Analysis&Perspective

In its recent decision in *Etcheverry v. Tri-Ag Service Inc.*, the California Supreme Court ruled that state based failure-to-warn claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act. In this week's Analysis and Perspective, author Lawrence S. Ebner explains the state supreme court's decision, discounts the U.S. government's "extraordinarily belated anti-preemption" litigation position, and responds to the minority's dissenting opinion. Ebner predicts that *Etcheverry* "will have far-reaching impact not only in California but throughout the United States."

The California Supreme Court Weighs In On FIFRA Preemption

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The California Supreme Court's recent decision in *Etcheverry v. Tri-Ag Service, Inc.*, 993 P.2d 366, 93 Cal. Rptr. 2d 36 (Cal. 2000), is a very significant addition to the already substantial body of case law holding that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") preempts pesticide-related product liability claims for inadequate labeling or failure to warn.

Prior to *Etcheverry*, California's highest court had not ruled on the critically important FIFRA preemption defense, even though probably more agricultural crop damage and personal injury suits involving pesticides are filed in California than anywhere else in the nation.[1] Furthermore, the Federal government participated in *Etcheverry* as *amicus curiae* for the first time in any FIFRA tort preemption case. The government vigorously argued, in a manner that was virtually oblivious to the hundreds of federal and state FIFRA preemption cases decided during the past 13 years, that based on its text and legislative history, FIFRA does not preempt tort claims at all.[2] Following extensive briefing and oral argument, four of the court's seven justices, joined by a fifth justice in a separate opinion, unequivocally rejected the government's extreme and extraordinarily belated anti-preemption position. Moreover, the *Etcheverry* majority sharply rebuked the government's fall-back contention that FIFRA does not preempt failure-to-warn claims involving agricultural crop damage.[3]

This article highlights the California Supreme Court's decision, including its criticism of the government's arguments, and also offers a response to the dissenting opinion.[4]

Case Background

The U. S. Environmental Protection Agency (EPA) is responsible for administering FIFRA, the comprehen-

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[1] At the time the Petition for Review was filed in *Etcheverry*, there were at least 20 pesticide-related product liability suits pending in lower California state courts.

[2] *Etcheverry* also attracted the attention of the following additional *amici curiae*: American Crop Protection Ass'n, RISE (Responsible Industry for a Sound Environment), Chemical Producers and Distributors Ass'n, Chemical Manufacturers Ass'n, Chemical Specialties Manufacturers Ass'n, and International Sanitary Supply Ass'n (supporting defendants); Washington Legal Foundation (supporting defendants); Product Liability Advisory Council (supporting defendants); Public Citizen Litigation Group (supporting plaintiffs); Rural Legal Assistance Foundation (supporting plaintiffs).

[3] *See* Lawrence S. Ebner, "California Supreme Court Repudiates Federal government Position on Pesticide Tort Preemption," *Leader's Product Liability Law & Strategy* (April 2000), for additional background on the government's decision to participate in *Etcheverry*. As that article indicates, in *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 598, 615 (1991) (holding that FIFRA does not preempt local governments from regulating pesticide use), the Solicitor General of the United States filed an *amicus curiae* brief arguing that "[t]o be sure, an exclusively federal approach is necessary in certain areas of pesticide regulation [and] *[o]ne such area is labeling*" (emphasis added).

[4] The Opinion of the Court was authored by Associate Justice Janice R. Brown, and joined by Chief Justice Ronald M. George and Associate Justices Ming W. Chin and Marvin R. Baxter. Associate Justice Joyce L. Kennard filed a separate concurring and dissenting opinion, rejecting both the government's position that FIFRA does not preempt any failure-to-warn claims, and the majority's holding that FIFRA preempts all failure-to-warn claims. Associate Justice Kathryn M. Werdegar wrote a dissenting opinion, joined by Associate Justice Stanley Mosk, asserting that FIFRA does not preempt state tort claims.

sive federal pesticide regulatory statute. 7 U.S.C. § 136-136y (1998). Pursuant to FIFRA, every pesticide product sold in the United States must be granted a registration by EPA, and distributed with EPA-approved product labeling. *See* 7 U.S.C. § 136a. The warnings, directions for use, and other information included on a product's labeling must be adequate to prevent "unreasonable adverse effects on the environment." *Id.* § 136a(c)(5)(C). This includes, among other things, harm to people, the natural environment, and agricultural crops. *Id.* § 136(j).

The majority of justices in *Etcheverry* "unequivocally rejected the government's extreme and extraordinarily belated anti-preemption position."

FIFRA's preemption provision, § 136v(b), is entitled "Uniformity." Its purpose is to ensure that each FIFRA-registered product is accompanied by nationally uniform labeling regulated *solely* by EPA. Section 136v(b) accomplishes this objective by broadly providing that a "State shall not impose or continue in effect *any requirements* for labeling or packaging *in addition to or different from* those required under [FIFRA]." 7 U.S.C. § 136v(b) (emphasis added). In other words, by virtue of § 136v(b), Congress intended that EPA alone—and not the states—have the authority to determine what warnings, directions for use, and other information should be required on a pesticide product's labeling.

Numerous federal and state courts have held that § 136v(b) *expressly* preempts any state law damages claim, including failure-to-warn claims, which would have the effect of imposing additional or different, state law requirements for "adequate" pesticide labeling. This case law has developed in light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 520-21 (1992), the landmark, smoking-related, tort preemption case holding that a federal statutory prohibition against state-imposed "requirement[s]," easily encompasses requirements imposed through common law claims. *See Etcheverry*, 93 Cal. Rptr. 2d at 40.

In *Etcheverry*, California farmers alleged that their 1993 walnut crop was injured due to the phytotoxic effect of a tank mix of two FIFRA-registered insecticides, whose EPA-approved labeling contained no warnings against applying the products together. Claiming that they should have been warned about the alleged dangers of combining the products, the Etcheverrys sued the products' manufacturer (Bayer Corp.), the retail distributor that sold them the products (Tri-Ag Service), and the state-licensed pest control advisor (a Tri-Ag employee) who recommended application of the tank mix (which also contained certain surfactant chemicals). Their complaint asserted state law causes of action for negligence, negligence per se, products liability, breach of implied warranty, misrepresentation, strict liability for ultra hazardous activity, and trespass.

The state trial court granted the defendants' summary judgment motions based on FIFRA preemption, holding that "all of plaintiffs' causes of action 'allege inadequate labeling in one form or another,' with the 'main issue being the failure of the labels to warn against mixing chemicals.' " *Etcheverry*, 93 Cal. Rptr. 2d at 39. In a bizarre 2-1 split decision, which now has been "depublished," the California Court of Appeal, Third Appellate District, reversed, finding that "the bulk of [FIFRA preemption] case law [had] gone astray," and that § 136v(b) does not preempt failure-to-warn claims. *Id.* The Supreme Court of California agreed to review the case.

The Majority Opinion

The majority opinion begins with the principle that although state courts are not bound by decisions of lower federal courts (i.e., courts of appeals and district courts), even on federal questions, "they are persuasive and entitled to great weight" where they "are 'both numerous and consistent.' " *Id.* at 38 (citations omitted). Finding that "[t]he federal court decisions holding that FIFRA preempts state law failure-to-warn claims are *numerous, consistent, pragmatic and powerfully reasoned*," the court "reverse[d] the judgment of the [California] Court of Appeal reaching the contrary conclusion." *Id.* (emphasis added).[5]

The bulk of the majority opinion is directed to the court of appeal's analysis and the government's arguments:

A. 'Cipollone.' The state court of appeal contended that FIFRA preemption case law had failed "to draw the correct lesson" from the U.S. Supreme Court's opinion in *Cipollone*. *Id.* at 39. The Court held in *Cipollone* that the 1969 federal "Cigarette Act" preemption clause, which provides that "[n]o *requirement* . . . based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes," encompasses common law claims, including for failure to warn. *See id.* at 40 (quoting Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, § 5) (emphasis added). In reaching this conclusion, the Court explained that the 1969 clause is "much broader," than its 1965 predecessor, which the Court found did not encompass damages claims since it merely barred state-required "statements" relating to smoking and health. *Id.* (quoting *Cipollone*, 505 U.S. at 520; Federal Cigarette Labeling and Advertising Act of

[5] All nine federal courts of appeals which have considered the subject in light of *Cipollone*—including the U.S. Court of Appeals for the Ninth Circuit (which encompasses California and other Western states)—have concluded that § 136v(b) preempts state tort claims for inadequate labeling or warnings. *See Hawkins v. Leslie's Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999); *Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999); *National Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602 (8th Cir. 1999); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997), *cert. denied*, 523 U.S. 1137 (1998); *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996); *Welchert v. American Cyanamid Co.*, 59 F.3d 69 (8th Cir. 1995); *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Lowe v. Sporicidin Int'l*, 47 F.3d 124 (4th Cir. 1995); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King v. E.I. du Pont de Nemours & Co.*, 996 F.2d 1346 (1st Cir. 1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir.), *cert. denied*, 510 U.S. 913 (1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir.), *cert. denied*, 510 U.S. 813 (1993).

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1965, Pub. L. 89-92, § 5). Numerous courts have concluded in light of *Cipollone* that § 136v(b) of FIFRA, which like the 1969 Cigarette Act preemption provision bars state-imposed "requirements," expressly preempts pesticide-related state tort claims for inadequate labeling or warnings. As the California Supreme Court confirmed in *Etcheverry*, "[t]here is no notable difference between the language in the 1969 Cigarette Act and the language in [§ 136v(b)]." *Id.* at 41 (quoting *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 559 (9th Cir. 1995)).

The state supreme court "rejected as 'inconsistent' " with *Cipollone*, the court of appeal's "convoluted attempt" to rewrite § 136v(b).

The state supreme court disagreed with the court of appeal that FIFRA preemption cases have failed to consider the 1965 Cigarette Act clause. The court noted that when two federal circuit courts, following remand by the U.S. Supreme Court for reconsideration in light of *Cipollone*, held that "FIFRA was functionally equivalent to the 1969 Cigarette Act, insofar as their preemption provisions were concerned, they impliedly found that it was distinguishable from the 1965 Cigarette Act." *Id.* (citing *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993); *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 981 F.2d 1177 (10th Cir. 1993)). Furthermore, the state supreme court rejected as "inconsistent" with *Cipollone*, the court of appeal's convoluted attempt to "literally rewrit[e] the text" of § 136v(b) in an effort to demonstrate that it is more "grammatically akin" to the 1965 cigarette act preemption clause. *Id.* at 41, 42. As the court indicated, "the [U.S.] Supreme Court drew the very distinction between the 1965 and 1969 Cigarette Acts that the Court of Appeal seeks to explain away in its effort to prove that all of the other courts are guilty of a 'striking omission.' " *Id.* at 42.

B. 'Ferebee.' The state court of appeal also contended that "the one case that got it right ... was a pre-*Cipollone* case," *Ferebee v. Chevron Chem. Co.* 36 F.2d 1529 (D.C. Cir. 1984), which held that FIFRA neither expressly nor impliedly preempts damages claims. *Id.* According to *Ferebee*, state tort claims for inadequate labeling or warnings, unlike "direct" regulatory commands, do not impose "requirements" for labeling within the meaning of § 136v(b). *Ferebee* held instead that such claims are just another way for states to regulate pesticide use, which § 136v(a) of FIFRA, 7 U.S.C. § 136v(a), confirms they can do.

The *Etcheverry* majority opinion explains, however, that

> [r]eliance upon *Ferebee* is misplaced because it is *no longer good law*. [citations omitted] Although the District of Columbia Circuit has not expressly overruled *Ferebee*, it has expressly acknowledged that *Cipollone* repudiated its central premise by "explaining that damage actions can be used to enforce state regulations as effectively as other forms of preventive relief and thus damage actions must be preempted where positive enactments are preempted. ..." (*Waterview Management Co. v. F.D.I.C.* 105 F.3d 696, 699 (D.C. Cir. 1997) [summarizing *Cipollone*'s holding].).
>
> *Ferebee*'s fundamental thesis—that liability under state law for failure to warn is not a requirement for labeling or packaging different from that required under FIFRA—has been rejected by the federal courts since *Cipollone* as "*sophistry*" and "*silly*," and the attempted distinction has been characterized as "*illusory*."

Etcheverry, 93 Cal. Rptr. 2d. at 42 (emphasis added).

Although *Ferebee* is considered a dead letter, the government in its *amicus* brief, without ever citing that case by name, essentially reargued *Ferebee*'s theory—that tort claims for inadequate labeling do not impose state law requirements because pesticide manufacturers supposedly may prefer to choose to pay damages in future liability suits rather than amend their labeling to avoid them. *See Ferebee*, 736 F.2d at 1541. When the attorney representing the government attempted to advocate this specious theory at the hearing held before the California Supreme Court, Justice Brown admonished him that the government's position was "disingenuous" in view of all of the cases that have repudiated *Ferebee*.

C. 'Medtronic.' The government also argued that the U.S. Supreme Court's highly fragmented, medical device preemption decision in *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996), seriously eroded post-*Cipollone* FIFRA preemption case law. *Medtronic* arose under the federal Medical Device Amendments ("MDA") preemption clause, which provides that "no State ... may establish ... with respect to a device ... any requirement ... which is different from, or in addition to, any [federal] requirement applicable ... to the device [and] which relates to [any] matter included in a requirement applicable to the device." *See Etcheverry*, 93 Cal. Rptr. 2d. at 43 (quoting 21 U.S.C. § 360k(a)). According to the Court, the defendant in *Medtronic* essentially argued "that the plain language of the statute pre-empts any and all common-law claims brought by an injured plaintiff against a manufacturer of medical devices." *Medtronic*, 518 U.S. at 486. The *Medtronic* plurality opinion holds, however, that the MDA preemption clause, *as interpreted by congressionally authorized FDA regulations which implemented and narrowed the scope of the clause*, " 'was not intended to pre-empt most, let alone all, general common law duties enforced by damages actions.' " *See Etcheverry*, 93 Cal. Rptr. 2d at 44 (quoting *Medtronic*, 518 U.S. at 491).

Although the Court held in *Medtronic* that none of the plaintiff's damages claims involving an allegedly defective heart pacemaker lead were preempted under the unique statutory/regulatory scheme involved in that case, five Justices (i.e., a majority of the Court) in two separate opinions explicitly reaffirmed *Cipollone*'s holding that a federal statutory prohibition against imposition of state requirements encompasses common law claims. *See Medtronic*, 518 U.S. at 504 (Breyer, J., concurring in part and concurring in the judgment) ("[one] can reasonably read the word 'requirement' as including the legal requirements that grow out of the application, in particular circumstances, of a State's tort law ... a contrary holding would have anomalous consequences"); *id.* at 510, 512 (O'Connor, J., concurring in part and dissenting in part) (the *Cipollone* "rationale is equally applicable in the present context ... the term 'requirement' encompasses state common-law causes of action"); *see also Geier v. American Honda Motor Co.*, 120 S.Ct. 1913, 1918 (2000) ("A majority of this

Court has said that . . . a provision that uses the word 'requirements' [ ] may well expressly pre-empt . . . tort actions"); *id.*, at *20 (Stevens, J., dissenting) ("we concluded that broadly phrased pre-emptive commands encompassed common-law claims") (citing *Cipollone* and *Medtronic*).

Etcheverry's majority opinion squarely rejects the government's (and the plaintiffs') arguments regarding the supposedly devastating impact of *Medtronic* on FIFRA preemption: "*Medtronic* does not undermine the conclusion that FIFRA preempts state failure-to-warn claims. The overwhelming majority of the courts that have examined the question have so held." *Etcheverry*, 93 Cal. Rptr. 2d at 43 (citations omitted). As the court explained, "*Medtronic* is distinguishable on the ground Congress gave the federal Food and Drug Administration a unique role in determining the scope of preemption under the MDA [determining when state medical device regulations should be exempted from preemption]. . . . Congress did not give EPA an analogous role in implementing FIFRA." *Id.* at 44 (citing *Kuiper v. American Cyanamid Co.*, 960 F. Supp. 1378, 1384 (E.D. Wis. 1997), *aff'd*, 131 F.3d 656 (7th Cir. 1997) ("FIFRA does not have a corresponding federal regulation which limits its preemptive effect. . . . Such a regulation, along with the MDA's particular statutory language, was critical to the Court's opinion in *Medtronic*."). Indeed, § 136v(b) contains no exceptions or exemptions, and Congress gave EPA no role whatsoever in implementing or interpreting it.

Preemption of Failure-To-Warn Claims Involving Crop Damage. The government argued in the alternative that even if FIFRA preempts some failure-to-warn claims, they do not include failure-to-warn claims based on an agricultural pesticide's alleged lack of "efficacy" (i.e., effectiveness in controlling insects, weeds, or other pests). The government (and plaintiffs' other *amici*) pointed to an EPA guidance document, Pesticide Regulation ("PR") Notice 96-4, which asserts that as a result of the so-called efficacy data waiver, "EPA does not concern itself with questions of efficacy in the initial pesticide registration and label approval process." *Etcheverry*, 93 Cal. Rptr. 2d at 45-46. According to the government, "the courts that have reached the conclusion that FIFRA preempts state failure-to-warn claims have done so under the mistaken impression that FIFRA regulates all aspects of pesticide labeling." *Id.* at 44-45.[6]

The *Etcheverry* majority took the government to task for asserting this erroneous position: "Even though the question presented in this case has been addressed by nine of the federal circuit courts of appeals, the United States failed to file amicus curiae briefs in any of the cases and permitted those courts to proceed upon a fundamental assumption that it now characterizes as mistaken." *Id.* at 44. The court explained that the efficacy data waiver and PR Notice 96-4 are "beside the point" since "[p]hytotoxicity is not a matter of efficacy, and it is phytotoxicity of which plaintiffs complain." *Id.* at 46.[7] Further,

> even assuming arguendo that phytotoxicity is included within the concept of efficacy, there remain two fundamental flaws in the argument that pesticide efficacy will go "largely, or entirely, unregulated" if state failure-to-warn claims are preempted: (1) Although the EPA has waived the submission of efficacy data for agricultural pesticides at the time of their *initial* registration, the agency does require and review such data if efficacy-related problems develop later; and (2) California has a comprehensive registration and regulatory program for pesticides, and while the California Department of Pesticide Regulation may not impose its own requirements for labeling, it can restrict or prohibit the sale or use of products that it determines are inefficacious or phytotoxic.

Id. at 46; *see id.* 46-47 (discussing these points in detail). The majority opinion finds that although "FIFRA clearly does contemplate a state/federal partnership in the regulation of pesticide efficacy and phytotoxicity . . . *[t]his does not mean, however, that the regulation may be accomplished through the back door by means of tort suits that effectively require changes in EPA-approved labeling.*" *Id.* at 47 (emphasis added). Thus, the court concluded that "having lay juries assess questions of phytotoxicity in the context of failure-to-warn claims is *neither necessary nor desirable*, and holding that such actions are preempted by FIFRA *promotes federalism, rather than undermines it.*" *Id.* (emphasis added).[8]

"This nationally influential court decisively repudiated the government's misguided attempt to turn the tide on FIFRA preemption."

The Etcheverrys' Claims. Having disposed of the court of appeal opinion and the government's (and plaintiffs') arguments, the California Supreme Court held that "FIFRA preempts state law claims for failure to warn of the risks of using a pesticide." *Id.* Although "courts have rejected preemption challenges with regard to a wide variety of claims where *they did not implicate requirements for labeling or packaging* different from those required by FIFRA," the court explained that "[w]hen 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*." *Id.* at 48 (emphasis added).

The majority opinion does not directly address the question of whether the Etcheverrys' *particular* causes

[6] The "efficacy data waiver" is somewhat of a misnomer. Although EPA has waived automatic submission of efficacy data at the time of initial registration of an agricultural pesticide, EPA regulations require the registrant to generate efficacy data and have them available for submission at EPA's request should questions about efficacy arise after a registration is granted. *See* 40 C.F.R. § 158.640(b)(1).

[7] The Etcheverrys alleged that the tank mix of the two pesticides was phytotoxic to their walnut crop. The court explained that EPA's testing guidelines draw a clear distinction between phytotoxicity (the toxic effect of a pesticide on a plant) and efficacy (the effectiveness of a pesticide in controlling a target pest). *See Etcheverry*, 93 Cal. Rptr. 2d at 45. In an effort to bootstrap its efficacy data waiver argument into *Etcheverry*, the government conveniently "redefined" efficacy to include phytotoxicity for purposes of its *amicus* brief.

[8] It also should be emphasized that § 136v(b) of FIFRA preempts state labeling requirements that either are "*in addition to*" or "different from" federal requirements. As a result, even if there were gaps in EPA's regulation of labeling, § 136v(b) would preempt states from filling them, either through state statutes or regulations, or through damages awards in tort suits.

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of action are preempted. Although the trial court held that all of the plaintiffs' claims are failure-to-warn or inadequate labeling claims, and thus, preempted, the court of appeal limited its analysis to holding that FIFRA does not preempt failure-to-warn claims. *See id.* at 49. As a result, the state supreme court remanded the case for further proceedings consistent with its opinion that failure-to-warn claims are indeed preempted. *Id.*

"For the guidance of the Court of Appeal on remand," the majority opinion rejects another of the government's fall back arguments—that claims based on so-called "off-label" statements (e.g., oral or advertising statements) are not preempted. The court explained that such statements are preempted if they "merely repeat information in the label itself." *Id.* (quoting *Kuiper v. American Cyanamid Co.*, 131 F.3d 656, 662 (7th Cir. 1997)).[9]

Concurring and Dissenting Opinion

In her separate concurring and dissenting opinion, Justice Kennard "agree[d] with the majority in rejecting a distinction between state regulation by statute or regulation and state regulation by tort liability." *Etcheverry*, 93 Cal. Rptr. 2d at 50-51 (Kennard, J., concurring and dissenting). She indicated that "[t]ort liability, imposed by a suit at common law, is an indirect but powerful method of regulating the contents of pesticide labels." *Id.* at 50. Thus, she "reject[ed] the dissent's conclusion that [FIFRA] preempts *no* state law tort actions asserting failure-to-warn claims predicated upon inadequacies in pesticide labels." *Id.* Justice Kennard asserted, however, that "preemption exists only if the EPA, presented with evidence of the crop damage, has not required, and would not require, any label correction." *Id.* In her view, a manufacturer confronted with a failure-to-warn claim involving crop damage allegedly due to a tank mix, would have "to establish FIFRA preemption through evidence that the EPA, after full consideration of information relevant to the allegation that combined use of its products causes crop damage, has determined that no change in the products' labels is required." *Id.* at 51.

"Although [the] dissenting opinion may seem to make sense at first reading, a deeper analysis reveals that it is seriously flawed."

The majority opinion responds by explaining that this theory "sets up a 'Catch-22' by imposing a burden defendants cannot reasonably be expected to carry." *Id.* at 49 n.3. "EPA would be unlikely ever to make [the] determination" that Justice Kennard posits. *Id.* The majority indicated this is because if there were only few crop damage reports, or if failure-to-warn suits claiming such damage were allowed but unsuccessful, EPA "would have no reason to expend the resources required to reassess the adequacy of a label." *Id.* On the other hand, if there were many reports of successful failure-to-warn suits, EPA "would hardly be likely to affirm the label." *Id.* Further, even if EPA were to reassess and reaffirm a product's label, under Justice Kennard's theory preemption would depend on whether a particular failure-to-warn suit were brought before or after EPA's determination is made. Thus, the majority found that "the rule proposed [by Justice Kennard] would be as *destructive* to the ideal of reaching like results in like cases as it would be to *Congress's goal of ensuring uniformity in pesticide labeling by preempting state failure-to-warn claims.*" *Id.* (emphasis added).

Dissenting Opinion

Justice Werdegar's dissent, joined by Justice Mosk (the court's most liberal as well as senior member), can be summarized as follows:

(a) "[P]roper appreciation of the states as independent sovereigns in our federal system demands that we presume Congress did *not* intend to displace the historic police powers of the states unless such intent is both 'clear and manifest.' " *Etcheverry*, 93 Cal. Rptr. 2d at 52 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (emphasis added) (Werdegar, J., dissenting). This case involves an express preemption provision, § 136v(b) of FIFRA, whose meaning "[a]t best . . . is ambiguous." *Id.* at 54. "Any attempt to infer Congress's intent" to preempt common law claims from "its statutory silence" on the subject is "improper." *Id.* at 55. A "requirement" for labeling "most certainly includes all positive enactments of law, but it could also include common law claims for damages, the success of which could have the indirect effect of encouraging manufacturers to alter their labeling . . . [t]he pertinent inquiry is whether the words of section 136v(b) *clearly* embrace the latter, broader interpretation." *Id.* at 54 (emphasis added). "Although *Cipollone* . . . suggested the word 'requirement' be given a broad interpretation in the preemption context, the high court's later decision in *Medtronic* . . . revealed that such an interpretation is too simplistic." *Id.* at 60.

(b) In § 136v(a) "Congress has affirmatively and specifically *preserved* the power of the states to regulate pesticides." *Id.* at 55 (citing *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613 (1991)) (emphasis added). As a result, to "view FIFRA as an overarching federal regulatory scheme intended to supplant all or even most state regulation is inaccurate." *Id.* "Reading FIFRA's preemption clause in conjunction with section 136v(a) reveals Congress's intent that the scope of FIFRA's preemption of state law should be limited in nature." *Id.* The majority "fail[ed] to appreciate the significance of section 136v(a) as a critical indicator of Congress's intent." *Id.*

(c) Further, "[t]he majority's interpretation . . . leads to this conundrum: A state may *directly* regulate pesticides pursuant to section 136v(a)—even to the point of banning their use—through statutes or administrative regulations (so long as the state does not require labeling inconsistent with what the EPA has approved), *even if such regulation has the indirect effect of encouraging*

[9] In *Kuiper*, a crop damage case alleging phytotoxicity, the Seventh Circuit noted that while some federal courts of appeals have held that FIFRA preempts any claim based on an off-label statement that does not "substantially differ" from the label, others "go farther." *See Kuiper*, 131 F.3d at 663. The *Etcheverry* majority indicated that "[w]here off-label statements address matters outside the scope of the label, an action may well lie." *Etcheverry*, 93 Cal. Rptr. 2d at 49.

manufacturers to alter their labels, but a state may not *indirectly* regulate pesticides by permitting tort suits at common law for damages, *for the very same reason that such regulation has the indirect effect of encouraging manufacturers to alter their labels.*" *Id.* at 57 (emphasis added). Moreover, "it must be assumed, in the absence of a clear expression of congressional intent, that Congress intended to tolerate the tension between section 136v(b)'s grant of exclusive power to the EPA over pesticide labeling and the availability of state tort remedies that could have an indirect effect on the content of such labels." *Id.* at 59. "There being no clear and manifest expression of Congress' intent in FIFRA to preempt state tort law . . . and it appearing implausible Congress intended to remove the remedies that historically have been available to compensate people for injuries caused by unreasonably dangerous commercial products . . . the majority's expansive view of FIFRA's preemptive effect is erroneous." *Id.* at 60.

Although this dissenting opinion may seem to make sense at first reading, a deeper analysis reveals that it is seriously flawed:

1. The dissenting opinion's emphasis on the "presumption against preemption" of the "historic police powers of the states" in the absence of "clear and manifest" congressional intent is unwarranted for at least two reasons.

First, as the majority opinion explains, § 136v(b) is "virtually indistinguishable" from the 1969 federal Cigarette Act preemption provision, whose express prohibition against state-imposed "requirement[s]" the U.S. Supreme Court held in *Cipollone* "easily encompass[es] obligations that take the form of common-law rules." *Etcheverry*, 93 Cal. Rptr. 2d at 40, 41 (quoting *Cipollone*, 505 U.S. at 521; *King v. E.I. du Pont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir. 1993)). Moreover, as discussed above, a majority of Justices in *Medtronic* expressly reaffirmed *Cipollone*'s holding. The dissent confuses the (i) question of whether a statutory prohibition against states imposing requirements encompasses requirements imposed through state tort claims—a question which the U.S. Supreme Court has repeatedly answered in the affirmative—with (ii) the question of what particular types of state tort claims are preempted—a question whose answer the U.S. Supreme Court has indicated depends on the scope of a statute's particular preemption provision (e.g., in the case of § 136v(b), only tort claims which would have the effect of imposing requirements for "labeling or packaging" that are "in addition to or different from" EPA's requirements are preempted). *See generally Medtronic*, 518 U.S. at 503 (Bryer, J., concurring in part and concurring in the judgment) (drawing a distinction between the question of whether the MDA "ever pre-empt a state-law tort action," and if so, the question of whether "the MDA preempt the particular state-law tort claims at issue").

Second, the subject matter of § 136v(b)—regulation of pesticide labeling (and packaging)—does *not* fall within the historic police powers of the states. Instead, pesticide labeling long has been comprehensively (and at least since 1972, exclusively) regulated by the Federal government. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. at 613, 615 (explaining that "FIFRA's historic focus [is] on labeling" and that "labeling [is] an area that FIFRA's 'program' pre-empts"). As a result, any presumption against preemption applicable to the states' historic police powers simply does not apply. Indeed, in a case decided a few days after *Etcheverry*, the U.S. Supreme Court confirmed that "[a]n 'assumption' of nonpre-emption is *not* triggered when the State regulates in an area where there has been a *history of significant federal presence.*" *United States v. Locke*, 120 S. Ct. 1135, 1147 (Mar. 2000) (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)) (" 'assumption' is triggered where 'the field which Congress is said to have pre-empted has been *traditionally occupied by the States*' ") (emphasis added).

2. The dissenting opinion incorrectly assumes that § 136v(a) is a "critical indicator" of the congressional intent underlying § 136v(b). To the contrary, *Wisconsin Pub. Intervenor v. Mortier* makes it clear that § 136v(a) serves a very limited function necessitated by enactment of § 136v(b). In *Mortier*, the U.S. Supreme Court held that FIFRA neither expressly nor impliedly preempts local governments from regulating pesticide *sales or use*. As to implied preemption, the Court found that because FIFRA "does not occupy the field of pesticide regulation in general . . . [t]he *specific* grant of authority in § 136v(a) consequently does not serve to hand back to the States powers that the statute had impliedly usurped." *Mortier*, 501 U.S. at 614 (emphasis added).

"The dissent confuses the question of whether a statutory prohibition against states imposing requirements encompasses requirements imposed through state tort claims . . . with the question of what particular types of state tort claims are preempted."

Thus, contrary to the dissenting opinion, § 136v(a) is not some sort of broad grant of state authority. "Rather, it acts to ensure that the States could continue to regulate *use and sales* even where, such as with regard to the banning of mislabeled products, a *narrow preemptive overlap might occur.*" *Id.* (emphasis added). In other words, the Supreme Court indicated that § 136v(a) merely confirms the states' authority to regulate pesticide *sales or use* where the sales or use regulation may peripherally touch upon the subject of labeling (e.g., banning the sale or use of misbranded products); it in no way carves out an exception from § 136v(b) that would allow states to impose additional or different requirements for the labeling itself. Section 136v(a), therefore, is not a saving clause (since it does not "save" any authority for the states to regulate labeling), and it contributes virtually nothing to the meaning of § 136v(b). As the *Etcheverry* majority opinion explains, the courts are almost unanimous in rejecting *Ferebee*'s theory that § 136v(a) somehow authorizes states to regulate labeling through the guise of regulating use by imposing tort liability for failure to warn. *See Etcheverry*, 93 Cal. Rptr. 2d at 42-43.

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3. The dissent's apparent concerns about depriving plaintiffs of all or most remedies in pesticide-related damages suits are unfounded. FIFRA preemption is an important, but narrowly focused, defense. It only pertains to state tort claims that would have the effect of imposing additional or different *labeling or packaging* requirements. Both the majority and dissenting opinions cite the case law holding that other types of claims (i.e., claims unrelated to labeling or packaging) are not preempted. *See id.* at 48-49; 56. Thus, the dissent's references to *Medtronic*'s holding that the MDA do not preempt "any and all" tort claims relating to allegedly defective medical devices are inapposite. *See Medtronic*, 518 U.S. at 486.

4. There is no basis for the dissent's attempted distinction between "direct" regulation of labeling (through state statutes and state agency regulations) and "indirect" regulation of labeling (through state tort claims) for FIFRA preemption purposes. The whole point of *Cipollone* and its progeny (including the hundreds of post-*Cipollone* FIFRA preemption cases) is that *there is no such distinction* for purposes of express preemption of state-imposed "requirements." Thus, the "conundrum" proposed by the dissent is fallacious.

"The whole point of *Cipollone* and its progeny . . . is that *there is no . . . distinction* for purposes of express preemption of state-imposed 'requirements' " between direct and indirect regulation of labeling.

5. The dissent completely fails to consider the question of whether FIFRA *impliedly* preempts failure-to-warn and other labeling claims even if, as the dissent erroneously concludes, there is no express preemption of such claims by *§ 136v(b)*. It is well settled that state law is impliedly preempted as conflicting with federal law where it " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Geier v. American Honda Motor Co.*, 120 S.Ct. at 1921 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (discussing this "frustration-of-purpose" principle of implied conflict preemption). In *Geier*, the U.S. Supreme Court reaffirmed that a statute can *impliedly* preempt common law claims even if the statute's preemption clause does not *expressly* preempt them. *See id.* at 1919 (citing *Freightliner Corp. v. Myrick*, 514 U.S. 280, 288 (1995)). The Court held in *Geier* that "no-airbag" product liability claims are impliedly preempted by the federal motor vehicle safety statute, although not encompassed by that statute's express preemption provision.

In the case of FIFRA, failure-to-warn claims are impliedly as well as expressly preempted. This is because such claims would directly conflict with FIFRA by frustrating the unequivocal congressional objective of national labeling uniformity. As the Supreme Court indicated in *Geier*, albeit in connection with a different federal statute:

> the pre-emption provision itself reflects a desire to *subject the industry to a single, uniform set of federal safety standards*. Its pre-emption of *all* state standards, even those that might stand in harmony with federal law, suggests an *intent to avoid the conflict, uncertainty, cost, and occasional risk to safety itself that too many different safety-standard cooks might otherwise create* . . . . This policy by itself favors pre-emption of state tort suits, for the *rules of law that judges and juries create or apply in such suits may themselves similarly create uncertainty and even conflict, say, when different juries in different States reach different decisions on similar facts*.

Id. 1920 (emphasis added). This same rationale is equally applicable to FIFRA and Congress' goal—reflected in the title and text of § 136v(b)—of maintaining national labeling uniformity. The *Etcheverry* majority recognized the destructive effect that failure-to-warn claims would have on national labeling uniformity, but the dissent utterly failed to do so. *See Etcheverry*, 93 Cal. Rptr. 2d at 49 n.3. [10]

Conclusion

The California Supreme Court's well-reasoned FIFRA preemption holding in *Etcheverry* should have far-reaching impact not only in California, but throughout the United States. One major reason is because this nationally influential court decisively repudiated the government's misguided attempt to turn the tide on FIFRA preemption. By upholding the congressional intent clearly manifested in § 136v(b), the court has rendered a ruling which greatly benefits not only the pesticide industry, but also farmers and the public.

[10] On April 12, 2000 the court denied two requests for modification of the *Etcheverry* decision. The first was submitted by the California Attorney General's office. Although the State of California did not participate in the case, it requested in a post-decision letter to the court, that the majority opinion be modified "to assure that the opinion is not read to find that the 'clear and reasonable warning' requirement" of California Proposition 65 is preempted by FIFRA. Letter from California Deputy Attorney General Edward G. Weil (Mar. 17, 2000). The second request was submitted by a tobacco plaintiffs' attorney who expressed concern about certain quotations in the majority opinion regarding the 1969 Cigarette Act preemption provision discussed in *Cipollone*.