Letter of the
LAW

Prop. 65, Other Issues, Hinge on Interpretation

# Federal Preemption Developments

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The Supremacy Clause of the U.S. Constitution provides that the "Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2.

This is the basis for the federal preemption doctrine under which state statutes, state regulations and even state common law are precluded by federal law under certain circumstances.

Congress's intent to preempt state law may be either express or implied. Thus a federal statute may expressly preempt state law, or preemption can occur when the federal scheme is so pervasive that it can be inferred that Congress "left no room" for state regulation, or when state law and federal law "actually conflict." The same applies to federal preemption of local law.

Although these federal preemption principles have been well established for many years, recent preemption cases have the potential for affecting the chemical industry.

Federal preemption of state and local law in the area of chemical product labeling and warnings is particularly important.

For decades CSMA has sought to maintain national uniformity of product labeling and warnings in order to avoid multiple, conflicting or inconsistent state or local requirements, which can impair the integrity and impact of federally mandated labeling and warnings, and unduly burden commerce.

## Cigarette Warnings

The most widely publicized recent federal preemption case is the Supreme Court's June 1992 decision in *Cipollone v. Liggett Group Inc.* The case involved the issue of whether the Federal Cigarette Labeling and Advertising Act preempts state law tort claims against cigarette manufacturers for cigarette-induced lung cancer.

Although the justices of the Supreme Court were split on their decision, the majority held with respect to the current version of the Cigarette Act that state law tort claims alleging that the manufacturers provided inadequate warnings about smoking's dangers are preempted.

The majority also held, however, that theories based on breach of express warranties, intentional fraud and misrepresentation or conspiracy are not preempted.

The basis for the court's ruling that failure to warn claims are preempted is the express preemption provision in the Cigarette Act, which provides 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 [Cigarette] Act."

The court held that this express preemption provision "sweeps broadly and suggests no distinction between positive enactments [state statutes and regulations] and common law." In reaching this conclusion, the court held that common law damage actions for failure to warn impose upon manufacturers the state law requirements pertaining to advertising or promotion, and therefore, fall within the law's express preemption provision.

## Pesticides

The *Cipollone* decision is important not only to the tobacco industry, but also to other industries—such as chemicals and pesticides—which are subject to federal label warning

requirements. Indeed, during the past few years there has been considerable judicial activity regarding the issue of whether the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) preempts in personal injury and other types of suits the state law tort claims based on allegations of inadequate pesticide labeling or warnings. In 1984 a federal appeals court in Washington, D.C. held in *Ferebee v. Chevron Chemical Co.* that FIFRA does not preempt such claims.

In 1991 however, the U.S. Court of Appeals for the Eleventh Circuit, rejected *Ferebee* and held in *Papas v. Upjohn Co.* that FIFRA impliedly preempts failure to warn claims. (See *Chemical Times & Trends*, October 1991.) After the *Papas* ruling, federal courts of appeals in the Fourth and Tenth Circuits have adopted the Eleventh Circuit's reasoning and upheld FIFRA preemption. Many federal and state trial courts also have adopted *Papas*, although some have not (the Arkansas Supreme Court recently ruled against FIFRA preemption in an agricultural crop damage case).

While the *Cipollone* case was being considered by the Supreme Court, a certiorari petition to the court to review the *Papas* decision was pending. A few days after deciding *Cipollone*, the Supreme Court declined to review *Papas* and instead sent the case back to the Eleventh Circuit for further consideration in light of *Cipollone*. Thus, there still is a split of authority on FIFRA preemption.

## Hazardous Substances

The same issue—whether federal labeling and warning requirements preempt common law suits for inadequate labeling or warnings, also has arisen under the Federal Hazardous Substances Act (FHSA) with respect to consumer products containing hazardous substances.

The Ohio Supreme Court is being asked to review a state court case, *Jenkins v. James B. Day & Co.*, involving a poisoning allegedly resulting from use of a paint stripper containing methylene chloride. Despite FHSA's provision which expressly preempts state labeling requirements for risks addressed by federal requirements, the lower court held that FHSA does not preempt a claim that the manufacturer failed to provide adequate warnings.

## Proposition 65

The preemptive effect of FIFRA and FHSA also is being litigated with respect to California Proposition 65, a first-of-its-kind public initiative measure conceived and promoted by environmentalist groups and approved by California voters in November 1986.

Prop. 65, enacted as the California Safe Drinking Water and Toxic Enforcement Act, establishes its own point-of-sale warning requirements for pesticides and other consumer products containing hazardous substances which California officials believe cause cancer or reproductive toxicity.

The Prop. 65 warnings that product manufacturers must ensure are provided to consumers are inflexible in content and often conflict or are inconsistent with label warnings required under FIFRA or FHSA.

In 1990 CSMA sued the State of California in federal district court, arguing that FIFRA and FHSA preempt Prop. 65 warning requirements.

CSMA contends that the point-of-sale signs are a form of product labeling, and thus, preempted by FIFRA and FHSA, both of which expressly prohibit state requirements for labeling. Alternatively, CSMA contends that even if the signs are not labeling within the meaning of FIFRA and FHSA, they are preempted because they conflict with and undermine the federal regulatory scheme for labeling and warnings.

The district court, and then the U.S. Court of Appeals for the Ninth Circuit, rejected CSMA's preemption arguments. Because of the importance of this issue and its impact on industry, CSMA has filed a petition for a writ of certiorari requesting the Supreme Court to review the case.

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## Local Regulation

One additional federal preemption issue pertains to local regulation of pesticides. In June 1991 the Supreme Court held in *Wisconsin Public Intervenor v. Mortier* that FIFRA does not preempt local governments from regulating sale or use of pesticides.

Under this ruling, local governments such as counties, cities and towns can regulate pesticides unless Congress amends FIFRA to expressly preempt local regulation, or unless a state enacts legislation to preempt its political subdivisions from regulation pesticides. For example, in the absence of preemption, a local government could ban or restrict manufacture, sale or use of a pesticide which has been registered by EPA under FIFRA and also by the state's pesticide agency.

Shortly after this ruling, CSMA and dozens of other industry groups formed the Coalition for Sensible Pesticide Policy (CSPP) for the purpose of lobbying Congress and state legislatures for preemption of local government regulation of pesticides.

The industry effort has been successful. In addition to ensuring that proposed amendments to FIFRA contain express preemption language, at least 11 states have passed preemption legislation since the Supreme Court ruling.