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CASENEOTE
SUING PESTICIDE MANUFACTURERS?: FEDERAL PREEMPTION STILL PREVAILS IN THE EIGHTH CIRCUIT

Netland v. Hess & Clark, Inc.¹

I. INTRODUCTION

Pesticides and other similar chemical products serve important and diverse functions in the lives of many Missourians. Agricultural endeavors require the use of pesticides to combat weeds, homemakers use insecticides and rodenticides to rid their abodes of household pests, and pool attendants make use of pesticide-type chemicals for swimming-pool maintenance. While pesticides are extremely functional, they are also highly toxic. Pesticide users expose themselves to various health dangers, especially if they fail to read and understand the product label, or if the label does not adequately warn of the product's potential health risks. In an attempt to manage the precarious tension between pesticide function and danger, the federal government began regulating pesticides through the Environmental Protection Agency. This regulation includes a requirement for EPA approval of all pesticide labels.

This casenote explores the reality that many plaintiffs are precluded from suing pesticide manufacturers for injuries resulting from inadequate product labels; it simultaneously provides legal and policy arguments in favor of diverging from this reality. The Eighth Circuit recently decided a case involving an injured young man, and found that he could not successfully bring suit against the pesticide manufacturer due to federal preemption of his claim.

II. FACTS AND HOLDING

Kim Netland brought state common law tort and breach of contract claims against a pesticide manufacturer for injuries he allegedly suffered after using the defendant’s product.² Netland was in between his junior and senior years of high school in the summer of 1994, when the events giving rise to this lawsuit took place.³ Hess & Clark, Inc. ("Hess") was the manufacturer of the pesticide KenAg Bovinol ("Bovinol"), which Netland used to combat the flies on his family’s three horses.⁴ In fact, Netland’s mother had purchased the Bovinol from a feed store in June 1994 with the hope that it would protect her son from the erratic behavior of their horses due to flies.⁵ The feed store sales clerk said the pesticide would work for horse flies.⁶ Mrs. Netland read the warning on the Bovinol, used gloves to pour the pesticide into a spray bottle, and then gave it to her son.⁷ From then on, Netland sprayed his horses with the pesticide three to four times a week for six weeks.⁸ Before riding the horses, Netland would spray each horse with eight to ten squirts of Bovinol,

¹ Netland v. Hess & Clark, Inc., 284 F.3d 895 (8th Cir. 2002).
² Id. at 896.
³ Id.
⁴ Id.
⁵ Id.
⁶ Id. at 897.
⁷ Id.
⁸ Id.
mounting the horse within a minute after spraying it. Netland himself did not read the Bovinol label, nor did he wear any protective clothing or equipment when using the pesticide.

After starting high school football practice in mid-August 1994, Netland began to experience bruising and fatigue. Then, on September 28, 1994, Netland collapsed en route to school and was taken to his family doctor, Dr. Thabes. Dr. Thabes transferred Netland to a hematologist in Fargo, North Dakota, after realizing that Netland was suffering from a severe blood problem. In Fargo, Netland was diagnosed with acquired aplastic anemia. For the next year Netland was treated with large doses of steroids and received approximately thirty-five blood transfusions. One of Netland’s hips failed and was replaced with a prosthesis as a result of this treatment. As of the time of the instant decision Netland’s other hip remained at risk.

Bovinol was an insecticide registered with the Environmental Protection Agency (“EPA”) as mandated under FIFRA, and had an EPA-approved label. The active ingredient in Bovinol, dichlorvos (“DDVP”), was an organophosphate, which can be absorbed into the human body by inhalation, ingestion, and skin absorption. The Bovinol label listed approved and lawful uses including, use on cattle, in animal buildings (horse barns, dairy barns, milk sheds, and shelter sheds), in poultry houses, dog kennels, and outdoor uses (picnic grounds, loading docks, parking areas, refuse areas, outdoor latrines, around open-air drive ins, outdoor ice cream stands, and garbage collection and disposal areas). The label did not explicitly state that the pesticide could be used on horses. In addition to the list of approved uses, the label also contained a warning and precautionary instructions.

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9 Id.
10 Id.
11 Id.
12 Id.
13 Id.
14 Id. Aplastic anemia is characterized by malfunction of the bone marrow in that all types of blood cells fail to properly form. Id. at n. 2.
15 Id. at 897.
16 Id.
17 Id.
19 Id. at 897.
20 Id.
21 Id.
22 Id.
23 Id. The label stated: “PRECAUTIONARY STATEMENTS: HAZARDOUS TO HUMANS AND DOMESTIC ANIMALS; WARNING: May be fatal if swallowed, inhaled or absorbed through the skin or eyes. Rapidly absorbed through skin and eyes. Do not get into eyes, on skin or on clothing. Do not breathe vapor or spray mist. Wash thoroughly with soap and water after handling and before eating or smoking. Do not contaminate feed, water, foodstuffs, milk or milking utensils. Wear clean natural rubber gloves, protective clothing, and goggles, faceshield or equivalent. Wear a pesticide respirator jointly approved by the Mining Enforcement and Safety Administration (MESA) and the National Institute for Occupational Safety and Health (NIOSH) under the provisions of 30 CFR Part 11. Wear impervious footwear or protective covers as shoes, boots and other articles made of leather or similar porous materials may be dangerously contaminated.” Id.
Netland filed a complaint against Hess on July 1, 1999 alleging three counts: (1) strict liability in that Bovinol was defectively designed and unreasonably dangerous; (2) failure to warn users of Bovinol’s inherently dangerous characteristics; and (3) “negligence and breach of warranty in that Hess failed to use reasonable care in the design, manufacture, and sale of Bovinol.” Hess moved for summary judgment on January 19, 2001, claiming federal preemption under FIFRA and that Netland failed to show admissible proof of causation. Hess further moved to exclude the opinion testimony of many of Netland’s expert witnesses. The district court granted Hess’s summary judgment motion, finding that each of Netland’s counts was essentially a challenge to Bovinol’s EPA-approved label, and accordingly preempted by FIFRA. The court never reached Hess’s causation issue or the admissibility of the expert witness testimony. 

Netland appealed to the United States Court of Appeals, arguing that the district court erred in granting summary judgment in favor of Hess. The Court of Appeals affirmed the decision of the district court. It declined Netland’s request to revisit its previous decisions, which held that state law failure to warn claims are preempted by FIFRA. The Court of Appeals further held that the breach of warranty claim was preempted by FIFRA. In terms of the negligence and strict liability claims, the Court of Appeals held that those claims were also preempted by FIFRA because essentially they represented “impermissible challenges” to Bovinol’s label.

III. LEGAL BACKGROUND

A. The Purpose and Creation of FIFRA

Congress enacted FIFRA in 1947 to replace the Insecticide Act of 1910, whose primary purpose was to protect consumers from deception. FIFRA’s purpose changed over the years as the focus of concerns changed from individual consumers to the environment. The 1940s saw a dramatic increase in pesticide production, spawning many non-uniform and complex state statutes and regulations. FIFRA aimed to regulate pesticides more uniformly. The 1947 Act promoted two main goals: (1) disclosure to pesticide users by establishing product labeling requirements; and (2) mandated registration with the United States Department of Agriculture (“USDA”) for all

24 Id. at 897-98.
25 Id. at 898.
26 Id.
27 The United States District Court for the District of Minnesota.
28 Netland, 284 F.3d at 898.
29 Id.
30 Id.
31 Id.
32 Id. at 899.
33 Id.
34 Id. at 900.
36 Id.
37 Id. at 128.
38 Id.
pesticides sold or distributed in interstate or foreign commerce.\textsuperscript{39} FIFRA has undergone many changes and amendments between its 1947 inception and the present time.\textsuperscript{40}

Today FIFRA regulates pesticide manufacturing, sale, use, and labeling.\textsuperscript{41} All pesticides must have an EPA-approved label that describes the active ingredients, potential hazards, and proper use of the pesticide.\textsuperscript{42} The requirements for warning statements are fairly detailed, but their specificity\textsuperscript{43} may actually "benefit manufacturers by serving as a defense against allegations that a warning was inadequate."\textsuperscript{44}

\textbf{B. Federal Preemption under FIFRA}

Authority for the federal preemption doctrine comes from the Supremacy Clause of the United States Constitution.\textsuperscript{45} The United States Supreme Court has held, however, that a finding of preemption is only proper when Congress' intent to supersede state law is "clear and manifest."\textsuperscript{46} Such intent may be explicit in the language of the statute, or implicit in the statute's structure and purpose.\textsuperscript{47} Implicit preemption occurs when the state’s law conflicts directly with federal law, or when the federal law "thoroughly occupies a legislative field," creating a reasonable inference that Congress left no room for state regulation in the particular area.\textsuperscript{48}

The majority of federal preemption litigation involving FIFRA has focused on the labeling and packaging requirements regulated by the EPA, and § 136v(b)\textsuperscript{49} of the statute.\textsuperscript{50} In a typical case, for example, the plaintiffs will claim that a pesticide injured them, and that the EPA-approved label\textsuperscript{51}.

\textsuperscript{40}In 1964 Congress amended the FIFRA to give the Secretary of the USDA more authority. In 1970, when the EPA was created, it took over the USDA’s Pesticide Division. Then in 1972 Congress passed the Federal Environmental Pesticide Control Act, which directed the EPA to register pesticides that caused "unreasonable adverse effects to the environment." Further amendments occurred in 1975, in 1978 with the enactment of the Federal Pesticide Act, in 1988, 1990, and 1991. \textit{Id.} at 6-8. \textit{See also}, Feeley, \textit{supra} n. 35, at 128.
\textsuperscript{41}Fisher, \textit{supra} n. 39, at 5.
\textsuperscript{42}\textit{Id.}
\textsuperscript{43}The regulations require specific warnings for \textit{inter alia}, hazards to humans, environmental hazards, hazards to domestic animals, and other hazards such as flammability. \textit{Id.} at 15.
\textsuperscript{44}\textit{Id.}
\textsuperscript{45}\textit{Netland v. Hess \\& Clark}, 140 F. Supp. 2d 1011, 1015 (D. Minn. 2001). \textit{See} U.S. Const. art. VI, cl. 2. ("This Constitution, and the Laws of the United States... shall be the supreme Law of the Land; and the Judges in every state shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.")
\textsuperscript{47}\textit{Id.}
\textsuperscript{48}\textit{Id.}
\textsuperscript{49}§ 136v(b) is known as the FIFRA's preemption clause, and declares: a "State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter." \textit{Netland}, 140 F. Supp. 2d at 1016 (quoting 7 U.S.C. § 136 v(b)).
\textsuperscript{50}Feeley, \textit{supra} n. 35, at 131.
\textsuperscript{51}The EPA may not register a pesticide or approve its label unless it finds the product and labeling satisfactorily protect human safety when the pesticide is used according to the approved directions for use on the label. \textit{Netland}, 140 F. Supp. 2d at 1016. Specifically, the EPA must find that the product "will perform its intended function without unreasonable adverse effects on the environment" and "when used in accordance
was inadequate, such that the inadequacy caused their injuries, and that they deserve relief from state
tort law under a failure to warn theory. Over the years, courts have reached different decisions on
the issue of FIFRA preemption of state tort law damage claims. Courts have held that either
FIFRA expressly preempts state law, implicitly preempts state law, or that it does not preempt
state law at all.

C. The Evolution of FIFRA's Preemptive Effect – U.S. Supreme Court Caselaw

The lack of consistency both in federal and state courts in terms of federal preemption on
state common law tort cases under FIFRA is due to the fact that the United States Supreme Court has
never addressed preemption of state tort claims with respect to FIFRA specifically. The Court,
however, has decided other preemption cases. Cipollone v. Liggett Group, Inc., decided in 1992, has
been the most quoted case in terms of FIFRA preemption by both state and federal courts.
Cipollone held in favor of federal preemption for common law failure to warn cases. A more
recent U.S. Supreme Court case, Medtronic v. Lohr, held against preemption. So far, both state
and federal courts have followed Medtronic less than Cipollone for federal preemption of state tort
claims issues, but fewer courts have examined its effect on FIFRA. In fact, the courts remain
confused over the effect of the Medtronic decision on FIFRA preemption. However, Medtronic
has the potential to alter FIFRA litigation significantly.

In Cipollone, the son of Rose Cipollone brought an action against the respondents, claiming
that they were responsible for her death. Specifically, the petitioner’s claims consisted of breach of
express warranty, failure to warn, fraudulent misrepresentation, and conspiracy to defraud.
Respondents contended, inter alia, that the Federal Cigarette Labeling and Advertising Act of 1965,
and its successor, the Public Health Cigarette Smoking Act of 1969, protected them from liability
based on preemption for any conduct post 1965. The Federal District Court of New Jersey held in

with widespread and commonly recognized practice, it will not generally cause unreasonable adverse effects
on the environment.” 7 U.S.C. §136a(c)(5). “Environment” includes “water, air, land, and all plants and man

52 Feeley, supra n. 35, at 131.
53 Id. at 132. See also, Mark C. Coulter, Student Author, The Impact of Cipollone and Federal Preemption
on State Common-Law Tort Actions in Missouri’s State and Federal Courts, 64 UMKC L. Rev. 357, 367
54 Some courts have found implicit preemption through an “occupation of the field” analysis; others have
found implicit preemption based on a conflict of law analysis. Id. at 367.
55 Feeley, supra n. 35 at 132.
56 Id. at 126.
57 Id.
58 Id.
60 Feeley, supra n. 35 at 126.
61 Id.
62 Id. at 137.
63 Rose Cipollone died of lung cancer in 1984. She had smoked for forty-two years. Cipollone, 505 U.S. at
508.
64 Id.
65 Id.
66 Id. at 510.
a pretrial ruling that the federal statutes were intended to establish a uniform warning that would protect cigarette manufacturers from the varying state requirements, but that the statutes did not preempt common law actions.67 The trial court explained that "the existence of the present federally mandated warning does not prevent an individual from claiming that the risks of smoking are greater than the warning indicates."68 The Third Circuit reversed the ruling on an interlocutory appeal, holding that while the statute did not expressly preempt common-law actions, such actions would conflict with federal law.69

After further procedural history,70 the U.S. Supreme Court granted certiorari to consider the preemption issue.71 The Court reasoned that because Congress addressed federal preemption in both the 1965 and 1969 statutes themselves, the courts only needed to "identify the domain expressly preempted by each of those sections" (referring to § 5 of each Act).72 As to the 1965 Act, the Court held that § 5 only preempted other rulemaking bodies, including the states, from mandating particular warning statements, but did not preempt state common law damages actions.73 The Court read the 1969 Act’s preemption provision as much broader than its predecessor.74 It held that the petitioner’s claims were preempted to the extent that “the legal duty that is the predicate of the common-law damages action constitutes a ‘requirement’ or ‘prohibition’ based on smoking and health” and imposed under State law in terms of advertising or promotion.75 Ultimately, the Court held that the 1969 Act preempted the petitioner’s claim based on failure to warn to the extent that it relied on inclusions or omissions in the respondents’ advertising or promotions. However, the Court held that the petitioner’s claims based on express warranty, intentional fraud and misrepresentation, and conspiracy were not preempted because the “predicate duty” underlying each of these claims did not impose “requirements” or “prohibitions” “based on smoking and health.”76

In Medronic v. Lohr, cross-petitioner Lora Lohr filed a petition in Florida state court alleging negligent manufacturing defect and failure to warn claims, as well as a strict liability design defect claim, after the pacemaker she had implanted three years prior failed.77 According to Lohr’s doctor, a defect in the pacemaker’s lead was the probable cause of failure.78 Such devices are regulated by the Medical Device Amendments of 1976 (“MDA”), which also contains a preemption clause.79 The preemption section provided in pertinent part that “... 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

67 Id.
68 Id. (quoting Cipollone v. Liggett Group, Inc., 593 F. Supp. 1146, 1148 (D. N.J. 1984)).
69 Cipollone, 505 U.S. at 511.
70 The U.S. Supreme Court originally denied certiorari, the case returned to the trial court, several rulings were made, followed by a 4-month trial and a jury award only on the breach of express warranty claim. Post-judgment cross appeals took place as well. Id. at 512.
71 Id.
72 Id. at 517.
73 Id at 519.
74 It barred “requirement[s] or prohibition[s] . . . imposed under State law . . . with respect to the advertising or promotion” of cigarettes. Id. at 520.
75 Id. at 523-524.
76 See id. at 531.
77 518 U.S. at 481.
78 Id.
79 Id.
this chapter to the device. . ."80 Medtronic removed the case to federal district court and filed a motion for summary judgment arguing that the claims were preempted by MDA’s § 360k.81 The trial court first denied the motion, but after considering a relevant Eleventh Circuit opinion,82 reversed its earlier decision and dismissed Lohr’s complaint in its entirety.83 The Court of Appeals held that the negligent defective design claim was not preempted, but that the negligent manufacturing and failure to warn claims were preempted.84 In terms of the strict liability claims, the Court of Appeals held they were not preempted insofar as a dangerous design was alleged.85

Both Lohr and Medtronic sought certiorari, and the U.S. Supreme Court granted both petitions.86 Medtronic argued that all common law causes of action are “requirements” which impose duties in violation of § 360k.87 The Court rejected the argument as implausible, stating that it was “difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct.”88 The Court also relied on MDA’s process of reviewing medical devices in reaching its decision.89 The review process allowed for two exceptions – one for devices on the market prior to the statute’s enactment, and one for products “substantially equivalent” to devices already on the market.90

The Court then compared and contrasted § 360k with the preemptive clause in Cipollone. It found that the Cipollone clause preempted a limited set of “requirements” related to smoking and health and involving advertising or promotion of cigarettes labeled in accordance with the federal statute, while § 360k mentioned “requirements” more often in the text.91 The Court explained that “in each instance, the word is linked with language suggesting that its focus is device-specific enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries.”92 Ultimately, the Court held that none of Lohr’s claims based on defective manufacturing or labeling were preempted by the MDA.93 It reasoned that the predicate legal duties underlying Lohr’s claims were general obligations rather than requirements “with respect to” specific devices like pacemakers.94 The dissenters in Medtronic disagreed with the majority’s interpretation of “requirement” in terms of the failure to warn claim.95 They focused on

80 Id. (quoting 21 U.S.C. § 360k(a) (2000)). The statute further prohibits any State imposed requirement “(2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.” 21 U.S.C. § 360k(a)(2).
81 Medtronic, 518 U.S. at 481.
83 Medtronic, 518 U.S. at 482-483.
84 Id. at 483.
85 Id. at 484.
86 Id.
87 Id. at 486.
88 Id. at 487 (quoting Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 251 (1984)).
89 Id. at 477.
90 Id. at 478. Devices falling into these exceptions do not have to go through a “premarket approval” process. The pacemaker lead implanted in Lohr fell into the “substantially equivalent” exception. Id. at 480.
91 Id. at 489-90.
92 Id. at 489.
93 Id. at 502.
94 Id. at 501-02.
95 Id. at 510.
the rationale of the *Cipollone* decision, reiterating that state common law damages actions do impose “requirements,” such that the federal statute should preempt them.96

D. The Evolution of FIFRA’s Preemptive Effect – Missouri and Eighth Circuit Caselaw

Before the Supreme Court’s decision in *Cipollone*, most Missouri common law tort claims involving FIFRA were filed in the federal district court system via diversity jurisdiction.97 In *Fisher v. Chevron Chemical Co.*,98 the court held that Missouri failure to warn claims conflicted with the purposes of FIFRA and were therefore impliedly preempted.99 In *Hurt v. Dow Chemical Co.*,100 the judge reached the same result in terms of the plaintiff’s failure to warn claims, but did not preempt her other claims based on the sale or application of the defendant’s chemical.101 In contrast to these decisions, however, the *Riden v. IC1 Americas, Inc.*102 Court held that FIFRA does not preempt Missouri state failure to warn claims.103 Judge Whipple reasoned that § 136v(b) did not create absolute uniformity in terms of pesticide labels; the purpose of the labeling requirements was not to discourage manufacturers from revising their labels when other, newer information, suggested further warnings were needed.104

After *Cipollone* but before *Medtronic*, one case involving FIFRA preemption of state common law claims was filed in state court, and one case was filed in the United States District Court for the Western District of Missouri. In *Yowell v. Chevron Chemical Co.*,105 a plaintiff brought a wrongful death action for the death of her husband allegedly resulting from his use of pesticides manufactured by the defendant.106 The Missouri Court of Appeals in the Southern District held that state tort actions based on labeling and claiming failure to warn were preempted as a matter of law.107 However, the court’s opinion did not mention *Cipollone* at all.108 It instead cited an earlier U.S. Supreme Court case,109 and relied significantly on Tenth and Eleventh Circuit cases as the basis for its implied preemption analysis.110 The *Yowell* Court held that both types of implied preemption applied, in that Congress intended to “occupy the field” of pesticide labeling, and a direct conflict between state and federal law would result should plaintiff proceed with a failure to

96 *Id.*
97 Coulter, *supra* n. 53, at 368.
99 Coulter, *supra* n. 53, at 368.
101 Coulter, *supra* n. 53, at 369.
103 Coulter, *supra* n. 53, at 370.
104 *Id.*
105 836 S.W.2d 62 (Mo. App. 1992)
106 Coulter, *supra* n. 53, at 374.
107 *Id.*
108 *Id.*
109 *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597 (1991). In this case, the plaintiff-property owner brought a declaratory judgment action, claiming that the town’s ordinance regulating the use of pesticides was preempted by state and federal law. The Court held that the FIFRA did not preempt the town’s regulation of the use of pesticides (referring to § 136v(a)), but suggested that it might expressly preempt state common law claims based on labeling requirements in § 136v(b). Coulter, *supra* n. 53, at 361.
110 *Id.* at 374.
warn claim.\textsuperscript{111} This reasoning contrasted significantly with \textit{Cipollone}, which relied exclusively on an express preemption analysis.\textsuperscript{112}

In \textit{Eppler v. Ciba-Geigy Corp.}, the plaintiff claimed that she suffered various injuries as a result of using an algicide on her pond that had been manufactured by the defendant.\textsuperscript{113} The district court held that the plaintiff’s failure to warn claim premised on an inadequate label theory was preempted by FIFRA.\textsuperscript{114} Judge Gaitan, quoting the \textit{Cipollone} decision extensively, ruled that there was no reason to go beyond the express language of the Act.\textsuperscript{115} The court held, just as \textit{Cipollone} did, that the scope of § 136v(b) included a preemption of both legislative enactments and the common law.\textsuperscript{116}

Another U.S. district court case, decided shortly after \textit{Eppler} and within the Eighth Circuit’s jurisdiction, provided a more in-depth analysis of \textit{Cipollone}’s effects on FIFRA preemption in state tort claims. In \textit{Roberson v. E.I. Dupont De Nemours & Co.},\textsuperscript{117} orchard owners sued a fungicide manufacturer claiming negligence, strict liability, and breach of warranty.\textsuperscript{118} The court held that to the extent the plaintiff’s claims were premised on an inadequate failure to warn, they were preempted.\textsuperscript{119} Although the court failed to rely on \textit{Cipollone}, it similarly found evidence of express preemption in the § 136v clause.\textsuperscript{120} In terms of the plaintiff’s other claims, however, the court found differently. Again like the \textit{Cipollone} Court, the \textit{Roberson} Court held that the manufacturer could not assert a preemption defense for fraudulent misrepresentation claims or breach of express warranty claims.\textsuperscript{121} It seemed to distinguish itself from \textit{Cipollone}, however, when it compared the labeling requirements mandated by FIFRA and those mandated by the 1969 Cigarette Act:

\begin{quote}
the “EPA does not dictate the detail of these labels or test their accuracy in any stringent fashion. Their content depends in great degree on the discretion of the manufacturer. By way of contrast, in \textit{Cipollone}, a statute expressly mandated. word-by-word, the content of a warning label on smoking and health.”\textsuperscript{122}
\end{quote}

The Eighth Circuit decided two cases post-\textit{Cipollone} and pre-\textit{Medtronic} that dealt with the federal preemption of state tort claims in terms of FIFRA. In \textit{Bice v. Leslie’s Poolmart, Inc.},\textsuperscript{123} the Eighth Circuit arrived at a succinct decision in a one page opinion. The plaintiff brought an action alleging that the label on defendant’s pool supplies failed to adequately warn her of the hazardous chemical product\textsuperscript{124} she used to maintain her swimming pool.\textsuperscript{125} The U.S. District Court for the

\textsuperscript{111} Id.
\textsuperscript{112} See id.
\textsuperscript{113} 860 F. Supp. 1391, 1392 (W.D. Mo. 1994).
\textsuperscript{114} Coulter, \textit{supra} n. 53, at 370.
\textsuperscript{115} Id.
\textsuperscript{116} Id.
\textsuperscript{117} 863 F. Supp. 929 (W.D. Ark. 1994)
\textsuperscript{118} Coulter, \textit{supra} n. 53, at 371.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
\textsuperscript{121} Id.
\textsuperscript{122} Id. at 372. (quoting \textit{Roberson})
\textsuperscript{123} 39 F.3d 887 (8th Cir. 1994).
\textsuperscript{124} Power Powder was the name of the chemical product. There was no dispute that Power Powder was a ‘pesticide’ under the FIFRA. \textit{Id.} at 888.
\textsuperscript{125} Id.
Eastern District of Missouri dismissed the action, ruling that the plaintiff’s state common law claim was preempted by FIFRA; the Eighth Circuit affirmed. While the Bice Court failed to mention Cipollone in its short opinion, it did quote another Eighth Circuit opinion that relied significantly on Cipollone. Referring to the EPA’s label approval requirement under FIFRA, the Eighth Circuit reiterated that “actual agency approval eliminates any possible claims under state tort law for failure to comply with federal [labeling] requirements.”

In Welchert v. American Cyanamid, Inc., the defendant appealed from a judgment and jury award totaling more than $116,000. The plaintiffs were commercial vegetable farmers who had used the defendant’s herbicide on their land. After noticing growth problems, the plaintiffs discovered that the land had been treated previously with an herbicide. After reading a similar herbicide’s label (a product also made by defendant), and speaking with a Cyanamid representative, the plaintiff believed it would be safe to plant after eighteen months. Planting again in 1991, the plaintiff’s vegetables experienced growth problems. While the district court held that the plaintiff’s claim for inadequate labeling was preempted by FIFRA, it allowed the breach of express warranty claim to go to the jury. However, the Eighth Circuit reversed, holding that the state law breach of express warranty claim was preempted by FIFRA. The Eighth Circuit relied on Cipollone, as well as a Fourth Circuit decision, in reaching its decision. Agreeing with Cipollone, the court stated that when the breach of express warranty claim is based on a “contractual commitment voluntarily undertaken,” the common law remedy would not be a “requirement” in violation of FIFRA’s preemption clause. However, because the plaintiffs claim was based entirely on the herbicide’s label, which indicated an eighteen month carryover effect, the claim had to be preempted. Because the express warranty claim in reality represented a challenge to the EPA-required and approved label, the claim could not survive. The Eighth Circuit stated that “to hold otherwise would be to allow state courts to sit, in effect, as super-EPA review boards that could question the adequacy of the EPA’s determination.”

Since Medronic, the Eighth Circuit has decided only two cases involving federal preemption under FIFRA for state common law claims. The latter of the two cases is the subject of this casenote. Before elaborating further on the impact of the Netland decision, this section will end with an analysis of the Eighth Circuit’s decision in National Bank of Commerce, of El Dorado, Ark., v. Dow Chemical Co. In National Bank the representatives of a minor child, and the father of the

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126 Id.
127 National Bank of Commerce v. Kimberly-Clark Corp., 38 F.3d 988 (8th Cir. 1994). This case did not involve the FIFRA. Instead, preemption was ultimately based on a clause in the MDA. Id.
128 Bice, 39 F.3d at 888.
129 Id. (quoting National Bank, supra n. 127, at 994 n. 4)
130 59 F.3d 69 (8th Cir. 1995).
131 Id. at 70.
132 Id.
133 Id.
134 Id.
135 Id. at 73.
137 Welchert, 59 F.3d at 71-72.
138 Id. at 72.
139 Id. at 73.
140 Id.
141 165 F.3d 602 (8th Cir. 1999).
child, brought an action against five pesticide companies for the child’s birth defects, alleging negligence, products liability, and breach of warranty. At the time the plaintiff-child was born, his parents were living with his grandparents. The grandparents were using various products manufactured by defendants to combat roaches and insects in their home. After more than a year of discovery, all of the companies moved for summary judgment.

The Federal District Court for the Western District of Arkansas granted summary judgment to four of the companies based on FIFRA preemption, and granted summary judgment to Dow based on product identification.

The plaintiffs asserted three reasons why summary judgment was inappropriate, including, inter alia, that FIFRA did not preempt their claims. The Eighth Circuit engaged in a somewhat lengthy discussion of this argument. While the court cited Cipollone to support its explanation that positive legislative enactments and common law both fall within the preemption scheme, it did not rely on the U.S. Supreme Court’s decision for any further analysis. Furthermore, the Eighth Circuit failed to mention the Medtronic decision at all. Instead, the court cited both of its previous decisions; Welchert and Bice.

The Eighth Circuit ruled that the plaintiffs brought preempted failure to warn claims “under the guise of negligence and products liability.” The court reminded that how the plaintiffs labeled their claims was immaterial because “if a state law claim is premised on inadequate labeling or a failure to warn, the impact of allowing the claim would be to impose an additional or different requirement for the label or packaging.” Relying on the reasoning in Welchert, the National Bank Court found that FIFRA preempted the plaintiffs’ breach of warranty claims. In terms of the defective manufacture and design claims, the court found it necessary to engage in further analysis. The court reminded that product liability claims were not necessarily preempted by FIFRA, stating that, “although the specifications and ingredients may be known, approved and accounted for in the EPA-approved label, a defect may still occur as a result of inadequate manufacturing or inappropriate design.” Ultimately, however, the Eighth Circuit held that the plaintiff’s products liability claims lacked support in the record to escape summary judgment.

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142 Dow Chemical Co., Chevron Chemical Co., Ciba Geigy Corp., Bengal Chemical Co., & United Industries Corp. Id.
143 Id. at 605.
144 Id.
145 Id.
146 Id. at 606.
147 The district court held “the products used by the Arnolds could not have contained” defendant’s chemical. (quoting National Bank of Commerce v. Dow Chem., Co., unpublished) Id.
148 Id. at 606.
149 Id. at 607.
150 Id. at 608.
151 Id.
152 Id.
153 Id.
154 Id. at 609.
155 Id.
156 Id.
IV. INSTANT DECISION

The Eighth Circuit began its analysis by explaining that the correct standard of review for
summary judgments is de novo. It stated that summary judgment is appropriate if, “after viewing
the facts and all reasonable inferences in the light most favorable to the nonmoving party, here
Netland, the record demonstrates that there is no genuine issue as to any material fact and that the
moving party is entitled to judgment as a matter of law.” Additionally, the court noted,
“preemption is a question of law” requiring de novo review.

The principle issue addressed by the Eighth Circuit was whether Netland’s strict liability,
failure to warn, negligence, and breach of warranty claims were indeed preempted by FIFRA.
The Eighth Circuit began by setting out the pertinent FIFRA chapters, including 7 U.S.C. § 136v(b),
which contains the express preemption clause providing that a state “shall not impose or continue in
effect any requirements for labeling . . . in addition to or different from those required under this
subchapter.”

A. Failure to Warn and Breach of Warranty Claims

Netland conceded that a previous Eighth Circuit decision preempted his state law claims
based on labeling or packaging requirements different from those required under FIFRA. However, Netland asked the court to revisit its prior decisions “insofar as they hold that state law claims based on failure to warn are preempted by FIFRA.” He argued that the court needed to revisit its stance in light of the Supreme Court’s decision in Medtronic and an amicus curiae brief filed by the EPA in another recent case.

Netland further argued that two recent state court cases decided after these recent
developments lent credence to his position. Both decisions held that failure to warn claims were
not preempted. While the Eighth Circuit mentioned all the authority Netland presented in his
argument, it declined Netland’s invitation to revisit its prior decisions, explaining that “the law is
well established . . . this court may not overrule one of its prior decisions unless it does so en bane.” Without engaging in any further analysis, the court held that pursuant to its decision in National Bank, Netland’s failure to warn and breach of warranty claims were preempted by FIFRA.

157 Netland, 284 F.3d at 898.
158 Id.
159 Id.
160 Id.
163 Netland, 284 F.3d at 899.
164 Id.
166 Id., referring to Etcheverry v. Tri-Ag Serv., Inc., 993 P.2d 366 (Cal. 2000).
168 Netland, 284 F.3d at 899.
169 Id.
170 Id.
B. Strict Liability and Negligence Claims

Netland argued that his strict liability and negligence claims were not on the list of state law causes of action preempted by FIFRA. He argued that FIFRA preempts only those state law claims that directly attack the product label, meaning his claims that Bovinol was defectively designed and unreasonably dangerous would not be preempted. The Eighth Circuit then explained why the district court disagreed with Netland. It concluded that Netland had failed to produce any evidence of errors in the manufacture of Bovinol without pointing to the issue of the adequacy of the warning. The district court further found that Netland’s liability expert, Dr. Lipsey, failed to prove Bovinol was unreasonably dangerous because his testimony reflected that Bovinol was safe if properly used and distributed with appropriate labeling.

On appeal Netland argued that the district court’s decision was erroneous because his complaint alleged defective design, and therefore was not preempted by FIFRA. The Eighth Circuit agreed with Netland insofar as defectively manufactured or designed products properly labeled under FIFRA remain subject to state common law or other claims. The court reminded, however, that if the state law claim were actually premised on a failure to warn theory, resulting in additional or different labeling requirements, it would be preempted under FIFRA, “regardless of the guise under which the claim is presented.”

The Eighth Circuit then presented the issue it had to resolve: whether Netland’s claims were essentially challenges to Bovinol’s label or its overall design. It then set out a question to guide its analysis; “whether in seeking to avoid liability for any error, would the manufacturer choose to alter the label or the product.” Netland argued that his claim was not preempted because Dr. Lipsey’s testimony indicated that Bovinol was defectively designed and unreasonably dangerous because DDVP was one of the active ingredients. In particular, Netland pointed to Dr. Lipsey’s testimony that pyrethrum was a safer and more effective alternative to DDVP.

The Eighth Circuit, however, disagreed with Netland’s characterization of the doctor’s testimony. In fact, the court found that Dr. Lipsey did not testify that DDVP’s presence in Bovinol made the pesticide defective or unreasonably dangerous. In the Eighth Circuit’s view Dr. Lipsey had testified that Bovinol was a product that could be used safely under appropriate circumstances. In terms of his comments about pyrethrum, the court declared that Dr. Lipsey merely recommended it, saying that most people (himself included) use pyrethrum for horses.

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171 Id.
172 Id.
173 Id.
175 Netland, 284 F.3d at 899.
176 Id. at 899-900.
177 Id. at 900.
178 Id.
179 Id.
180 Id.
181 Id.
182 Id.
183 Id.
184 Id.
185 Id.
The Eighth Circuit found no logic in concluding that Bovinol was defectively designed or unreasonably dangerous merely because another product might be preferred.186

The Eighth Circuit further characterized Dr. Lipsey’s other complaints with Bovinol as direct challenges to its label.187 Specifically, Dr. Lipsey testified that the label should include information about Bovinol’s potential to affect bone marrow and cause leukemia.188 Dr. Lipsey also complained that the label was misleading in terms of horses in that it “said okay to horse barns and okay to pests that get on horses, but they didn’t exclude horses, so you can assume that you can apply it to horses.”189 The Eighth Circuit then admitted that Dr. Lipsey’s complaints with Bovinol might have created genuine issues of fact.190 Nonetheless, the genuine issues of fact were insufficient to avoid summary judgment because they failed to offer evidence of a design defect unrelated to the label.191

After reviewing all of Netland’s claims, the court ultimately held that each one represented nothing more than an attack on Bovinol’s label, and therefore, all three claims were preempted by FIFRA. The Eighth Circuit affirmed the lower court’s decision granting summary judgment in favor of Hess.

V. COMMENT

The Eighth Circuit did not depart from its precedent in terms of finding federal preemption under FIFRA for state common law claims based on inadequate pesticide labels; but it failed to engage in an analysis of Medtronic’s potential effect on such claims. Furthermore, in reaching the instant decision, the court principally relied upon National Bank, and although decided post-Medtronic, it failed to mention the Supreme Court’s decision at all. Thus, in Netland, the Eighth Circuit reaffirmed its reluctance to consider the effect of the recent Supreme Court decision. However, the Court in Netland seemed to foreshadow the possibility of such consideration in the future. After acknowledging the plaintiff’s legal authority post-Medtronic,192 the court reminded, “[t]he law is well established, however, that this court may not overrule one of its prior decisions unless it does so en banc.”193 Thus, it held, that “until modified or overruled by the court en banc, National Bank is the law of this circuit.”194 It begs the question, then, what circumstances would inspire the Eighth Circuit to hear a FIFRA preemption case en banc? In fact, the court denied a rehearing en banc in the instant decision.195

In a footnote, the Eighth Circuit did mention that “at least two of our sister circuits have concluded that the established interpretation of FIFRA preemption clause is unchanged by the Supreme Court’s decision in Medtronic.”196 Without more than this cursory reference, however, predicting how the Eighth Circuit would incorporate Medtronic proves a more difficult task.

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186 Id.
187 Id.
188 Id.
189 Id.
190 Id.
191 Id.
192 Netland, 284 F.3d at 899 (referring to Sleath v. W. Mont. Home Health Servs., Inc., 16 P.3d 1042 (Mont. 2000); Brown v. Chas. H. Lilly Co., 985 P.2d 846 (Ore. 1999)).
193 Netland, 284 F.3d at 899.
194 Id.
195 Id. at 895. Rehearing En Banc Denied May 13, 2002.
196 Id. at n. 4
Certainly the weight of the authority points towards a finding of federal preemption in failure to warn claims under FIFRA, but not all courts agree. Judicial decisions both before and after Medtronic have found that FIFRA does not preempt state common law claims based on a failure to warn theory. The logic and policy used by these courts in reaching their decisions merit attention, as Missouri and/or the Eighth Circuit may rely on them in the future.

Historically, the seminal case against federal preemption under FIFRA was Ferebee v. Chevron Chem. Co. Admittedly, the Ferebee Court reached its decision even pre-Cipollone. However, it has not been expressly overruled. Furthermore, because the reasoning employed by the D.C. Circuit has been echoed in recent decisions, Ferebee arguably retains a significant role in FIFRA preemption jurisprudence. In Ferebee, an employee at an agricultural research center under the auspices of the United States Department of Agriculture allegedly contracted pulmonary fibrosis after long-term skin exposure to an herbicide produced by Chevron. After the plaintiff died before trial, his estate maintained the action against Chevron, adding a wrongful death count as well. Chevron appealed a jury verdict in favor of the estate, claiming, inter alia, that federal law preempted state common law actions based on an inadequate product label theory.

The D.C. Circuit rejected Chevron’s argument, however, stating that “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.” The D.C. Circuit explained that the jury’s verdict did not require Chevron to alter its label; the verdict merely communicated to Chevron that if it continued to sell its product in Maryland, it might have to compensate some plaintiffs for resulting injuries. As between a manufacturer and an injured party, the court held that a state could decide that the manufacturer should bear the cost of the injuries that could have been prevented with a more detailed label beyond that required by the EPA. The court further reasoned that state tort actions would aid in the discovery of new dangers associated with pesticides. Actions by plaintiffs of this kind, especially if successful, would provide manufacturers with a strong impetus to reevaluate their labels, and petition the EPA to change them if necessary.

A more recent opinion, decided post-Medtronic, held that FIFRA did not preempt state failure to warn claims. In fact, the Supreme Court of Montana overruled its prior decision in light of the U.S. Supreme Court’s opinion in Medtronic. Writing over seven pages on the preemption issue, the majority analyzed several cases, including the U.S. Supreme Court’s reasoning in Cipollone and Medtronic. In overruling its previous decision, the Supreme Court of Montana explained that “we did not have the benefit of the Supreme Court’s decision in Medtronic in making

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197 726 F.2d 1529 (D.C. Cir. 1984).
198 Id. at 1531-32.
199 Id. at 1532.
200 Id. at 1539.
201 Id. at 1540.
202 Id. at 1541.
203 Id.
204 Id.
205 Id.
206 Sleath v. West Mont. Home Health Services, 16 P.3d 1042 (Mont. 2000).
208 Sleath, 16 P.3d at 1053.
209 Id. at 1046-1053.
our determination in McAlpine."\textsuperscript{210} The court considered the preemption clause's "requirements" term, a term that has spawned hundreds of pages of controversy in FIFRA preemption cases. It reasoned that the text, legislative history, and purposes of FIFRA indicate that Congress had no intention of extinguishing state common law claims with the use of the term "requirements" in § 136v(b).\textsuperscript{211} In fact, the term "requirements" is used 75 times in the FIFRA statute, yet no court has considered its meaning in this broader context.\textsuperscript{212} Congress intended "requirements" to mean positive law enactments from legislatures or administrative bodies every time it used the term "requirements" in other parts of the statute.\textsuperscript{213} The court emphatically declared it impossible that Congress intended § 136v(b) to be the only FIFRA section in which the term "requirements" would include common law rules by judges and juries.\textsuperscript{214}

The Supreme Court of Montana also relied on an \textit{amicus} brief filed by the EPA in another recent case\textsuperscript{215} decided by the Supreme Court of California.\textsuperscript{216} The EPA reasoned on behalf of potential plaintiffs when it stated, "'[g]iven that FIFRA establishes no private damages remedy for those injured by pesticides, it would be astonishing that, without any discussion, Congress could have intended to deprive injured persons of all means of relief.'"\textsuperscript{217} Furthermore, the court derived its opinion from the EPA's position found in legislative history.\textsuperscript{218} The EPA's General Counsel testified at a committee hearing about the 1972 amendments to FIFRA. He emphasized the importance of the states in pesticide regulation, and stated unequivocally, "[t]he bill does not affect tort liability."\textsuperscript{219}

The recent Supreme Court of California decision, \textit{Etcheverry}, found federal preemption proper under FIFRA, even in light of \textit{Medtronic}, but two judges dissented, expounding their reasons over ten pages.\textsuperscript{220} The dissent emphasized that the majority failed to heed the all important rule that when Congress intends to impinge on state law, it must express that intent clearly.\textsuperscript{221} As in \textit{Sleath}, the dissenting judge discussed the use of the word "requirements" in FIFRA's preemption clause.\textsuperscript{222} Finding that "at best" the language of § 136v(b) was ambiguous, the dissent reasoned that such ambiguity requires a narrow rather than broad preemptive effect.\textsuperscript{223} The dissent also engaged in a discussion of \textit{Medtronic} and \textit{Cipollone}, finding \textit{Medtronic} more persuasive for FIFRA cases. Finally, the dissent ended its discussion with policy arguments similar to those espoused in \textit{Sleath} and \textit{Ferebee}. It reminded that FIFRA does not provide a federal cause of action for injured plaintiffs.\textsuperscript{224} Instead, injured consumers' sole remedy, according to the majority, is to complain to the EPA administrator, demanding a better label for the pesticide.\textsuperscript{225} The court found it impossible

\begin{thebibliography}{9}
\bibitem{210} Id. at 1049.
\bibitem{211} Id. at 1050.
\bibitem{212} Id. at 1051.
\bibitem{213} Id.
\bibitem{214} Id.
\bibitem{215} \textit{Etcheverry v. Tri-Ag Service, Inc.}, 22 Cal. 4th 316 (Ca. 2000).
\bibitem{216} \textit{Sleath}, 16 P.3d at 1050.
\bibitem{217} Id. (quoting the EPA's \textit{amicus} brief)
\bibitem{218} Id. at 1052.
\bibitem{219} Id.
\bibitem{220} 22 Cal. 4th at 340-351. (Werdegar, J., dissenting).
\bibitem{221} Id. at 340.
\bibitem{222} Id. at 343.
\bibitem{223} Id.
\bibitem{224} Id. at 350.
\bibitem{225} Id.
\end{thebibliography}

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to believe that Congress intended to alter the historically sound notion of injured persons seeking redress through common law actions, with such an ambiguous preemption clause.226

While the Eighth Circuit did not embrace the reasoning in Ferebee, Sleath, or the dissent in Eicheverry in the instant decision, it arguably left the door open for the Court to sit en banc on the issue in the future. Until the United States Supreme Court decides a FIFRA preemption case involving pesticide labels, enough precedent exists to bolster a court’s decision either for or against preemption. Therefore, courts will arguably look to policy implications with increasing frequency in forming their opinions, especially in light of the split created by Medtronic.

Although the great weight of decisional law favors federal preemption in FIFRA label cases, the EPA’s labeling process provides strong policy arguments against federal preemption.227 The registration process relies almost exclusively on data submitted by the manufacturers themselves about their product’s safety.228 Furthermore, the manufacturers design and word their own labels, and submit their own data to support the label’s appropriateness.229 The EPA merely considers whether the manufacturer used accepted methodology; it conducts no independent analysis.230 Under such a system, even when a manufacturer fails to provide relevant information or submits improper label instructions, an EPA-approved label effectively provides carte blanche immunity for the manufacturer, leaving an injured consumer without a remedy.231 In addition to having lower enforcement penalties than other environmental statutes, FIFRA also distinguishes itself as lacking a citizen suit provision.232 While consumers can petition the EPA to suspend or cancel a pesticide’s registration, such a remedy serves little purpose to an injured plaintiff seeking compensation.233 Federal preemption of state common law claims leaves private citizens without a mechanism to encourage manufacturers to use better warning and use labels, or to improve the product itself.234

Given that Missouri is a state replete with agriculture, many Missourians interact with pesticides and herbicides on a regular basis. Ideally, Missouri’s farmers would read every label carefully and understand the potential dangers involved. But warning and use labels “cannot assure safety and be effective unless labels and instructions are comprehensible, understood, and followed by the user.”235 As the law stands now, both in Missouri state courts and the Eighth Circuit, injured plaintiffs are barred from claiming that the product’s label failed to adequately warn them of the injuries ultimately suffered after using the product. Though not current law, at least one opinion in federal district court in Missouri found state failure to warn claims proper under FIFRA.236 Will the courts embrace such a holding again in the state of Missouri? The policy implications resulting from federal preemption, namely leaving injured Missouri farmers and other citizens without recourse, seem to indicate that FIFRA’s original purpose has been eviscerated. While the Eighth Circuit

226 Id.
228 Id. at 620.
229 Id.
230 Id.
231 See id.
232 Id. at 621.
233 Id.
234 Id.
235 Id. at 622.
236 See Riden v. IC Americas, Inc., supra n. 102.
properly followed its precedent in reaching the holding in the instant decision, it may be compelled
to consider the reasoning of those courts finding against preemption in the future.

VI. CONCLUSION

The Eighth Circuit correctly followed its precedent in precluding Netland’s suit against Hess. It
reached a “safe” decision when it held that all of Netland’s claims represented impermissible
challenges to Bovinol’s label. In finding preclusion, the Eighth Circuit affirmed the majority
position in FIFRA preemption jurisprudence. As a result of the Court’s decision, parties are
reminded that recovery for pesticide injuries based on failure to warn claims represents an unlikely
reality. However, given the Eighth Circuit’s overt reminder that current law can be overruled en
banc, future decisions may diverge from this precedent. Missouri’s consumers, attorneys, and
legislators may want to encourage a revisiting of this issue since it has the potential to affect human
lives in profound ways.

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