA.[216] First, the state law "must be a requirement for labeling or packaging."[217] Second, the state law "must impose a labeling or packaging requirement that is 'in addition to or different from those required under this subchapter."[218] The Court found that the test used by the Fifth Circuit had no support in § 136v(b) because that section spoke only of requirements.[219]

Although other courts had found no discernible distinction between the preemption language in *Cipollone* and the preemption language in FIFRA, the Court noted "obvious" differences.[220] The Court found that FIFRA's preemption language was different from *Cipollone* because if the state law is equivalent to and consistent with FIFRA, the state law will not be preempted under FIFRA.[221] The *Bates* Court found the "parallel requirements" reading of § 136v(b) to be the proper interpretation.[222] The Court explained

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212. *Id.*

213. *Id.*

214. *Id.* at 442-43. The relevant part is § 136v(b), which states that "[s]uch state shall not impose or continue in effect any requirements for labeling or packaging . . . under this subchapter." 7 U.S.C. § 136v(b) (2000).

215. *Bates*, 544 U.S. at 443. The Court stated that a requirement "is a rule of law that must be obeyed." *Id.* at 445.

216. *Id.* at 444.

217. *Id.*

218. *Id.*

219. *Id.* at 445. The test that the Fifth Circuit used examined whether liability would induce a manufacturer to alter or change its label. *Id.* The Court called this the effects-based test or inducement test. *Id.* The Court went on to say that this test was also inconsistent with § 136v(a) of FIFRA, which gives the states broad regulatory authority over the use and sale of pesticides. *Id.* at 446.

220. *Id.* The Court stated, "Not even the most dedicated hair-splitter could distinguish these statements." *Id.* (quoting Shaw v. Dow Brands, Inc., 994 F.2d 364, 371 (7th Cir. 1993)).

221. *Id.* at 447. The language that is comparable to FIFRA in the 1969 Cigarette Act is that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this [Act]." *Id.*

222. *Id.* The Court found that this case was aligned with *Medtronic* more so than with *Cipollone*. *Id.* The language of FIFRA's preemption clause is worded similarly to that of the preemption clause at issue in *Medtronic*. *Id.* The *Bates* Court held that as in *Medtronic*, the statute does not deny a "damages remedy for violations of common-law [sic] duties when those

that Dow's argument against parallel requirements, combined with the United State's reading of § 136v(b), would preempt all state requirements concerning labeling, which was not the intention of Congress when it added this provision.[223] Finally, the Court said that its duty was to "accept the reading [of the text] that disfavors pre-emption [sic]."[224]

The Court also examined the history of tort litigation against manufacturers of poisonous substances.[225] The Court agreed with the proposition laid out in *Silkwood* that if Congress had intended to deprive injured parties from gaining compensation for their injuries, Congress would have expressed that intention clearly.[226] The Court also said that the history of providing compensation to those injured by a manufacturer's product provides an incentive to the manufacturer to make that product with the most care possible to avoid liability.[227] The Court also noted that "it seems unlikely that Congress considered a relatively obscure provision like § 136v(b) to give pesticide manufacturers virtual immunity from certain forms of tort liability."[228] The Court recognized the fact that over-enforcement could produce large financial burdens on manufacturers, but under-enforcement produces financial and safety burdens on consumers.[229]

Finally, the Court addressed the policy objections regarding previous § 136v(b) decisions, and found those objections to be unpersuasive.[230] The Court found that FIFRA's decentralized scheme left a broad role for the states in regulation.[231] States may ban the use of a pesticide within their state or they may approve a use that goes beyond the uses allowed by FIFRA.[232] The Court also noted that tort remedies help, rather than hinder, manufacturers of pesticides because FIFRA contemplates label changes over time as more knowledge is gained.[233] The *Bates* Court relied on the *Ferebee* decision, which stated that suits against manufacturers can aid in

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duties parallel federal requirements." *Id.* (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 495 (1996)).

223. *Id.* at 448. The United States joined Dow through an amicus brief to support the parallel requirements argument. *Id.* The Court said that the addition of the provision was evidence of Congress's intention to make "a distinction between state labeling requirements that are pre-empted [sic] and those that are not." *Id.* at 449.

224. *Id.*

225. *Id.* at 449.

226. *Id.* at 449-50.

227. *Id.* at 450.

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 451.

the realization of new dangers related to the pesticide.[234] The *Ferebee* court also observed that suits may lead manufacturers to ask the EPA to allow more on their labels, or may even cause the EPA to change their labeling standards.[235]

The *Bates* Court reiterated that § 136v(b) still has a narrow, but important, role in preempting state labeling standards that compete with federal standards.[236] The Court also held that § 136v(b) preempts those state rules which impose requirements for labels that are different from the requirements set out in FIFRA.[237] The Court emphasized the fact that a "state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption [sic]."[238]

B. JUSTICE BREYER'S CONCURRENCE, JOINED BY JUSTICE THOMAS IN PART

Justice Breyer wrote separately to stress the importance that the "state-law requirements must 'be measured against' relevant [EPA] regulations 'that give content to [FIFRA's] misbranding standards.'"[239] Justice Breyer pointed out that federal agencies that enforce the statute are in a better position than the Court to determine if states are complying with the federal standards.[240] Justice Breyer also suggested that the EPA may be in a better position to determine which state law claims, if any, will help the discovery of new dangers associated with pesticides.[241]

C. JUSTICE THOMAS'S DISSENT IN PART, JOINED BY JUSTICE SCALIA

Justice Thomas started his opinion by stating that he agreed with the majority on some aspects of the case.[242] However, he argued that the Court omitted a step in its reasoning: "[A] state-law cause of action, even if not specific to labeling, nevertheless imposes a labeling requirement 'in

234. *Id.* (citing Ferebee v. Chevron Chem. Co., 736 F.2d 1529, 1541 (D.C. Cir. 1984)).

235. *Id.*

236. *Id.* at 452.

237. *Id.*

238. *Id.* at 453. The Court concluded the language of the state requirements did not need to be identical to the requirements of FIFRA. *Id.* at 454.

239. *Id.* (Breyer, J., concurring) (citations omitted).

240. *Id.* at 455.

241. *Id.*

242. *Id.* (Thomas, J., dissenting). Justice Thomas stated that he agreed with the Court's reading of the term "requirements" and that state law requirements may not impose requirements "in addition to or different from" those required under FIFRA. *Id.*

addition to or different from' FIFRA's when it attaches liability to statements on the label that do not produce liability under FIFRA."[243]

Justice Thomas argued that the Court should only have looked to the plain meaning of the statute when interpreting it, and that the Court went too far in advancing arguments that "tip[ped] the scales in favor of the States . . . against the Federal Government."[244] Justice Thomas wrote that the task of the Court is to determine which state law claims are preempted by § 136v(b) "without slanting the inquiry in favor of either the Federal Government or the States."[245]

Justice Thomas argued that the history of tort litigation against manufacturers of poisonous substances was irrelevant.[246] Justice Thomas also stated that it was not enough for the Court that Congress enacted a preemption provision; the Court also wanted Congress to add specificity to the statute or display its preference for preemption.[247] Further, Justice Thomas argued that the Court did not follow its own test because it agreed that some common law actions will not be allowed to go forward anymore.[248]

Justice Thomas also observed that the majority did not address Dow's arguments that Bates's claims were subject to other types of preemption.[249] Justice Thomas concluded that the Court's decision showed its "increasing reluctance to expand federal statutes beyond their terms through doctrines of implied preemption."[250]

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243. *Id.* at 456 (citations omitted).

244. *Id.* at 457. Justice Thomas used as an example the majority's statement that there is a presumption against preemption. *Id.* He argued that the presumption does not apply when the statute has an express preemption provision. *Id.*

245. *Id.*

246. *Id.* Justice Thomas supported this position by citing to his dissent in *Small v. United States*. *Id.* at 458. In *Small*, Justice Thomas said that "[r]eliance on explicit statements in the history, if they existed, would be problematic enough. Reliance on silence in the history is a new and even more dangerous phenomenon." Small v. United States, 544 U.S. 385, 406 (2005) (Thomas, J., dissenting).

247. *Bates*, 544 U.S. at 458.

248. *Id.*

249. *Id.* The *Bates* majority failed to ask if "FIFRA's regulatory scheme is 'so pervasive' and the federal interest in labeling 'so dominant,' that there is no room for States to provide additional remedies." *Id.* at 1806-07 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Nor did the majority ask if enforcing the state law labeling claims would stand in the way of accomplishing FIFRA's objectives and purposes. *Id.* (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

250. *Id.* at 459.

IV. IMPACT

A. GENERAL IMPACT

The *Bates* decision will affect people seeking damages for claims based on common law or statutes that impose requirements for labels that are different from those required under FIFRA.[251] When states have requirements that are different from or add to those required by FIFRA, the injured person will be preempted from recovering damages.[252] Because FIFRA does not provide a federal remedy for those injured by a manufacturer's violation of FIFRA's labeling standards, states can and should provide a remedy themselves.[253]

The *Bates* decision may reverse the trend started by *Cipollone*; thus, reversing the trend to uphold preemption claims and bar state law claims.[254] The *Bates* Court also showed much greater deference to the states in regulating common law duties.[255] Consumer advocates have called the decision a "victory for fairness to individuals who are poisoned by toxic pesticides."[256] However, the decision has been deemed "a major disappointment for industry" by defense counsel.[257]

Since *Bates* was decided in April 2005, five courts have followed its reasoning.[258] In August 2005, a United States District Court in New York held that there was no preemption under FIFRA for manufacturers of a pesticide that was used to fight the West Nile Virus.[259] As a result, the fishermen who claimed that the pesticide killed the lobsters in Long Island Sound were allowed to go forward with their claims for damages.[260]

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251. *Id.* at 452 (majority opinion).

252. *Id.* at 447.

253. *Id.* at 448. States are allowed to provide a remedy as long as there are no additional requirements that do not comply with FIFRA labeling standards. *Id.*

254. Kevin McHargue, *Pre-emptive Strike; High Court Deals Blow to Federal Pre-emption in Toxic-Tort Cases*, TEX. LAW., Sept. 12, 2005, at 34.

255. *Id.*

256. Philip Karmel, *Toxic Torts; Preemption After* Bates v. Dow Agrosciences, N.Y.L. J., June 28, 2005, at 3.

257. *Id.*

258. *See, e.g.*, McMullen v. Medtronic, Inc., 421 F.3d 482, 490 (7th Cir. 2005) (holding that a post-sale failure to warn was preempted); Gougler v. Sirius Prod., Inc., 370 F. Supp. 2d 1185, 1199 (S.D. Ala. 2005) (holding that tort claims based on a product's label are not automatically preempted).

259. Fox v. Cheminova, Inc., 387 F. Supp. 2d 160, 168 (E.D.N.Y. 2005).

260. *Id.* at 167-68.

The courts have also applied the *Bates* rationale to other federal statutes containing preemption clauses.[261] In *Rite-Aid v. Levy-Gray,*[262] a Maryland Court of Special Appeals held that the Food, Drug, and Cosmetic Act (FDCA) did not preempt a tort claim against a pharmacy.[263] A customer sued the pharmacy alleging that the instructions the pharmacist gave her with her medicine were wrong.[264] The court found that under *Bates*, the pharmacy could be liable for giving instructions on how to take the drug, even if the FDA approved the label.[265]

In another case, *Gougler v. Sirius Products, Inc.*,[266] a United States District Court for the Southern District of Alabama held that "defective design claims [under the Federal Hazardous Substances Act (FHSA)] are not preempted . . . because state rules requiring manufacturers to design reasonably safe products plainly do not qualify as 'cautionary labeling requirements.'"[267] The court used a *Bates* analysis when making its decision.[268]

B. IMPACT ON NORTH DAKOTA

The impact on North Dakota is especially important because North Dakota's basic industry is agriculture.[269] Since the state relies on agriculture, FIFRA issues may be more prevalent than in other areas of the United States. In 2002, agriculture made up 25 percent of North Dakota's economic base.[270] In addition, 24 percent of employment in North Dakota is in farming or is farm related.[271] This number is larger than the national average of farming or farm related jobs, which is 15 percent.[272] In 2002,

261. *See, e.g.*, Rite-Aid Corp. v. Levy-Gray 876 A.2d 115 (Md. Ct. Spec. App. 2005) (discussing the Food, Drug, and Cosmetic Act); Gougler v. Sirius Prod., Inc., 370 F. Supp. 2d 1185 (S.D. Ala. 2005) (discussing the Federal Hazardous Substances Act).

262. 876 A.2d 115 (Md. Ct. Spec. App. 2005)

263. *Rite-Aid Corp.*, 876 A.2d at 134.

264. *Id.* at 118-21.

265. *Id.* at 134.

266. Gougler v. Sirius Prod., Inc., 370 F. Supp. 2d 1185 (S.D. Ala. 2005)

267. Gougler, 370 F. Supp. 2d at 1198.

268. *Id.*

269. Larry Remele, EDUCATION AND INTERPRETATION DIVISION, STATE HISTORICAL SOCIETY OF NORTH DAKOTA, NORTH DAKOTA HISTORY: OVERVIEW AND SUMMARY (1999), *available at* http://www.state.nd.us/hist/ndhist.htm.

270. North Dakota Agriculture, http://www.northern-crops.com/aboutnci/ndagbr04.pdf (last visited Jan. 28, 2006).

271. *Id.*

272. Brian Oleson, New Generation Cooperatives on the Northern Plains, http://www.umanitoba.ca/afs/agric_economics/ardi/agricandndecon.html (last visited Jan. 28, 2006).

North Dakota's agriculture industry generated $3.6 billion in cash receipts.[273]

In addition, 90 percent of North Dakota's land is farmland.[274] Since agriculture is such a large part of North Dakota's economy, and farmland makes up nearly all of the land of North Dakota, the *Bates* decision will likely have a strong impact on North Dakota.[275] The *Bates* decision will help farmers who use pesticides to recover from manufacturers if their claims meet the exception to the preemption clause.

This decision may have an impact on the economy of North Dakota as well. If manufacturers of pesticides are worried about state law tort liability, the manufacturers could raise the prices of pesticides, making it more expensive for farmers to operate. The impact of *Bates* could, in turn, raise prices for consumers of farm products, both in North Dakota and in other states which receive North Dakota exports. North Dakota consumers, especially, will be affected, because on average, North Dakota consumers spend 7 percent of their income on home-grown food.[276]

Although FIFRA deals with pesticides and pesticides are used in agriculture, the North Dakota Supreme Court has only addressed FIFRA once in a decision.[277] However, the decision was not based on the pre-emption doctrine of FIFRA.[278] Perhaps in the future, North Dakota courts will see more cases now that there is an exception to federal preemption that will allow some state law claims. Most federal statutes have a pre-emption clause in them so the *Bates* decision will have further reaching effects than just on FIFRA.

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273. North Dakota Agriculture, *supra* note 270.

274. *Id.*

275. *Id.*

276. *Id.*

277. N. States Power v. N.D. Pub. Serv. Comm'n, 502 N.W.2d 240 (N.D. 1993). Generally, FIFRA cases are removed to or filed in federal court because they involve a federal statute. *See, e.g.*, Stenehjem v. Whitman, NO. 3:00CV109, 2001 U.S. Dist. LEXIS 8387, at *1 (D.N.D. 2001) (bringing a case in federal court based on FIFRA).

278. *N. States Power*, 502 N.W.2d at 246. The claim dealt with disclosure of trade secrets under an open records law. *Id.* at 246-47.

V. CONCLUSION

The United States Supreme Court in *Bates* held that two conditions must be met before a state law is preempted by FIFRA.[279] First, "it must be a requirement 'for labeling or packaging.'"[280] Second, "it must impose a labeling or packaging requirement that is 'in addition to or different from those required under this subchapter.'"[281] The Court reiterated that § 136v(b) still has a narrow, but important role, because it preempts state labeling standards that compete with federal standards.[282] The Court also held that § 136v(b) preempts those state rules that impose requirements for labels that are different from the requirements set out in FIFRA.[283] The Court emphasized the fact that a "state-law labeling requirement must in fact be equivalent to a requirement under FIFRA in order to survive pre-emption [sic]."[284] The *Bates* decision is going to have far reaching effects on the preemption doctrine. There is now a chance to sue under a federal statute using state law, where that chance never was available before.

This holding not only affects FIFRA, but also all other Federal Acts that contain preemption clauses.[285] This impacts all businesses and consumers that produce or use anything that is regulated by a federal act. Focusing on FIFRA specifically, most states have some form of agriculture and will be affected by the decision. As the statistics above show, North Dakota will be affected more so than most states because of the sheer amount of agriculture within the state in the form of land for farming, jobs involving agriculture, or products for export; the end result will impact a large part of the North Dakota economy.[286]

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279. Bates v. Dow Agrosciences, L.L.C., 544 U.S. at 444.

280. *Id.* (quoting 7 U.S.C. § 136v(b) (2000)).

281. *Id.*

282. *Id.* at 452.

283. *Id.*

284. *Id.* at 453. The language of the state requirements does not need to be identical to the requirements of FIFRA. *Id.* at 454.

285. *See, e.g.*, Rite-Aid Corp. v. Levy-Gray 876 A.2d 115 (Md. Ct. Spec. App. 2005) (discussing the Food, Drug, and Cosmetic Act); Gougler v. Sirius Prod., Inc., 370 F. Supp. 2d 1185 (S.D. Ala. 2005) (discussing the Federal Hazardous Substances Act).

286. *See supra* Section IV Part B (discussing agricultural statistics for North Dakota).

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