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PREEMPTION DOCTRINE AFTER *CIPOLLONE* — NEVADA SUPREME COURT HOLDS THAT THE FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT IMPLIEDLY PREEMPTS STATE COMMON-LAW ACTIONS BASED ON INADEQUATE LABELING. — *Davidson v. Velsicol Chem. Corp.*, 836 P.2d 931 (Nev. 1992).

In *Cipollone v. Liggett Group, Inc.*,¹ the Supreme Court held that the express preemption provision of the Public Health Cigarette Smoking Act of 1969 (1969 Cigarette Act)² bars all state tort claims against cigarette manufacturers based on the inadequacy of federally-mandated labeling.³ The Court further held that this preemption provision also precluded judicial inquiry into any implied federal preemption of state law.⁴ The issue of preemption⁵ of state product liability actions is not unique to the cigarette industry; numerous other products are also subject to federal statutes containing preemption provisions.⁶

Prior to *Cipollone*, the circuits were divided over whether the Federal Insecticide, Fungicide, and Rodenticide Act's (FIFRA) labeling preemption provision⁷ impliedly preempted state tort actions for inadequate labeling.⁸ Under FIFRA, the Environmental Protection Agency (EPA) has the authority to approve pesticide warning labels based on data submitted by the manufacturer.⁹ The EPA has promulgated, pursuant to FIFRA, comprehensive regulations regarding the content, placement, type, size, and prominence of warnings and instructions on pesticide labels.¹⁰ FIFRA permits the states to regulate

¹ 112 S. Ct. 2608 (1992).

² 15 U.S.C. § 1334(b) (1988). Section 5(b) of the 1969 Cigarette Act provides that "[n]o requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertisement or promotion of any cigarettes the packages of which are [lawfully] labeled." *Id.*

³ See *Cipollone*, 112 S. Ct. at 2625. A majority of the Court concluded that the phrase "no requirement or prohibition" in the 1969 Cigarette Act encompasses "obligations that take the form of common law rules," and therefore, that § 5(b) preempted state tort claims regarding labeling. *Id.*

⁴ See *id.* at 2620.

⁵ The preemption of state law results from the constitutional requirement that federal law prevails when state and federal laws conflict. State law can be preempted by federal law in one of three ways: (1) by an express statement of Congress, see *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); (2) by implication when the structure and purpose of the federal statutory and regulatory scheme evince a clear intent to preclude state action, see *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); or (3) through a direct conflict with a federal law, see *Free v. Bland*, 369 U.S. 663, 666 (1962).

⁶ See, e.g., Federal Insecticide, Fungicide, and Rodenticide Act § 24, 7 U.S.C. § 136v (1988); Alcoholic Beverage Labeling Act of 1988 § 205, 27 U.S.C. § 216 (1988).

⁷ 7 U.S.C. § 136v.

⁸ See, e.g., *Riden v. ICI Americas, Inc.*, 763 F. Supp. 1500, 1503-09 (W.D. Mo. 1991); *Cox v. Velsicol Chem. Corp.*, 704 F. Supp. 85, 86-87 (E.D. Pa. 1989).

⁹ See 7 U.S.C. §§ 136(q)(1)(G), 136a.

¹⁰ See 40 C.F.R. § 156.10(a) (1992).

the sale or use of pesticides,¹¹ but it specifically provides that “[a] State shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required under this subchapter.”¹²

In *Davidson v. Velsicol Chemical Corp.*,¹³ the first post-*Cipollone* state court preemption decision, the Nevada Supreme Court held that FIFRA preempts state tort actions for inadequate labeling. However, instead of limiting its analysis to FIFRA’s express preemption provision, as *Cipollone* requires, the *Davidson* court analyzed the FIFRA claim under an implied preemption rubric. This failure to apply *Cipollone* suggests the *Davidson* court’s confusion over *Cipollone*’s holding that although courts are free to consider implied preemption in the absence of a preemption provision, they may not do so when a statute contains expressly preemptive language. *Davidson*’s reliance on implied preemption also signalled its doubts about the ability of common-law courts to identify socially optimal warning labels.

In *Davidson*, a homeowner brought suit against Velsicol, a pesticide manufacturer, for Velsicol’s failure to provide adequate warning and appropriate labeling instructions for the application of its product to the foundation of newly constructed residences.¹⁴ Velsicol argued that FIFRA preempted state tort claims based on a failure adequately to label or warn.¹⁵ The trial court agreed, and held that the statute impliedly preempted inadequate labeling claims against manufacturers of EPA-registered pesticides.¹⁶

In analyzing whether FIFRA preempts failure-to-warn claims against manufacturers based on inadequate labeling, the *Davidson* court first announced that it did not find *Cipollone* instructive.¹⁷ However, the court noted that its “opinion is consonant with *Cipollone* in that [it] address[es] implied preemption only after concluding that FIFRA does not expressly preempt such claims.”¹⁸ Thus, the *Davidson* court interpreted *Cipollone* to require courts to focus on the scope of a statute’s express preemption provision *in addition to* — rather than to the exclusion of — an implied preemption analysis.

Next, the *Davidson* court asserted that the statute’s express preemption provision made no reference to the preemption of state

¹¹ See 7 U.S.C. § 136v(a).

¹² *Id.*

¹³ 834 P.2d 931 (Nev. 1992).

¹⁴ See *id.* at 932.

¹⁵ See *id.*

¹⁶ See *id.*

¹⁷ See *id.* at 933 n.2.

¹⁸ *Id.*

common-law remedies.¹⁹ Because Congress had expressly preempted common-law claims in other statutes,²⁰ its silence in section 136v(b) of FIFRA precluded a finding of express preemption.²¹ Turning to the question of whether Congress *implicitly* intended to preempt state tort claims, the *Davidson* court concluded that Congress intended section 136v(b) to preempt the entire field of pesticide labeling.²² Relying on legislative history, the court further reasoned that it was unlikely that Congress would have designated federal control over labeling in section 136v(b) if it had believed that the provision could be thwarted by state action authorized by section 136v(a).²³ In addition, the pervasiveness of the federal regulation of pesticide labeling created by FIFRA indicated that Congress had left no room for state supplementation.²⁴

Finally, the court asked if state tort claims were impliedly preempted because they conflicted with FIFRA.²⁵ Under preemption doctrine, an "actual" conflict arises when compliance with both state and federal law is impossible or when a state law obstructs the accomplishment and execution of Congress's purposes and objectives.²⁶ Before *Cipollone*, some courts²⁷ had held that compliance with the requirements of both FIFRA and state tort law was not impossible because the manufacturer had the choice of how to react to tort liability: it could continue to use the label approved by the EPA and at the same time pay damages to successful tort plaintiffs; alternatively, the manufacturer could petition the EPA for a more comprehensive label.²⁸ *Davidson* rejected this "choice of reaction" analysis,²⁹

¹⁹ See *Davidson*, 834 P.2d at 934.

²⁰ See, e.g., Domestic Housing and International Recovery and Financial Stability Act § 253(e), 12 U.S.C. § 1715z-18(e) (1988) (preempting any "State constitution, statute, court decree, common law, rule, or public policy"); Copyright Act of 1976 § 301(a)-(b), 17 U.S.C. § 301(a)-(b) (1988) (preempting rights "under the common law or statutes of any State").

²¹ See *Davidson*, 834 P.2d at 934.

²² See *id.* at 934-36.

²³ See *id.* at 936. The Supreme Court has recognized that FIFRA does not preempt the entire field of pesticide regulation. See *Wisconsin Pub. Intervenor v. Mortier*, 111 S. Ct. 2476, 2487 (1991). Some states have exploited the tenuous distinction between regulating pesticide use (which FIFRA does not preempt) and regulating labeling (which is preempted) by passing legislation that requires manufacturers to provide warnings and notification through means other than labels. See, e.g., *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115, 119-20 (2d Cir. 1989); *Chemical Specialties Mfrs. Ass'n v. Allenby*, 744 F. Supp. 934, 935 (N.D. Cal. 1990), *aff'd*, 958 F.2d 941 (9th Cir.), *cert. denied*, 113 S. Ct. 80 (1992).

²⁴ See *Davidson*, 834 P.2d at 936.

²⁵ See *id.* at 936-37.

²⁶ See *Mortier*, 111 S. Ct. at 2482.

²⁷ See, e.g., *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529, 1542 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

²⁸ See *id.*

²⁹ See *Davidson*, 834 P.2d at 937.

and agreed instead with other cases³⁰ that had held jury damage awards conflicted directly with FIFRA.³¹ The court reasoned that, by registering a pesticide, the EPA has determined that the labels are adequate, and a jury finding that a pesticide label is inadequate directly conflicts with the EPA's determination.³² Furthermore, state tort actions would obstruct Congress's goal of achieving uniformity in pesticide labeling because tort liability would compel a manufacturer to change its label.³³

Although its ultimate finding of preemption was consistent with *Cipollone*, the *Davidson* court ignored *Cipollone's* relevance to FIFRA's labeling preemption provision and erroneously engaged in a pre-*Cipollone* implied preemption analysis of the statute. The *Davidson* court's refusal to find *Cipollone* instructive was manifested in two ways.

First, the *Davidson* court should have relied on *Cipollone* to resolve the express preemption question. In finding express preemption, *Cipollone* held that the term "requirement" — present in both the 1969 Cigarette Act and FIFRA — sweeps "broadly and suggests no distinction between positive enactments and common law."³⁴ Therefore, under *Cipollone*,³⁵ FIFRA's prohibition against state labeling "requirements" in addition to those set forth by the EPA expresses a congressional intent to preempt *any* state interference with federal regulation. *Davidson* thus should have held that FIFRA expressly preempts the tort claim at issue even though the statute's preemption provision makes no reference to state common-law remedies.

Second, rather than restricting itself to determining whether FIFRA's express preemption provision revealed a congressional intent to supersede state law, the *Davidson* court turned to implied preemption doctrines. Only a misconstrual of the Supreme Court's preemption approach could have led the *Davidson* court to proclaim its implied preemption analysis as "consonant" with *Cipollone*.³⁶

In *Cipollone*, the Supreme Court held that "Congress' enactment of a provision defining the preemptive reach of a statute implies that matters beyond that reach are not preempted."³⁷ The Court's un-

³⁰ See, e.g., *Arkansas-Platte & Gulf v. Van Waters & Rogers*, 959 F.2d 158, 161-64 (10th Cir.), *vacated*, 113 S. Ct. 314 (1992) (remanded for reconsideration in light of *Cipollone*).

³¹ See *Davidson*, 834 P.2d at 937.

³² See *id.*

³³ See *id.*

³⁴ See *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992).

³⁵ Section V of the *Cipollone* opinion, which discussed the term "requirement," was a four-Justice plurality opinion. If that opinion is read in tandem with Justice Scalia's dissent, which Justice Thomas joined, it is clear that six Justices support the broad reading of the term. See *id.* at 2632 (Scalia, J., concurring in the judgment in part and dissenting in part).

³⁶ See *Davidson*, 834 P.2d at 933 n.2.

³⁷ *Cipollone*, 112 S. Ct. at 2618.

willingness to engage in implied preemption analysis when a statute contains an express preemption provision stems from its belief that the most reliable indicator of what Congress intended to preempt is what it expressly preempted in the statute.³⁸ Thus, when an explicit statement of preemption is present (as in FIFRA and the 1969 Cigarette Act), courts should focus exclusively on the text of that statement.³⁹ By requiring that Congress bear the burden of comprehensiveness and clarity when it chooses to speak on preemption, *Cipollone* professed to give force to the heavy presumption against displacing state law in the face of congressional silence.⁴⁰

However, the *Cipollone* Court weakened this presumption, first by finding express preemption of inadequate labeling claims despite the failure of the 1969 Cigarette Act's preemption provision to mention common-law actions,⁴¹ and, second, by not limiting the ability of courts to consider implied preemption in the absence of expressly preemptive language.⁴² Although the *Davidson* court clearly misinterpreted *Cipollone's* directive to confine itself to determining the scope of the statute's preemption provision, *Davidson's* approach highlights these deficiencies in the Supreme Court's holding. By failing to find express preemption because FIFRA (like the 1969 Cigarette Act) contains no mention of state common-law actions, the *Davidson* court actually applied a stricter express preemption test than that adopted

³⁸ See *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 282 (1987) (Marshall, J.) (observing that when Congress has included an express preemption provision in a statute, "there is no need to infer congressional intent to preempt state laws from the substantive provisions" of the legislation).

³⁹ See *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1140 (E.D.N.Y. 1992). *Burke*, which held that FIFRA expressly preempts failure-to-warn claims based on inadequate labeling, implemented *Cipollone's* preemption principles. However, despite its recognition that *Cipollone* requires courts to focus exclusively on express preemption clauses, even the *Burke* court did not refrain from examining, in dicta, the manufacturer's implied preemption claims. See *id.* at 1141. Similarly, in *Couture v. Dow Chem. U.S.A.*, 804 F. Supp. 1298 (D. Mont. 1992), the court found "its analysis to be consonant with" *Cipollone's* emphasis on express preemption provisions only after endorsing the "choice of reaction" analysis and holding that state tort claims would not conflict with FIFRA. See *id.* at 1300-01.

⁴⁰ Because preemption threatens to restrain state sovereignty, preemption analysis begins with the assumption that the federal law does not supersede the historic police powers of the states unless "that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-25, at 480-81 (2d ed. 1988) (observing that courts' reluctance to find preemption "seems particularly appropriate in light of the Supreme Court's repeated emphasis on the central role of Congress in protecting the sovereignty of the states").

⁴¹ See *Cipollone*, 112 S. Ct. at 2618-19. For example, the Supreme Court found that the legislative history of the 1969 Cigarette Act supported interpreting the phrase "imposed under State law" to include common-law rules "[a]lthough the presumption against pre-emption might give good reason to construe the phrase 'state law' in a pre-emption provision more narrowly than an identical phrase in another context." *Id.*

⁴² See *id.* at 2617.

by the *Cipollone* Court. Furthermore, the *Davidson* court's belief that it could rely on implied preemption doctrine underscores the inconsistency of *Cipollone's* ruling that, although courts may not use implied preemption when Congress has included some preemptive language in the statute, they are free to displace state remedies when Congress is entirely silent on the preemption issue.⁴³

Besides expressing justifiable confusion over *Cipollone's* approach, the *Davidson* court's implied preemption analysis may have also masked its concern about the competence of the courts to identify accurately an efficient label.⁴⁴ If it is likely that courts will make mistakes in setting the standard for what constitutes a reasonable warning label, as well as in determining whether the inadequate labeling caused the plaintiff's harm, manufacturers will have an incentive to provide inefficient labels in order to escape liability.⁴⁵ That it was a *state* court finding federal preemption supports the idea that the *Davidson* court was using preemption doctrine as a pretext to avoid the difficult questions of judicial competence.⁴⁶ The flexibility of an implied preemption approach offered the *Davidson* court the opportunity to circumvent the problems posed by judicial error and to defer to the superior ability of the EPA to identify socially optimal labels.

Despite their facial differences, both *Cipollone* and *Davidson* illustrate how courts, although purporting to rely upon notions of state sovereignty, have been reluctant to constrain their ability to find preemption. *Davidson* also suggests that concerns about judicial competence to resolve complex problems can influence a court's preemption decision.

⁴³ Cf. *id.* at 2634 (Scalia, J., concurring in the judgment in part and dissenting in part) (criticizing the majority's rule that "[t]he statute that says anything about pre-emption must say everything; and it must do so with great exactitude, as any ambiguity concerning its scope will be read in favor of preserving state power").

⁴⁴ For an example of an argument favoring preemption on judicial competence grounds, see generally Note, *A Question of Competence: The Judicial Role in the Regulation of Pharmaceuticals*, 103 HARV. L. REV. 773, 785-93 (1990).

⁴⁵ This problem of inefficiency caused by inaccurate case-by-case judicial determinations might be resolved through the use of a strict liability standard, which would encourage manufacturers to take no more than reasonable care with respect to labeling. Inefficiency may also result if manufacturers are unable to predict the point at which courts will draw the line for an acceptable label. See Robert D. Cooter, *Defective Warnings, Remote Causes, and Bankruptcy: Comment on Schwartz*, 14 J. LEGAL STUD. 737, 748 (1985).

⁴⁶ *Davidson* is not the only post-*Cipollone* state court decision which relied on implied preemption principles to find federal preemption of state common law remedies with respect to pesticide labeling. In *Yowell v. Chevron Chemical Co.*, 836 S.W.2d 62 (Mo. App. 1992), the Missouri Court of Appeals acknowledged *Cipollone* but, like the *Davidson* court, undertook an implied preemption analysis to conclude that FIFRA preempts state common law actions based on inadequate labeling. See *id.* at 64-66.