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Are Cell Phones Safe Until the FCC Telss Us They are Not? A Preemption Analysis in the Context of Cell Phone Radiation Emissions Standards

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NOTES

ARE CELL PHONES SAFE UNTIL THE FCC TELLS US THEY ARE NOT? A PREEMPTION ANALYSIS IN THE CONTEXT OF CELL PHONE RADIATION EMISSIONS STANDARDS

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I. INTRODUCTION & ISSUE

As wireless telephones (cell phones) burst into mainstream culture in the early 2000s,[1] Jeremy, then a teenager, begged his parents for his

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1. The CTIA—The Wireless Association, an industry trade group, estimates that from

own cell phone. Despite their initial resistance, Jeremy had his first cell phone at age sixteen. At first, Jeremy's love affair was tempered by the realization that talking on his cell phone for hours on end was a costly endeavor. Then, as cell phone companies began to offer "unlimited" nighttime minutes, Jeremy was able to use his phone for his hours-long conversations with friends. When Jeremy went away to college, he balked at the idea of having a landline. Instead, he relied on his cell phone to keep in touch with his family and friends back home. Jeremy never worried as his monthly minutes soared because he confined his usage to times when the minutes were "free."

But were they really free? In a financial sense, yes, but research has led many to question whether long-term heavy cell phone use carries with it alarming health risks.[2] Those risks became abundantly clear to Jeremy when he was diagnosed with a highly malignant form of brain cancer in his late twenties. Although science on the subject remains muddied, Jeremy could not help but wonder whether his cell phone usage contributed to the development of his cancer by exposing him to unsafe levels of radiofrequency (RF) radiation.[3] Tucked away deep in the insert for his iPhone was a warning that users should operate their phones at least 5/8th an inch from the body[4]—a warning that Jeremy and virtually all iPhone users never heeded, in part because they were not aware that such a warning existed. Given that Jeremy was never fully aware of the radiation risk from cell phone usage, he never used a headset when operating his cell phone, which would have significantly

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June 2001 to June 2006, wireless penetration in the United States increased from nearly 41% to over 72%. *Wireless Quick Facts*, CTIA, http://www.ctia.org/advocacy/research/index.cfm/aid/10323 (last visited Oct. 16, 2011). Wireless penetration is defined as the number of active units divided by the total U.S. population. *Id.*

2. *See, e.g.*, Cecilia Kang, *Law Carries a Ring of Fear; Cellphone Industry Attacks San Francisco's Ruling on Radiation*, WASH. POST, June 20, 2010, at A1 (quoting a professor of oncology and cancer epidemiology as stating that long-term cell phone use corresponds with "a consistent pattern of increased risk for" the development of certain types of malignant brain tumors); Randall Stross, *Should You Be Snuggling With Your Cellphone?*, N.Y. TIMES, Nov. 14, 2010, at BU4 (describing inconclusive study results); Wolters Kluwer Health, *Best Available Evidence Links Cell Phone Use to Brain Tumors*, NEWSWISE (Nov. 11, 2010), http://www.newswise.com/articles/best-available-evidence-links-cell-phone-use-to-brain-tumors-reports-the-journal-of-computer-assisted-tomography (reporting results of recent study finding that "'[l]ong term cell phone usage can approximately double the risk of developing a glioma or acoustic neuroma in the more exposed brain hemisphere'").

3. For a discussion of RF radiation, see *infra* Part II.

4. iPhone 4 Important Product Information Guide, *available at* http://manuals.info.apple.com/en_US/iPhone_4_Important_Product_Information_Guide.pdf (last visited Oct. 1, 2011 ("When using iPhone near your body for voice calls or for wireless data transmission over a cellular network, keep iPhone at least 15 mm (5/8 in.) away from the body, and only use carrying cases . . . ."); iPhone 3G Important Product Information Guide, at 7, *available at* http://manuals.info.apple.com/en_US/iPhone_3G_Important_Product_Information_Guide.pdf (same).

reduced Jeremy's RF radiation exposure.[5]

If Jeremy demonstrates a sufficient causal linkage between cell phone usage and the development of his brain cancer, is he able to bring a state law cause of action to recover damages from certain cell phone manufacturers? Depending on the jurisdiction in which Jeremy brings his claim, surprisingly, the answer may be no.[6] The uncertainty surrounding Jeremy's ability to bring such an action hinges, in part, on whether the Federal Communication Commission's (FCC) RF emissions standards preempt state law claims challenging the adequacy of those levels.[7]

The answer to that question is an important one as there are an estimated 322.9 million cell phone wireless subscriptions in the United States, a figure greater than the entire U.S. population.[8] As of June 2011, nearly 30% of the nation's households were wireless-only.[9] In light of the pervasiveness of cell phones in American culture, if the now theoretical health risks associated with cell phone usage become reality, mass litigation will ensue. The extent to which federal law may preempt such state tort litigation is the subject of this Note.

II. BACKGROUND ON RF RADIATION

To fully understand the nature of the potential linkage between cell phones and brain tumors, it is helpful to define RF radiation and to assess its potential impact on humans. Many electronic products use some form of electromagnetic energy[10] to operate.[11] One form of

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5. *See, e.g.*, Office of Eng'g and Tech., *Radiofrequency Safety—Frequently Asked Questions*, FED. COMMC'NS COMM'N, http://www.fcc.gov/oet/rfsafety/rf-faqs.html (last updated Aug. 4, 2010) [hereinafter *FCC RF FAQ*] ("[U]se of an ear piece connected to a mobile phone will significantly reduce the rate of energy absorption (or SAR) in the user's head.").

6. Appellate courts are split with respect to this issue. *Compare* Farina v. Nokia, Inc., 625 F.3d 97, 133-34 (3d Cir. 2010) *and* Murray v. Motorola, Inc., 982 A.2d 764, 777 (D.C. 2009), *with* Pinney v. Nokia, Inc., 402 F.3d 430, 456-57 (4th Cir. 2005). This split was recently highlighted in cert briefing before the U.S. Supreme Court. *See* Petition for Writ of Certiorari at 24-25, Farina v. Nokia, Inc., No. 10-1064 (U.S. filed Feb. 22, 2011), 2011 WL 704764. Although the Court sought the Solicitor General's input on the issue, the Court ultimately denied cert. *See* Farina v. Nokia, Inc., 79 U.S.L.W. 3514 (U.S. Oct. 3, 2011) (No. 10-1064).

7. *See Farina*, 625 F.3d at 133-34; *Murray*, 982 A.2d at 777; *Pinney*, 402 F.3d at 456-57.

8. *Wireless Quick Facts*, *supra* note 1 (statistics are as of June 2011).

9. *Id.*

10. Electromagnetic energy is defined as "the energy source required to transmit information (in the form of waves) from one place (material) to another." Aishwarya Nirmal, *What is Electromagnetic Energy?*, BUZZLE.COM, http://www.buzzle.com/articles/what-is-electromagnetic-energy.html (last visited Sept. 25, 2011).

11. *See* Robert F. Cleveland, Jr. & Jerry L. Ulcek, *Questions and Answers about*

electromagnetic energy that is particularly important to the telecommunications sector is called RF energy, or radio waves.[12] Radio waves are created as a result of the movement of electrical charges in antennas.[13] The resultant waves then radiate away from the antenna at the speed of light.[14]

In the case of cell phones, every time a person speaks during a phone call, that person's voice is converted into radio waves. Those radio waves are then transmitted from the cell phone's antenna to a nearby base station antenna.[15] The base station antenna then routes the call through the telephone network until it reaches its intended recipient.[16] Because RF energy is emitted through an antenna within the phone, the proximity of a cell phone to the user's head is positively correlated with increased exposure to RF radiation.[17]

It is widely accepted that exposure to high levels of RF radiation can heat human tissue, thereby causing potentially harmful biological effects to those exposed.[18] However, it is less clear whether exposure to the lower levels of RF radiation that typify cell phone usage can cause similarly harmful biological effects, even when the levels are not strong enough to measurably heat human tissue.[19] Although scientists are actively researching that question, studies to date have proven "inconclusive."[20] In June 2010, researchers published the results of a thirteen-country INTERPHONE study, which is the largest study of its kind.[21] INTERPHONE researchers found no statistically significant link between the development of certain brain tumors and normal amounts

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Biological Effects and Potential Hazards of Radiofrequency Electromagnetic Fields, FED. COMMC'NS COMM'N OFFICE OF ENG'G & TECH. 1 (1999), http://www.fcc.gov/oet/info/documents/bulletins/#56.

12. *Radiofrequency Background*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/HomeBusinessandEntertainment/CellPhones/ucm116338.htm (last updated Mar. 10, 2009).

13. *Id.*

14. *Id.*

15. *See FCC Encyclopedia: FAQS-Wireless Phones*, FED. COMMC'NS COMM'N, http://www.fcc.gov/encyclopedia/faqs-wireless-phones (last visited Oct. 1, 2011).

16. *Id.*

17. *Id.*

18. *FCC RF FAQ*, *supra* note 5.

19. *Id.* ("At relatively low levels of exposure to RF radiation . . . the evidence for production of harmful biological effects is ambiguous and unproven.").

20. *Id.* ("Results to date have been inconclusive."). Cell phone studies come in two forms: they are either epidemiological in nature, or controlled experiments conducted in laboratories. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-545, TELECOMMUNICATIONS: RESEARCH AND REGULATORY EFFORTS ON MOBILE PHONE HEALTH ISSUES 9-11 (2001), *available at* http://www.gao.gov/new.items/d01545.pdf.

21. INTERPHONE Study Grp., *Brain Tumour Risk in Relation to Mobile Telephone Use: Results of the INTERPHONE International Case-Control Study*, 39 INT'L J. EPIDEMIOLOGY 675, 685 (2010).

of cell phone usage.[22] However, researchers suggested that there may be an increased risk of tumor development for heavy cell phone users and that further inquiry into the long-term effects of heavy cell phone usage is necessary.[23] Based in part on the results of that study, the World Health Organization recently classified wireless phones as "possibly carcinogenic to humans [] based on an increased risk for glioma, a malignant type of brain tumor, associated with wireless phone use."[24]

Although the danger, if any, associated with cell phone usage will no doubt become more defined as science progresses, all studies to date suffer from the same general uncertainty.[25] This uncertainty is due, in part, to the difficulty in gathering reliable information regarding cell phone usage.[26] Specifically, study participants may not perfectly recall their pattern of cell phone use over the years, particularly if those participants are afflicted with a brain tumor that inhibits overall memory function.[27] The uncertainty may also be attributed to the often decades-long latency period between RF exposure and the formation of a brain tumor.[28] As widespread cell phone usage is a relatively recent occurrence in the United States,[29] reliable long-term data accounting for

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22. *Id.* at 688.

23. *Id.* When examining the data in greater detail, it appears that users who talk on the cell phone thirty minutes a day or more have a 40% greater risk of developing gliomas, a highly malignant type of brain tumor. Press Release, Congressman Dennis J. Kucinich, Kucinich Introduces Cell Phone Research, Warning Label Bill (June 30, 2010), *available at* http://kucinich.house.gov/News/DocumentSingle.aspx?DocumentID=192995). The increased risk rises to 96% for cell phone users who use their cell phone primarily on one side of their head. *Id.*

24. Press Release, World Health Org., Int'l Agency for Research on Cancer, IARC Classifies Radiofrequency Electromagnetic Fields as Possibly Carcinogenic to Humans (May 31, 2011), *available at* http://www.iarc.fr/en/media-centre/pr/2011/pdfs/pr208_E.pdf. The International Agency for Research on Cancer is tasked with classifying agents according to their carcinogenicity to humans. Cell phones are in Group 2B (Possibly carcinogenic to humans), below Group 1 (Carcinogenic to humans) and Group 2A (Probably carcinogenic to humans). *Id.* at 4-5. Possibly carcinogenic means that there is "limited evidence of carcinogenity," or that a credible "positive association has been observed between exposure to the agent and cancer." *Id.* at 5-6.

25. *See supra* notes 18-24 and accompanying text.

26. *See Fact Sheet: Cell Phones and Cancer Risk*, NAT'L CANCER INST., http://www.cancer.gov/cancertopics/factsheet/Risk/cellphones (last visited Sept. 25, 2011).

27. *Id.* Compounding this problem is the fact that the U.S. cell phone industry has declined to release usage statistics for individual cell phone users. *See* Kang, *supra* note 2. Therefore, there is no objective measure by which to verify the accuracy of a cancer patient's assertions of heavy use, or non-heavy use. *Id.*

28. *Id.*; *see also* DEVRA DAVIS, DISCONNECT 56 (2010) (noting that "[a]n invisible cancer cell must double thousands of times before it can be detected," and that, as a result, the "latency . . . period . . . can be decades").

29. For instance, the Cellular Telecommunications Industry Association estimates that in December 1995, there were only 33.8 million wireless subscriptions in the United States, composing 13% of the U.S. population. *Wireless Quick Facts*, *supra* note 1. Most recent

any latency period is not yet available.[30]

In the interim, the FCC has stepped into the role of regulating the level of RF emissions coming from cell phones.[31] The FCC deems all cell phones that comply with their RF emissions levels "safe" and authorizes them for sale in the United States.[32] Because the FCC's current RF emissions levels still pose a potential, albeit unidentified, risk to all cell phone users, litigation is, and has been, an inevitable consequence. The litigation to date has hinged primarily on one issue—whether state law claims that either directly, or indirectly, impose stricter RF emissions standards than those mandated by the FCC are preempted under the doctrine of conflict preemption.[33] The U.S. Court of Appeals for the Third Circuit[34] and the District of Columbia Court of Appeals[35] answered that question in the affirmative, while the U.S. Court of Appeals for the Fourth Circuit reached the opposite conclusion.[36]

Part III of this Note explores the authority under which the FCC set its emissions standards and the nature of the standards currently in place. Part IV addresses the various forms of federal preemption and examines the applicability of those forms to cell phone radiation claims. Part V deals specifically with one type of preemption, conflict preemption, and analyzes the likelihood of a plaintiff's success with respect to several state law causes of action. Finally, Part VI briefly concludes with a discussion of the future of cell phone emissions law.

III. FCC REGULATION OF RF RADIATION EMISSIONS

A. *FCC's Legal Authority*

Congress established the FCC in 1934 with the passage of the Federal Communications Act of 1934 (FCA).[37] At the time of establishment, Congress tasked the FCC with carrying out its "purpose

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estimates from June 2011 set the current figure at 322.9 million, or 102.4% of the U.S. population. *Id.*

30. *Fact Sheet No. 193: Electromagnetic Fields and Public Health: Mobile Phones*, WORLD HEALTH ORG., http://www.who.int/mediacentre/factsheets/fs193/en (last visited Sept. 23, 2011).

31. 47 C.F.R. § 2.1093 (2010).

32. *See, e.g.*, Farina v. Nokia, Inc., 625 F.3d 97, 126 (3d Cir. 2010).

33. *See id.* at 133-34; Murray v. Motorola, Inc. 982 A.2d 764, 777 (D.C. 2009); Pinney v. Nokia, Inc., 402 F.3d 430, 456-57 (4th Cir. 2005).

34. *Farina*, 625 F.3d at 133-34.

35. *Murray*, 982 A.2d at 777.

36. *Pinney*, 402 F.3d at 456-57.

37. Communications Act of 1934, Pub. L. No. 73-416, § 2, 48 Stat. 1064, 1064-65.

of regulating interstate and foreign commerce in communication by wire and radio so as to make available . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . . ."[38] To fulfill this mandate, Congress granted to the FCC the power to "perform any and all acts . . . as may be necessary in the execution of its functions."[39] The Supreme Court has said that the FCC's authority over certain technical details of the nation's telecommunications network is "clearly exclusive."[40] Nonetheless, the FCA contains a savings clause retaining remedies "existing at common law or by statute" and providing that the FCA's provisions "are in addition to such remedies."[41]

It was not until 1985 that the FCC began issuing guidelines for human exposure to RF radiation from certain FCC authorized facilities.[42] At that point, however, the FCC did not include cell phones within the scope of the regulations.[43] The FCC proposed those initial regulations in response to an amendment to the National Environmental Policy Act of 1969 (NEPA), which imposes an obligation on all federal agencies to consider "the environmental impact of [their] proposed action[s]."[44] At the outset, the FCC explicitly acknowledged its lack of expertise in the realm of health and safety standards:

> [T]he Commission has concluded that it is necessary to clarify our responsibilities and intentions with regard to potential hazards from radiofrequency (RF) and microwave radiation. At the outset, we would like to stress that the Commission has neither the expertise nor the primary jurisdiction to promulgate health and safety standards for RF and microwave radiation. At the same time, it appears that the National Environmental Policy Act (NEPA) . . . requires the Commission to consider whether the equipment and operations it authorizes will "significantly affect

38. 47 U.S.C. § 151 (2006). In 1993, Congress amended the FCC's mission statement to include cell phones. Specifically, Congress instructed the FCC to "foster the growth and development of mobile services that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure." H.R. REP. NO. 103-111, at 260 (1993), *reprinted in* 1993 U.S.C.C.A.N. 378, 587.

39. 47 U.S.C. § 154(i).

40. Head v. N.M. Bd. of Examiners in Optometry, 374 U.S. 424, 430 n.6 (1963) (citing 47 U.S.C. § 301).

41. 47 U.S.C. § 414.

42. Report and Order, *In re* Responsibility of the Fed. Commc'ns Comm'n to Consider Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices, 100 F.C.C.2d 543, 543-44 (1985) [hereinafter 1985 Report and Order].

43. *See id.*

44. 42 U.S.C. § 4332(C)(i) (2006). The FCC expressly noted that it enacted the rules pursuant to NEPA.

> the quality of the human environment." . . . For this reason, we today propose an amendment to our rules implementing the National Environmental Policy Act to provide for processing under our environmental rules of applications for equipment authorizations or transmitting facilities which do not comply with all applicable radiation health and safety standards promulgated by agencies of the federal government.[45]

As a result of the FCC's admitted inexperience in the field of health and safety, the FCC adopted radiation guidelines already established by the American National Standards Institute (ANSI).[46]

When ANSI revised its standards in 1993 to include restrictions on cell phone emissions, the FCC proposed rulemaking again to determine whether the FCC should adopt those standards.[47] During the notice and comment period for the proposed rule, Congress passed the Telecommunications Act of 1996 (TCA).[48] The TCA directed the FCC to "make effective rules regarding the environmental effects of [RF] emissions" within 180 days of the TCA's enactment.[49] Upon enacting the TCA, Congress expressly preempted certain state law in telecommunications[50] and preserved remaining state law through the inclusion of a savings clause.[51] At the conclusion of the notice and comment period, the FCC adopted revised standards that included cell phones within its regulatory scope.[52] Just as before, the FCC relied on standards proposed by other organizations—this time a hybrid of the ANSI standard and another standard recommended by the National Council on Radiation Protection and Measurements.[53] Also as before, the FCC denied any special expertise on matters relating to public

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45. Notice of Proposed Rulemaking, *In re* the Responsibility of the Fed. Commc'ns Comm'n to Consider Biological Effects of Radiofrequency Radiation When Authorizing the Use of Radiofrequency Devices, 89 F.C.C.2d 214, 251 (1982) (internal citation omitted).

46. 1985 Report and Order, *supra* note 42, at 551.

47. Notice of Proposed Rulemaking, *In re* Guidelines for Evaluating Environmental Effects of Radiofrequency Radiation, 8 FCC Rcd. 2849, 2850 (1993) [hereinafter 1993 Notice of Proposed Rulemaking].

48. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified in scattered sections of 47 U.S.C.).

49. *Id.* § 704(b), 110 Stat. at 152.

50. 47 U.S.C. § 332(c)(7)(B)(iv) (2006). That express preemption clause was in addition to another already existing at the time of the passage of the TCA. *See id.* § 332 (c)(3)(A).

51. Telecommunications Act of 1996 § 601(c)(1), 110 Stat. at 143 (codified as a note to 47 U.S.C. § 152). Note that the FCA also contained a savings clause, albeit more general in nature. *See* 47 U.S.C. § 414.

52. Report and Order, *In re* Guidelines for Evaluating the Envtl. Effects of Radiofrequency Radiation, 11 FCC Rcd. 15123, 15146-47 (1996) [hereinafter 1996 Report and Order]; *see also* 47 C.F.R. § 2.1093(d)(2) (2010).

53. *See* 1996 Report and Order, *supra* note 52, at 15124 nn.1-2.

health and safety.[54]

B. *Current Emissions Standards*

The current FCC radiation exposure limits are found at 47 C.F.R. § 2.1093(d) (2010). The limits are expressed in terms of a "specific absorption rate" (SAR), which is a measure of the rate at which RF energy emitted by cell phones (and other devices) is absorbed by the body.[55] The model from which the SAR standards derive is based on the Standard Anthropomorphic Man (SAM).[56] The SAM is an adult male weighing in at approximately two hundred pounds with an eleven-pound head and a height of six feet two inches.[57] Regardless of whether the user is a child, a woman, or a smaller man,[58] the FCC considers all phones that comply with the SAR standards safe.[59] Once certified by the FCC, all compliant cell phones may be legally sold in the United States.[60]

IV. PREEMPTION ANALYSIS

A. *Types of Preemption*

Federal preemption refers to the invalidation of a state law because it conflicts in some way with existing federal law.[61] The Supremacy

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54. *Id.* at 15134-35 (stressing that the FCC is "not a health and safety agency" and that it "would defer to the judgment of [] expert agencies with respect to determining appropriate levels of safe exposure to RF energy"); *see also* 1993 Notice of Proposed Rulemaking, *supra* note 47, at 2850 ("The Commission, however, is not the expert agency for evaluating the effects of RF radiation on human health and safety. Therefore, it uses standards and guidelines developed by those with appropriate expertise.").

55. CONSUMER & GOVERNMENTAL AFFAIRS BUREAU, FED. COMMC'NS COMM'N., FACTS: SAR FOR CELL PHONES: WHAT IT MEANS FOR YOU 1, *available at* http://www.fcc.gov/cgb/consumerfacts/sar.html.

56. DAVIS, *supra* note 28, at 74.

57. *Id.*

58. Many have criticized the SAR standards because they do not address, or account for, the physical differences between the SAM and each individual user. *See, e.g.*, ENVIRONMENTAL WORKING GROUP, CELL PHONE RADIATION: SCIENCE REVIEW ON CANCER RISKS AND CHILDREN'S HEALTH 12 (2009), http://ewg.org/project/2009cellphone/cellphoneradiation-fullreport.pdf. This problem is particularly pronounced in children and some estimate that a younger child's head absorbs twice the radiation of an adult's. *Id.* As a result, a child may receive radiation in an amount in excess of the FCC standards. *Id.*

59. *See* 47 C.F.R. §§ 2.803(a)(1), 24.50-.52 (2010).

60. *See id.* § 2.803(a)(1).

61. *See, e.g.*, Dayna B. Royal, *Take Your Gun to Work and Leave it in the Parking Lot: Why the OSH Act Does Not Preempt State Guns-at-Work Laws*, 61 FLA. L. REV. 475, 480 (2009). Murray v. Motorola, Inc., 982 A.2d 764, 772 (D.C. 2009) (citations omitted).

Clause of the U.S. Constitution serves as the legal justification for preemption and provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority 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.[62]

Federal law[63] can preempt state law either expressly or impliedly.[64] Express preemption exists when "Congress, through a statute's express language, declares its intent to displace state law."[65] However, a determination of intent to preempt *some* state law is just one part of the analysis, and a reviewing court must look further to "congressional intent as to the scope" of the intended preemption.[66]

The second type of preemption, implied preemption, encompasses both field and conflict preemption.[67] Field preemption is appropriate where "federal law so thoroughly occupies a legislative field as to make reasonable the inference that Congress left no room for the States to supplement it."[68] Although extensive regulation in a particular field is a strong indicator of congressional intent to preempt, it is not dispositive.[69]

Even where Congress has not intended to occupy a legislative field, federal law may still displace state law to the extent that the two conflict.[70] This type of preemption is referred to as conflict preemption

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62. U.S. CONST. art. VI, cl. 2.

63. It should also be noted that "[f]or preemption purposes, federal 'law' includes federal regulations . . . and state 'law' includes the common law as a basis for judgments in tort suits." *See also* Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 760 (2008).

64. *See* Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992) ("Congress' intent may be 'explicitly stated in the statute's language or implicitly contained in its structure and purpose.'" (quoting Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

65. Farina v. Nokia, Inc., 625 F.3d 97, 115 (3d Cir. 2010).

66. *Id.* at 118. The *Farina* court noted that to discern congressional intent, courts "look primarily to the text of an express preemption provision," but will also "look to the context of the regulatory scheme as a whole, including its purposes and the way in which Congress intended it to affect the public and the law." *Id.*

67. *Id.* at 115.

68. *Cipollone*, 505 U.S. at 516 (internal quotation marks omitted).

69. *Farina*, 625 F.3d at 121 ("'Pre-emption should not be inferred, however, simply because the agency's regulations are comprehensive.'" (quoting R.J. Reynolds Tobacco Co. v. Durham Cnty., 479 U.S. 130, 149 (1986))).

70. *Id.* at 115.

and comes in two primary forms.[71] The first form, called impossibility preemption,[72] is implicated where "compliance with both federal and state regulations is a physical impossibility."[73] The second form, called obstacle preemption,[74] mandates preemption where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[75] The Supreme Court has stated that "[w]hat is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects . . . ."[76]

B. *Applied Preemption Analysis*

1. Relevant Appellate Case Law

To date, three appellate courts—two federal and one state—have decided preemption cases pertaining to the adequacy of FCC RF exposure limits. The Fourth Circuit Court of Appeals was the first to address the issue in *Pinney v. Nokia, Inc.*[77] Plaintiffs in that case

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71. *Id.*

72. *See, e.g.*, Royal, *supra* note 61, at 485.

73. Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963).

74. *See, e.g.*, Royal, *supra* note 61, at 485.

75. Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

76. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000). The Court elaborated:

> For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.

Id. (quoting Savage v. Jones, 225 U.S. 501, 533 (1912)).

77. 402 F.3d 430, 430 (4th Cir. 2005). By way of background, *Pinney* dealt with the claims of five separate classes with lead plaintiffs named Pinney, Farina, Gilliam, Gimpelson, and Naquin. *Id.* at 441. All five of those class actions were originally brought in state court, then removed to various federal courts on federal question jurisdictional grounds. *Id.* Following removal, the Judicial Panel on Multidistrict Litigation transferred all of the actions to the District of Maryland for purposes of conducting consolidated pre-trial proceedings. *Id.* While there, the district court dismissed all the actions on the basis of complete preemption and denied multiple motions to remand. *Id.* On appeal in *Pinney*, the Fourth Circuit rejected the applicability of the complete preemption doctrine and, finding no other basis for federal jurisdiction, remanded all but one class action. *Id.* at 451. The one remaining diversity action, identified by lead plaintiff Naquin, is the only class to which the preemption analysis in *Pinney* applies. *Id.* As is noted *infra*, one of the dismissed classes—Farina—ultimately received different treatment by the Third Circuit.

consisted of cell phone users who were free from brain infirmities and who bought cell phones without headsets.[78] Plaintiffs brought several state law causes of action, seeking punitive damages and compensatory damages in an amount sufficient for each class member to purchase a headset.[79] Relying on the strong presumption against preemption,[80] the court found that plaintiffs' claims survived express preemption,[81] field preemption,[82] and conflict preemption[83] inquiries.

In deciding whether awarding damages to purchase headsets constituted an obstacle to the fulfillment of congressional objectives, the court focused primarily on the two express preemption clauses and the two savings clauses found in the FCA and the TCA.[84] Ultimately, the court concluded that the framework of those acts indicated strong congressional intent to retain certain state law causes of action.[85] Because there was no overarching intent to preclude the precise claims at issue in *Pinney*, the court then examined whether allowing the relief sought would upset the congressional goal of "establishing a nationwide network of wireless telephone service coverage."[86] Finding that headset requirements did not upset that goal, the court rejected the preemption argument.[87]

Most recently, the Third Circuit took the opposite view in *Farina v. Nokia, Inc.*[88] In *Farina*, plaintiffs were similar to those in *Pinney* and sought similar relief.[89] However, unlike the court in *Pinney*, the *Farina* court found the claims barred on the basis of conflict preemption.[90] In reaching that conclusion, the Third Circuit examined various federal sources like the TCA and the FCC regulations enacted pursuant to that authority. In contrast with *Pinney*, the *Farina* court focused its analysis on the cause of action, and not on the effect of the specific relief sought

78. *Id.* at 440.

79. *Id.* at 440-41. For plaintiffs whose cell phones were not equipped with headset capability, plaintiffs also sought an injunction compelling the provision of acceptable phones. *Id.*

80. *See infra* Part V.

81. *Pinney*, 402 F.3d at 456.

82. *Id.* at 459.

83. *Id.* at 457-58.

84. *Id.* at 456-58.

85. *Id.* at 458.

86. *Id.*

87. *Id.*

88. 625 F.3d 97 (3d Cir. 2010). For a more detailed explanation of the procedural background in *Farina*, see *supra* note 77. Following the remand in *Pinney*, the *Farina* defendants again removed to federal court (specifically, the Eastern District of Pennsylvania) under the Class Action Fairness Act. *Id.* at 109.

89. *Id.* at 104, 107; *Pinney*, 402 F.3d at 440-41.

90. Farina, 625 F.3d at 133-34.

(like the provision of headsets).[91]

With respect to the TCA, the court declined to give "broad effect" to the TCA's savings clause and instead treated it as "merely one data point out of many . . . use[d] to discern congressional intent."[92] Examining other "data point[s]," the court found conflict preemption on the basis of a conflict between the instant litigation and the FCC's regulations. Specifically, although plaintiffs' argument facially challenged only the misleading literature accompanying cell phones indicating that the phone was "safe to operate," the court found that plaintiffs indirectly challenged the FCC standards themselves.[93] To find that cell phone manufacturers misrepresented the safety of their product, the court noted it would have to find, first, that the FCC standards with which the phones complied were not safe.[94] The court determined such a finding would upset the balancing process that the FCC underwent in creating the FCC emissions standards and would frustrate the congressional purpose of achieving a uniform cellular network and in entrusting that responsibility in the FCC exclusively.[95]

The D.C. Court of Appeals in *Murray v. Motorola, Inc.*[96] fell somewhere in between the courts' findings in *Pinney* and *Farina*. Unlike *Pinney* and *Farina*, plaintiffs in *Murray* consisted of people who actually suffered brain injuries, purportedly as a result of their use of defendants' cell phones.[97] Plaintiffs sought damages on multiple state law grounds.[98] The court ultimately found that "insofar as plaintiffs' claims rest on allegations about the inadequacy of the FCC's RF radiation standard or about the safety of their FCC-certified cell phones, the claims are preempted under the doctrine of conflict preemption."[99] In reaching that conclusion, the court limited its discussion of the TCA savings clause to one sentence, repeating only the oft-cited notion that savings clauses do not bar a finding of preemption.[100]

However, the court carved out certain claims that could proceed even upon a finding of conflict preemption.[101] Specifically, the D.C.

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91. *Id.* at 133-34.

92. *Id.* at 131-32.

93. *Id.* at 133.

94. *Id.*

95. *See id.* at 133-34.

96. 982 A.2d 764 (D.C. 2009). Like the *Pinney* and *Farina* actions, *Murray* began in state court and was later removed to federal court and joined with similar cases in the District of Maryland. *See id.* at 768-69. *Murray* was subsequently remanded back to state court, where it was ultimately litigated. *Id.*

97. *Id.* at 768.

98. *Id.* at 770-71.

99. *Id.* at 777.

100. *Id.* at 778 n.19.

101. *Id.* at 781.

Court of Appeals allowed claims based on the inadequate safety features of phones manufactured before August 1, 1996 (the date on which the current FCC SAR standards came into effect).[102] In addition, the court authorized consumer protection claims that were not based on the adequacy of the FCC standards per se, but on the deceptive nature in which the safety features of the cell phones were described (*i.e.*, one warning maintained that the phones were entirely safe).[103]

In the following sections, this Note elaborates on the preemption discussion found in *Pinney*, *Farina*, and *Murray* and sets forth the relevant arguments at both ends of the preemption spectrum. This Note ultimately adopts, and expands upon, the *Pinney* court's reasoning.

2. Express Preemption

There are two express preemption clauses potentially applicable to cell phone radiation claims, but defense attempts to persuade courts of their applicability failed in *Pinney*, *Farina*, and *Murray*.[104] The first provision, enacted under the TCA, provides: "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions."[105] Relying on a broad interpretation of the word "facilities," cell phone manufacturer defendants in previous litigation have maintained that cell phones fall within the scope of "personal wireless service facilities"[106] because the word "facilities" includes things "which promote[] the ease of any action, operation, transaction, or course of conduct."[107] Plaintiffs, on the other hand, have suggested that the word "facilities" implies a "sense of permanence, as with a physical structure."[108] Finding that both meanings were plausible, reviewing courts looked to the "broader context in which 'facility' is used."[109] Because the section containing the preemptive language is

102. *Id.* at 781-82.

103. *Id.* at 782-83.

104. Farina v. Nokia, Inc., 625 F.3d 97, 117-18 (3d Cir. 2010); *Murray*, 982 A.2d at 772; *Pinney*, 402 F.3d at 454-57.

105. 47 U.S.C. § 332(c)(7)(B)(iv) (2006) (emphasis added).

106. *See, e.g.*, *Farina*, 625 F.3d at 118 (citing Black's Law Dictionary 591 (6th ed. 1990)). Note that the defendants advanced both arguments in all three cases, with the court reaching the same conclusion in each case. However, this discussion focuses on *Farina* solely for brevity purposes.

107. *Id.*

108. *Id.*

109. *Id.*

entitled "Preservation of local zoning authority,"[110] the courts interpreted this language to mean Congress intended to limit the provision to physical infrastructure, and not to cell phones.[111] As a result, the court in *Farina* found no express preemption with respect to the first provision.[112] The courts in *Murray* and *Pinney* reached the same conclusion.[113]

The second provision on which cell phone manufacturers relied is codified at 47 U.S.C. § 332(c)(3)(A).[114] That provision provides that "no state or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile service."[115] Defendants argued in *Murray*, and the trial court so held, that state law standards imposing more restrictive requirements on the sale of cell phones indirectly "regulate the entry" of mobile providers.[116] The court rejected that argument as excessively broad and far reaching.[117]

As the FCC itself admitted, under this logic, any disparate state requirement with which mobile providers must comply would constitute a regulation of entry.[118] Yet, such an interpretation reads out the carefully crafted exception housed within section 332(c)(3)(A) indicating that states remain free to restrict "the *other* terms and conditions of commercial mobile services."[119] In light of the plain text of the statutory provision, the *Murray* court concluded that "'Congress's intent in enacting [section 332(c)(3)(A)] was to prevent the states from obstructing the creation of nationwide cellular service coverage, and not the preemption of health and safety and police powers."[120] The courts in *Farina* and *Pinney* adopted the same logic in rejecting the defendants' express preemption claims.[121]

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110. 47 U.S.C. § 332(c)(7).

111. *Farina*, 625 F.3d at 119.

112. *Id.* at 120.

113. Murray v. Motorola, Inc., 982 A.2d 764, 773 (D.C. 2009); Pinney v. Nokia, Inc., 402 F.3d 430, 444-45 (4th Cir. 2005).

114. 47 U.S.C. § 332(c)(3)(A); *Farina*, 625 F.3d at 120.

115. 47 U.S.C. § 332(c)(3)(A).

116. Murray, 982 A.2d at 774.

117. *See id.*

118. *Id.*

119. 47 U.S.C. § 332(c)(3)(A) (emphasis added).

120. *Murray*, 982 A.2d at 774 (quoting Farina v. Nokia, 578 F. Supp. 2d 740, 761 (E.D. Pa. 2008)).

121. Farina v. Nokia, Inc., 625 F.3d 97, 121 (3d Cir. 2010) (although the *Farina* defendants did not raise the issue on appeal, the Third Circuit raised the argument *sua sponte*); Pinney v. Nokia, Inc., 402 F.3d 430, 457-58 (4th Cir. 2005).

3. Field Preemption

As in the case of express preemption, all reviewing appellate courts have rejected the argument that the FCC emissions standards preempt state law in the same field.[122] The courts have been careful to distinguish what they perceive as intent to accord FCC "primacy over the area of technical standards and competitive market structure for cellular service," from intent to occupy that entire field.[123] The most obvious indication that Congress did not intend to occupy the field is that the two major acts governing the FCC's regulatory authority in the area, the FCA and the TCA, contain savings clauses.[124] So-called savings clauses represent deliberate congressional intent to reserve some role for states within the field.[125] Therefore, as the court in *Farina* noted, "[t]he presence of a savings provision 'is fundamentally incompatible with complete field preemption.'"[126]

Despite the unwillingness of appellate courts to entertain the field preemption defense, the FCC has argued in favor of its applicability.[127] Specifically, in *Murray* amicus briefing, the FCC maintained that the federal government occupies the field of "regulating technical standards for RF transmissions."[128] The FCC reached that conclusion by reviewing its historically dominant regulation in the area, purportedly buttressed by Supreme Court precedent and by the structure of the FCA.[129] In light of these disparate approaches, the decisions of future courts addressing field preemption issues will likely hinge on the level of deference accorded to the agency's preemption views.

4. Conflict Preemption

Although defendants in cell phone emissions litigation typically raise express and field preemption arguments, most litigation to date has hinged on the issue of conflict preemption. As set forth above, conflict preemption may apply in two instances—first, "where compliance with both federal and state regulations is a physical impossibility,"[130] and second, where state "law stands as an obstacle to the accomplishment

122. *Farina*, 625 F.3d at 121; *Murray*, 982 A.2d at 787; *Pinney*, 402 F.3d at 458-59.

123. *Farina*, 625 F.3d at 121 (internal quotation marks omitted).

124. *Id.*

125. *Id.*

126. *Id.* (quoting *In re* Nos Commc'ns, 495 F.3d 1052, 1968 (9th Cir. 2007)).

127. Brief of FCC as Amicus Curiae at 12-14, Murray v. Motorola, Inc., 982 A.2d 764 (D.C. 2009) (Nos. 07-1704 to 07-1079).

128. *Id.* at 15.

129. *Id.* at 12-14.

130. Wyeth v. Levine, 129 S. Ct. 1187, 1208 (2009) (Thomas, J., concurring) (internal quotation marks omitted).

and execution of the full purposes and objectives of Congress."[131] Because it is possible to simultaneously comply with looser federal standards and more stringent state standards, the proper inquiry is whether state tort litigation would frustrate congressional "purposes and objectives."

V. *WYETH V. LEVINE*: CONFIRMING THE JUDICIAL PRESUMPTION AGAINST CONFLICT PREEMPTION

In evaluating the appropriateness of conflict preemption in the cell phone radiation context, it is important to note that there is a judicial presumption against preemption.[132] This presumption applies with particular force in cases where, as here, "Congress has 'legislated . . . in a field which the States have traditionally occupied.'"[133] The Supreme Court has stressed that the stronger presumption is warranted because states are "independent sovereigns in our federal system," and it is, therefore, assumed that "Congress does not [intend to] cavalierly pre-empt state-law causes of action."[134] As a result, reviewing courts must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act," and may stray from that assumption only upon a finding that preemption "was the clear and manifest purpose of Congress."[135]

Many view the recent Supreme Court opinion in *Wyeth v. Levine*[136] as markedly strengthening this presumption, particularly in the realm of conflict preemption.[137] In that case, a woman sued Wyeth

131. *Id.* (internal quotation marks omitted).

132. *See, e.g., id.* at 1194-95 (majority opinion). Before *Wyeth*, the Supreme Court had not officially recognized the presumption against preemption in the implied preemption context. *See* Note, *Chevron and the Substantive Canons: A Categorical Distinction*, 124 HARV. L. REV. 594, 606 (2010).

133. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). The Court specifically identified "state regulation of matters of health and safety" as one of those areas over which states have "historic primacy." *Id.* at 486.

134. *Id.* at 485.

135. *Id.* (quotation marks omitted); *see also* Geier v. Am. Honda Motor Co., 529 U.S. 861, 885 (2000) ("[C]ourt[s] should not find pre-emption too readily in the absence of clear evidence of a conflict.").

136. *Wyeth*, 129 S. Ct. at 1191.

137. *See generally, e.g.*, Richard A. Epstein, *What Tort Theory Tells Us About Federal Preemption: The Tragic Saga of* Wyeth v. Levine, 65 N.Y.U. ANN. SURV. AM. L. 485, 485-86 (2010); Eric Policastro, Comment, *Saying Goodbye to Implied-Federal Preemption: The Contemporary Scope of Federal Preemption in Light of* Geier, Reigel, *and* Wyeth, 61 BAYLOR L. REV. 1028, 1030 (2009). To be sure, Justice Thomas would go even further than the majority. In his *Wyeth* concurrence, Justice Thomas noted that he would do away with implied preemption altogether. *Wyeth*, 129 S. Ct. at 1205 (Thomas, J. concurring). He expressed serious

Pharmaceuticals to recover damages for injuries suffered as a result of an adverse reaction to Phenergan, a drug manufactured by Wyeth.[138] Her injuries stemmed from administration of the drug via the IV-push method (directly into a vein), as opposed to the IV-drip method (whereby the drug is first placed into an IV bag).[139] Levine brought a state law failure-to-warn claim, alleging that the manufacturer's warning should have cautioned against IV-drip administration of the drug.[140] Wyeth argued that the Food, Drug, and Cosmetics Act (FDCA) impliedly preempted state law failure-to-warn claims for Phenergan, and that Wyeth's compliance with applicable federal laws precluded any recovery.[141]

Rejecting Wyeth's implied preemption argument, the Court noted that "[i]f Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision . . . ."[142] Because Congress failed to expressly preempt the claims, and because of "its certain awareness of the prevalence of state tort litigation," there was "powerful evidence that Congress did not intend FDA oversight to be the exclusive means of ensuring drug safety and effectiveness."[143]

The Court's focus on the presence, or absence, of an express preemption clause as an important factor in an implied preemption inquiry may signal a shift toward more restrained preemption jurisprudence.[144] However, the Third Circuit in *Farina* found otherwise.[145] On a general level, the *Farina* court counseled against an overly expansive reading of *Wyeth* on the basis that such a reading "would come too close to subsuming conflict preemption into expression preemption analysis."[146] The court also noted various factual distinctions between the claims at issue in *Wyeth* and those at issue in cell phone litigation.[147] First, the court found, the longstanding "complementary role" between state law and the operation of the FDCA did not exist in the context of regulation of RF emissions.[148] Second,

misgivings about a judicial policy that allows a reviewing court to trump the actual text of federal law on the basis of some generalized notion that state law claims would frustrate Congressional "purposes and objectives." *Id.*

138. *Wyeth*, 129 S. Ct. at 1191.
139. *Id.*
140. *Id.* at 1191-92.
141. *Id.* at 1193-94.
142. *Id.* at 1200.
143. *Id.*
144. *Id.*; *see also supra* note 137.
145. *See* Farina v. Nokia, Inc., 625 F.3d 97, 129-30 (3d Cir. 2010).
146. *Id.* at 130.
147. *Id.* at 129-30.
148. *Id.* at 129.

unlike *Farina*, *Wyeth* was not a case where the results of agency balancing were at issue.[149] Accordingly, while FDA labeling requirements and state tort litigation were both aimed at protecting public safety, the court found the FCC's regulations more complex insofar as they reflected an expert balance between public safety and efficiency concerns.[150]

A. *Conflict Preemption Post-*Wyeth*: A Broad View*

The Supreme Court has not yet explicitly clarified the scope of the doctrine it set forth in *Wyeth*. Assuming the broadest reading of that case, all state law claims premised on the adequacy of cell phone emissions standards would survive a preemption inquiry. Though over the years Congress expressly preempted certain state law, it seemingly did not expressly preempt the tort claims at issue in cell phone radiation litigation. At the same time, Congress inserted savings clauses into both the FCA and the TCA shielding all remaining state law from preemption. Therefore, arguably, the structure of both the FCA and the TCA counsel against a finding of congressional intent to preempt tort claims.

B. *Conflict Preemption Post-*Wyeth*: A Narrower View*

Nonetheless, assuming a narrower reading of *Wyeth* prevails, as it did in *Farina*, further analysis is necessary. A narrower reading of *Wyeth* maintains the dividing lines between express and implied preemption, but does not discount the express preemption and savings clauses in both the FCA and the TCA.[151] Instead, the various clauses serve as indicators of congressional intent, which, under either reading of *Wyeth*, is the cornerstone of any preemption analysis.[152] However, the inquiry does not end upon a finding that Congress intended to retain *some* state law causes of action.[153] Instead, a reviewing court must look further to whether allowing a particular cause of action interferes with congressional objectives by serving as an "obstacle" to the realization of those objectives.[154]

As discussed above, the only outward evidence of congressional

149. *Id.* at 130.

150. *Id.*

151. The *Farina* court adopted this narrower reading of *Wyeth*. *Id.* at 130-31.

152. *Wyeth*, 129 S. Ct. at 1194 ("'[T]he purpose of Congress is the ultimate touchstone in every preemption case.'" (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996))); Royal, *supra* note 61, at 481 ("Congressional intent is . . . the lodestar for determining whether state law is preempted.").

153. Geier v. Am. Honda Motor Co., 529 U.S. 861, 869 (2000).

154. *Id.*

intent to preempt is found in two express preemption clauses, one passed before the TCA's enactment and the other created by the TCA. The express preemption clauses are counterbalanced by the presence of two savings clauses contained within the FCA and the TCA.[155] The FCA clause provides that "[n]othing in this chapter . . . shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."[156] More forcefully, section 601(c)(1) of the TCA, titled "EFFECT ON OTHER LAWS," explicitly rejects implied preemption:

> (c) FEDERAL, STATE, AND LOCAL LAW—
> (1) *No Implied Effect*—This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments.[157]

Indeed, the legislative history of the TCA corroborates the assertion that Congress intended to "prevent[] affected parties from asserting that the bill impliedly preempts other laws."[158]

In cell phone litigation, the weight accorded to those specific statutory provisions has varied. In *Murray*, for instance, the D.C. Court of Appeals essentially dispensed with the savings clauses in one sentence, affirming that such clauses do not otherwise bar conflict preemption analysis.[159] By contrast, the *Pinney* court accorded great weight to the statutory framework and found that it "counsel[ed] against any broad construction of the goals of [the TCA] that would create an implicit conflict with state tort law."[160] Finally, though acknowledging its importance in defining congressional intent, the *Farina* court referred to the statutory framework as but "one data point out of many" in analyzing congressional intent.[161]

Regardless of the varying treatment, it seems that all three appellate courts are in agreement that savings clauses have some bearing on congressional intent, but do not end the inquiry altogether. Accordingly, it is apparent that Congress intended to retain some state telecommunications law, and the next question is whether allowing

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155. Telecommunications Act of 1996, Pub. L. No. 104-104, § 601(c)(1), 110 Stat. 56, 143 (codified as a note to 47 U.S.C. § 152 (2006)); 47 U.S.C. § 414 (2006).

156. 47 U.S.C. § 414.

157. Telecommunications Act of 1996 § 601(c)(1), 110 Stat. at 143 (codified as a note to 47 U.S.C. § 152 (2006)).

158. H.R. REP. NO. 104-458, at 201 (1996) (Conf. Rep.).

159. Murray v. Motorola, Inc., 982 A.2d 764, 778 n.19 (D.C. 2009).

160. Pinney v. Nokia, Inc., 402 F.3d 430, 458 (4th Cir. 2005).

161. Farina v. Nokia, Inc. 625 F.3d 97, 131-32 (3d Cir. 2010).

state tort judgments premised on the inadequacy of the FCC's RF radiation standards nonetheless conflicts with broader congressional and agency objectives.[162] The logic behind this second question is that it is nearly impossible for Congress to foresee every possible scenario in which state law may conflict with proposed federal legislation.[163] Although Congress may include a broad savings clause in legislation, a situation may arise in which a state law claim technically falling within the savings clause clearly upsets the overall intent behind Congress's regulatory scheme.[164] In such instances, a savings provision should not be interpreted so broadly as to "permit[] [the] law to defeat its own objectives."[165]

1. Did Congress Foresee a Possible Conflict?

An additional question is whether Congress actually *did* foresee the possibility of concurrent state tort litigation that conflicts with FCC standards, yet intended for those claims to be subsumed within the savings clauses.[166] Under such circumstances, there is no "conflict" between congressional purposes and state law because, had Congress intended otherwise, it "surely would have enacted an express pre-emption provision" encompassing this type of litigation.[167] Though the possibility of state law claims premised on the adequacy of the FCC's SAR standards are perhaps not as foreseeable as claims against drug manufacturers like Wyeth, they are not entirely unforeseeable.[168]

In 1968, Congress passed the Radiation Control for Health and

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162. *See, e.g., id.*

163. Geier v. Am. Honda Motor Co., 529 U.S. 861, 872 (2000).

164. *Id.*

165. *Id.*; *see also id.* (noting that some conflict analysis is necessary because otherwise, enforcers of a law may be deprived of the "ability to achieve the law's congressionally mandated objectives that the Constitution, through the operation of ordinary pre-emption principles, seeks to protect."); *Farina*, 625 F.3d at 131 ("[A] clarification of intent not to preempt some state law is not a statement of intent to permit actual conflicts between state and federal law.").

166. The Supreme Court has stated, "'The case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.'" Wyeth v. Levine, 129 S. Ct. 1187, 1200 (quoting Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 166-67 (1989)) (alteration in original).

167. *Id.*

168. At a minimum, the *FCC* recognized the potential for tort litigation. 1996 Report and Order, *supra* note 52, at 15128. In its final report instituting the current standards in 1996, the FCC noted that they received a "significant number" of comments "address[ing] the issue of Federal preemption of state and local regulations for RF exposure" based on "health and safety objectives." *Id.* FCC awareness does not conclusively translate into congressional awareness, but at least bolsters the argument that Congress was not in the dark.

Safety Act of 1968 (RCHSA).[169] Under the RCHSA, Congress delegated to the FDA the authority, when it deems it "necessary for the protection of the public health and safety," to "prescribe performance standards for electronic products to control the emission of electronic product radiation from such products."[170] The FDA responded to that delegation of authority by instituting radiation emission limits for certain consumer devices, such as television receivers in 1970[171] and microwave ovens in 1971.[172] Apparently foreseeing the possibility of litigation and conflicting state laws, Congress included an express preemption clause in the RCHSA that invalidated any state standard "not identical to the Federal standard."[173]

Congress's experience with the RCHSA serves two significant functions. First, it demonstrates that Congress was aware of the possibility of divergent state law with respect to radiation emissions levels. Second, it demonstrates that Congress knew how to expressly preempt such state law. When Congress instructed the FCC to enact regulations regarding radiofrequency radiation, it was not entering unchartered territory. However, instead of following the same course of action as it did in the RCHSA by expressly preempting related state law, Congress did not do so. The logical conclusion is that Congress did not intend broad-based preemption of state law governing cell phone RF emissions. If broad-based preemption is to occur, it seems it should be done by the FDA exercising its authority under the RCHSA.

2. Frustration of Congress's "Purposes and Objectives"?

If reviewing courts are unwilling to stretch beyond the text of a statute and its accompanying legislative history to ascertain congressional intent, further preemption analysis is needed. The next step requires comparing Congress's purposes and objectives in enacting the FCA and the TCA, and the FCC's objectives in creating its radiation standards, with the overall effect of state tort litigation on those objectives. As an initial step, an overview of the various purposes and objectives at issue is helpful here.

At the time of the FCC's creation, Congress charged the agency with the duty to create "a rapid, efficient, Nation-wide, and world-wide wire

169. Pub. L. No. 90-602, 82 Stat. 1173 (1968) (codified as amended 21 U.S.C. §§ 360hh-360ss (2006)).

170. 21 U.S.C. § 360kk(a)(1).

171. 21 C.F.R. § 1020.10 (2010).

172. *Id.* § 1030.10; *see also Microwave Oven Radiation*, U.S. FOOD & DRUG ADM'N, http://www.fda.gov/Radiation-EmittingProducts/ResourcesforYouRadiationEmittingProducts/ucm252762.htm (last updated Apr. 26, 2011).

173. 21 U.S.C. § 360ss.

and radio communication service with adequate facilities at reasonable charges."[174] Around 1996, Congress recognized a threat to the nation-wide wireless network in the form of inconsistent "State and local requirements, siting and zoning decisions" fueled by radiation fears.[175] As a result, Congress affirmed that a "high quality national wireless telecommunications network cannot exist if each of its component[s] must meet different RF standards in each community."[176]

With that problem in mind, Congress passed the TCA in 1996, thereby broadening the FCC's mandate to include "rules regarding the environmental effects of radio frequency emissions."[177] According to the TCA's legislative history, the purpose behind the delegation of authority was to ensure the establishment of "uniform, consistent requirements, with adequate safeguards of the public health and safety."[178] Congress believed such requirements would "ensure an appropriate balance in policy and [] speed deployment of the availability of competitive wireless telecommunications services at a low price to consumers."[179]

In contrast to the FCC's authority over the technical standards of the nation's wireless network, however, it is clear that Congress did not intend the FCC's authority over radio frequency emissions to be exclusive. Rather, such authority is exercised concurrently with the FDA.[180] The FDA, though not regulating cell phone radiation as a matter of course, "does have the authority to take action if cell phones are shown to emit radiofrequency energy (RF) at a level that is hazardous to the user."[181] And, if it chooses to exercise that authority, the FDA's regulations are clearly preemptive.[182] While the FCC is the exclusive authority on technical wireless matters, its authority over health and safety aspects of cell phones is at all times subject to the FDA's tacit approval.[183]

Just as Congress did not intend to entrust exclusive health and safety authority in the FCC, based on express preemption clauses and savings clauses in the FCA and the TCA, it also clearly intended to retain some

174. 47 U.S.C. §§ 151, 301 (2006).

175. H.R. REP. NO. 104-204, pt. 1, at 94 (1995).

176. *Id.* at 95.

177. Pub. L. No. 104-104, § 704, 110 Stat. 56, 152 (1996).

178. H.R. REP. NO. 104-204, pt. 1, at 94.

179. *Id.*

180. *Cell Phone Overview*, U.S. FOOD & DRUG ADMIN., http://www.fda.gov/Radiation-EmittingProducts/RadiationEmittingProductsandProcedures/HomeBusinessandEntertainment/CellPhones/default.htm ("FDA shares regulatory responsibilities for cell phones with the Federal Communications Commission (FCC).") (last updated Dec. 2, 2010).

181. 21 U.S.C. § 360ss (2006).

182. *Id.*

183. *Id.*

telecommunications-based state law (or litigation). The intent was made most clear in the TCA. Congress could have expressly preempted all non-identical state law and tort litigation, but it opted to preempt only inconsistent state zoning laws.[184] That carefully worded express preemption clause, coupled with a strongly worded savings clause explicitly disclaiming any implied preemptive effect, weighs against a finding of implied preemption. As aforementioned, though these factors alone may not be dispositive from an implied preemption perspective, they are still powerful sources of congressional intent. This is particularly true when contrasted with RCHSA, which quite clearly bars conflicting litigation.

Finally, although "Congress' intent, of course, primarily is discerned from the language of the . . . statute and the 'statutory framework' surrounding it,"[185] courts do often look to federal agencies for their views on the objectives behind regulations passed pursuant to a congressional delegation of power.[186] The FCC, for its part, defined its objective as striking "a proper balance between the need to protect the public and workers from exposure to potentially harmful RF electromagnetic fields and the requirement that industry be allowed to provide telecommunications services to the public in the most efficient and practical manner possible."[187] According to the FCC, the present RF emissions standards represent that agency's carefully reasoned policy judgment that its standards strike that appropriate balance.[188]

In sum, a common theme throughout the FCA's and TCA's legislative history is the notion of wireless network uniformity.[189] Although the TCA undoubtedly instructed the FCC to regulate cell phone RF emissions, that authority appears secondary to its primary responsibility of maintaining the nation's wireless network. Nonetheless, to exercise that responsibility, the FCC necessarily had to go undergo a balancing of health and safety concerns against uniformity concerns. Congress entrusted that balancing in the FCC, and the FCC claims that such balancing is an important objective of its RF emissions regulations.

Because the frustration of Congress's "purposes and objectives" is a fact-specific inquiry, it is useful to analyze the effect of certain tort

184. 47 U.S.C. § 332(c)(7)(B)(iv) (2006).

185. Medtronic, Inc. v. Lohr, 518 U.S. 470, 486 (1996).

186. *See, e.g.*, Williamson v. Mazda Motor of Am., Inc., 131 S. Ct. 1131, 1134 (2011).

187. Second Memorandum Opinion and Other and Notice of Proposed Rulemaking, *In re* Procedures for Reviewing Requests for Relief from State and Local Regulations, 12 FCC Rcd. 13494, 13499 (1997) [hereinafter 1997 Second Memorandum Opinion and Order].

188. *See* Brief of FCC as Amicus Curiae, *supra* note 127, at 17.

189. *See, e.g., id.*; 47 U.S.C. §§ 151, 301.

claims separately.[190] Where one type of claim may frustrate Congress's objectives, another may exist harmoniously with those objectives. However, at the outset, it is important to establish the weight, if any, accorded to the FCC's determination that state tort law conflicts with important federal purposes and objectives.

a. FCC's View Regarding the Preemptive Effect of Its Regulations

Although the FCC had the opportunity to address the preemptive status of its RF radiation regulations early on, it apparently did not think it necessary at first.[191] It was not until 2008 that the FCC determined that allowing state tort litigation would prevent the FCC from fully performing the authority delegated to it by Congress.[192] Specifically, in amicus briefing in *Murray*, the FCC cited the possibility that a "patchwork of technical standards [] would contravene the federal policy of creating a 'rapid, efficient, Nation-wide, and world-wide . . . radio communication service,'"[193] and declared all conflicting state law, or litigation, impliedly preempted.[194]

An agency's determination that state law adversely affects congressional objectives is given "some weight,"[195] the extent of which is determined by the "thoroughness, consistency, and persuasiveness" of the agency's explanation.[196] This is true even of agency views expressed in the context of amicus briefing and outside of the formal notice and comment process.[197] Nonetheless, the phrase "some weight" means just

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190. For purposes of this Note, certain types of claims are highlighted. There may be other claims available to potential plaintiffs that are not addressed in the Note, such as fraud, intentional misrepresentation, negligent misrepresentation, breach of express and implied warranties, and battery. *See, e.g.*, Murray v. Motorola, Inc., 982 A.2d 764, 770-71 (D.C. 2009).

191. 1996 Report and Order, *supra* note 52, at 15183-84.

192. Brief of FCC as Amicus Curiae at 9-12, Murray v. Motorola, Inc., 982 A.2d 764 (D.C. 2009) (Nos. 07-1704 to 07-1079). Apparently, the Solicitor General authorized the filing of an amicus brief in the wake of the *Pinney* decision in 2005. *See* Brief in Opposition to Petition for Writ of Certiorari at 13 n.22, Farina v. Nokia, Inc., No. 10-1064 (U.S. filed Apr. 29, 2011), 2011 WL 1633941. However, because the Fourth Circuit denied a request for rehearing en banc, the FCC never had the opportunity to submit its briefing. *Id.*

193. Brief of FCC as Amicus Curiae, *supra* note 127, at 14 (quoting 47 U.S.C. § 151).

194. *Id.* at 15-18.

195. Geier v. Am. Honda Motor Co., 529 U.S. 861, 883 (2000). The FCC's statements on their own, however, are insufficient to preempt state law as they do not carry with them the force and effect of law. *See, e.g.*, Merrill, *supra* note 63, at 764.

196. Wyeth v. Levine, 129 S. Ct. 1187, 1201 (2009) (deferring to "an agency's explanation of how state law affects the regulatory scheme").

197. Auer v. Robbins, 519 U.S. 452 (1997) ("The Secretary's interpretation is not rendered unworthy of deference by the fact that it is set forth in an *amicus* brief; . . . there is no reason to suspect that it does not reflect the Secretary's fair and considered judgment."); *see also* Williamson v. Mazda Motors of Am., Inc., 131 S. Ct. 1131, 1139 (2011). Although in the preceding cases, the Court appears to be referring to *Chevron* deference, Chevron, U.S.A., Inc.

what it says. Courts should not simply "defer[] to an agency's *conclusion* that state law is pre-empted."[198] Instead, a reviewing court should continue to "perform[] its own conflict determination, relying on the substance of state and federal law and not on agency proclamations of pre-emption."[199] Indeed, the courts in *Farina* and *Murray* appear to have done just that when they rejected the applicability of field preemption, despite FCC assertions to the contrary.

b. Design Defect Claims[200]

As previously established, every preemption inquiry hinges on the intent of Congress and the views of agencies exercising congressionally delegated authority. To ascertain Congress's intent, it is important to isolate the authority under which the FCC instituted its SAR regulations. Although typically a simple exercise, it is more complex in this scenario because the FCC appears to have enacted its standards pursuant to either NEPA or the TCA, or some combination thereof.[201]

The FCC stated in its regulation instituting the SAR standards that the standards came as "a consequence of Commission responsibilities under the *National Environmental Policy Act* to evaluate the environmental significance of its actions."[202] NEPA is a law generally applicable to all federal agencies and, as such, regulations enacted pursuant to it presumably have no preemptive effect.[203] Therefore, if the standards resulted solely from the FCC's NEPA obligations, they would not preempt design defect claims, or any other claims for that matter.

Notwithstanding the foregoing, the TCA also imposed substantive

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v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984), the *Murray* court opted for the less deferential *Skidmore* standard. Murray v. Motorola, Inc., 982 A.2d 764, 777 n.17 (D.C. 2009) (citing Christensen v. Harris Cnty., 529 U.S. 576, 576 (2000)).

198. *Wyeth*, 129 S. Ct. at 1201.

199. *Id.*

200. As this Note makes no attempt to reach the merits of available claims, the general preemption argument set forth in this section would be applicable to certain other claims such as breach of express and implied warranties and negligence.

201. This issue arose in *Farina*, *Murray*, and *Pinney*, but the *Farina* and *Murray* courts summarily dismissed the argument. *Compare* Farina v. Nokia, Inc., 625 F.3d 97, 128-29 (3d Cir. 2010), *and Murray*, 982 A.2d at 778 n.19, *with* Pinney v. Nokia, Inc. 402 F.3d 430, 457 (4th Cir. 2005).

202. 47 C.F.R. § 2.1093(a) (2010) (emphasis added); *see also* 1997 Second Memorandum Opinion and Order, *supra* note 187 ("To meet its responsibilities *under NEPA*, the Commission has adopted requirements for evaluating the environmental impact of its actions. One of several environmental factors addressed by these requirements is human exposure to RF energy . . . ." (emphasis added)).

203. *See* Petition for Writ of Certiorari at 24-25, Farina v. Nokia, Inc., No. 10-1064 (U.S. filed Feb. 22, 2011), 2011 WL 704764.

obligations on the FCC with respect to RF radiation standards.[204] The TCA presents a less obvious picture of congressional intent. On the one hand, the statutory framework suggests undeniable congressional intent to "save" certain state law from preemption and to expressly preempt only a very narrow subset of state law. The TCA also reaffirms an overriding interest in wireless uniformity, with the FCC exercising primary responsibility for maintaining that uniformity. On the other hand, the TCA clearly entrusts the FCC with the task of balancing health and safety concerns against uniformity concerns. And the FCC has expressed a consistent belief that its balancing responsibilities are a significant objective of the telecommunications scheme.

Based on the review of congressional purposes and objectives above, to the extent plaintiffs in state law actions seek lower SAR values by tort judgment, those claims may be preempted. In response to a tort judgment entered against them, cell phone manufacturers will probably respond by lowering the SAR value of their phones sold in that particular state. As a result, a phone that works in one state may require more power to work in another state where SAR levels are lower. That result indirectly upsets Congress's overriding goal of a uniform wireless network and creates a situation where allowing the claim would genuinely hinder the full realization of congressional intent.

However, plaintiffs may also allege that cell phones sold without headsets[205] are defective because they expose a user to unsafe levels of RF radiation.[206] As a general matter, allowing those type of claims does not upset the overarching goal of wireless "uniformity" because the phones will still operate at the same power level.[207] Moreover, as those claims do not fall within the scope of an express preemption clause, and because the TCA explicitly rejects attempts at implied preemption, allowing the claims to proceed seemingly does not upset that element of congressional intent.

These considerations were sufficient for the court in *Pinney* to reject the preemption argument and to allow the claims to proceed.[208] In *Murray* and *Farina*, however, the courts were less convinced.[209] Those courts found that at their core, headset requirements do not differ in any meaningful way from other design defect claims.[210] Rather, all claims

204. Telecommunications Act of 1996, Pub. L. No. 104-104, § 704, 110 Stat. 56, 152.

205. These could be either non-detachable headsets (that, if removed, prevent the phone from operating) or normal headsets provided for optional use with the cell phone.

206. These were the claims at issue in *Murray* and *Pinney*.

207. Pinney v. Nokia, Inc., 402 F.3d 430, 458 (4th Cir. 2005).

208. *Id.*

209. *See* Farina v. Nokia, Inc., 625 F.3d 97, 122 (3d Cir. 2010); Murray v. Motorola, Inc., 982 A.2d 764, 775 (D.C. 2009).

210. *Farina*, 625 F.3d at 122; *Murray*, 982 A.2d at 775.

require the same threshold finding that the FCC standards are unsafe and that phones compliant with those standards are nonetheless defective.[211] Regardless of whether allowing the claims affected wireless uniformity, they thwarted congressional and agency intent by stripping from the FCC the exclusive authority to determine the optimal structure of the nation's wireless network.[212] The *Farina* and *Murray* courts also rejected *Pinney*'s focus on the relief sought instead of on the nature of the claim.

The courts in *Murray* and *Farina* seem to be adopting an overly formulistic approach to conflict preemption for two reasons. First, it is not clear that balancing of considerations is a "significant objective" of the agency's regulations such that they are capable of preempting conflicting state law.[213] Second, even if such considerations were a "significant objective" of the agency's regulations, they are likely not significant enough to override what overall would appear to be a contrary intent.

In a recent Supreme Court case, the Court muddied the implied preemption waters even more by adding a requirement that state law must conflict with a "significant objective" of a federal regulation before preemption is warranted.[214] As a loose framework for that inquiry, the Court set forth a number of considerations, including (1) a regulation's history; (2) the "agency's contemporaneous explanation" of a regulation's objectives; and (3) whether there are "consistently held interpretive views" indicating that the objective at issue is an important one.[215] In light of these requirements, it is not a foregone conclusion that balancing is a significant objective of the RF emissions standards.

When issuing its standards, the FCC contemporaneously issued a statement that the standards struck a "proper balance."[216] However, the FCC included no express indication that the balancing was an important part of their regulations. Indeed, the FCC itself underwent no balancing of its own, and instead relied on standards established by international standards bodies.[217] Nonetheless, since 2008, the FCC has consistently expressed a belief that its regulations are preemptive based on the ability of state tort litigation to frustrate the results of agency balancing.[218] Based on the foregoing, it is not entirely clear which way a

211. *Farina*, 625 F.3d at 122; *Murray*, 982 A.2d at 775, 780-81.

212. *Farina*, 625 F.3d at 122-23; *Murray*, 982 A.2d at 775, 780-81.

213. *See* Williamson v. Mazda Motors of Am., Inc., 131 S. Ct. 1131, 1134 (2011).

214. *Id.*

215. *Id.* at 1139.

216. 1997 Second Memorandum Opinion and Order, *supra* note 187.

217. 1996 Report and Order, *supra* note 52, at 15134-35.

218. *See* Brief for the United States as Amicus Curiae, Farina v. Nokia, Inc., No. 10-1064 (U.S. filed Feb. 22, 2011), 2011 WL 3799082.

court would go on the "significant objective" issue.

Assuming balancing is a significant objective of the RF emissions standards, a subsidiary question is whether that objective is strong enough to override contrary congressional intent. It is true that an agency's views regarding the preemptive effect of its own regulations are entitled to "some weight" by reviewing courts, but it seems illogical that agency proclamations should ever prevail over clear congressional intent. After all, it is congressional, and not agency, intent that is the "ultimate touchstone in every preemption case."[219]

As aforementioned, the FDA's concurrent regulation of RF emissions and the overall statutory scheme helps illuminate congressional intent. First, Congress did not intend for the FCC to have unfettered authority to select health and safety standards pertaining to cell phones. Second, the TCA's legislative history demonstrates that Congress charged the FCC with the creation of RF radiation standards, not because of the FCC's expertise in health and safety matters, but because of perceived threats to the uniform cellular network by inconsistent "State and local requirements, siting and zoning decisions" fueled by radiation fears.[220] Although Congress could have expressly preempted all non-identical state law and tort litigation, it opted to preempt only inconsistent state zoning laws.[221] Headset requirements do not pose any threat to the wireless network, let alone a threat on par with that caused by state restrictions on the placement of cell phone towers. In keeping with the overall congressional scheme and with the strong presumption against preemption, design defect claims premised on a failure to provide headsets should not be preempted.[222]

c. Failure-to-Warn Claims

It seems more clear that the FCC RF radiation regulations do not preempt state failure-to-warn claims. Although the FCC balanced competing safety and efficiency interests in creating its current emissions standards, it provided a very limited legal framework for the content of manufacturer warnings.[223] The FCC requires only that a

219. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996).

220. H.R. REP. NO. 104-204, pt. 1, at 94 (1995).

221. *Id.* at 95.

222. A plaintiff's likelihood of success on the merits is beyond the scope of this Note. In Florida, prevailing on a design defect claim requires expert testimony demonstrating that "(1) a defect existed in the product, (2) the defect caused the injury, and (3) the defect in the product existed at the time the product left the possession of the manufacturer." Cooper v. Old Williamsburg Candle Corp., 653 F. Supp. 2d 1220, 1223 (M.D. Fla. 2009). In light of the scientific uncertainty surrounding cell phone health effects, causation will likely be a major stumbling block in this class of claims.

223. If anything, the FCC prescribes only the form in which warnings may appear. 47

"users manual or instruction manual for an intentional or unintentional radiator . . . caution the user that changes or modifications . . . could void the user's authority to operate the equipment."[224] However, this sort of general warning requirement is insufficient to preempt state law and relieve cell phone manufacturers of a duty to warn about anything other than user modification.[225] Moreover, it seems implausible that federal law can preempt state claims based on a manufacturer's failure to warn about risks the FCC expressly acknowledges on its website.[226] Even though the FCC considers cell phones that are in compliance to be safe, warning of potential risks that the FCC admits exist does not require a threshold finding that a phone is unsafe.[227]

Although this Note does not attempt a thorough analysis of the likelihood of a plaintiff's success in bringing a failure to warn claim, such claims involve a deeper analysis of the warning or lack thereof. Under Florida law, "[t]he mere existence of warnings is not dispositive of the adequacy of the warnings . . . ."[228] Therefore, Florida requires a secondary inquiry into whether the warning suffered from "inadequate wording," or whether it was in a location not readily apparent to the user.[229]

A typical cell phone's safety instructions may suffer from both of those inadequacies. For example, the iPhone 3G Product Information Guide leaves any mention of RF radiation to the sixth page and never expressly addresses any potential health risks associated with RF radiation.[230] Instead, the manual merely suggests ways that concerned users can limit their exposure.[231] Although the safety manual provides the SAR values for its products and presents those values in a side-by-side comparison to the FCC maximum authorized levels, it makes no real effort to explain what the SAR values mean.[232] Additionally, Apple

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C.F.R. § 15.21 (2010). The FCC authorizes cell phone manufacturers to provide operating manuals in non-traditional formats, such as on a computer disk or through the Internet. *Id.*

224. *Id.*

225. *See* Medtronic, Inc. v. Lohr, 518 U.S. 470, 501 (1996) (finding federal labeling requirements reflecting "entirely generic concerns about device regulation generally" not preempted).

226. For example, the FCC acknowledges that it "cannot rule out the possibility" of health risks from radiation to the brain and proposes various methods by which a user can reduce overall exposure. *FCC RF FAQ*, *supra* note 5.

227. Recall that this was the deciding factor in *Farina* and *Murray*. *See supra* note 189.

228. Brown v. Glade & Grove Supply, Inc., 647 So. 2d 1033, 1035 (Fla. Dist. Ct. App. 1994).

229. *Id.*

230. iPhone 3G Important Product Information Guide, *supra* note 4, at 6.

231. *Id.* at 7.

232. *Id.* at 6. Apple defines the specific absorption rate as "a unit of measurement," but never explains what exactly it is measuring (i.e. the rate at which a user's body may absorb radiation).

saves until page seven the warning that the iPhone's radiation emissions "may exceed the FCC exposure guidelines for body-worn operation if positioned less than 15 mm (5/8 in.) from the body (*e.g.*, when carrying iPhone in your pocket)."[233] As a large number of cell phone users habitually carry cell phones in their pockets, one must question the logic of leaving such a warning until the seventh page of a safety manual.[234]

d. Municipal and State Legislative Enactments

The most recent challenges to cell phone safety have occurred at the state and local government level, not before the courts.[235] San Francisco was one of the first cities to address cell phone safety by passing a "Cell Phone Right-to-Know Ordinance" in 2010.[236] In its original form, the ordinance required that all cell phone retailers publicly displaying their products also display a variety of information pertaining to that product's SAR value.[237] The ordinance also called for the provision of factsheets to consumers describing SAR values and informing customers of ways to minimize radiation exposure.[238] Following San Francisco's lead, legislatures in Oregon and the California cities of Burlingame and Arcata introduced similar legislation.[239]

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233. *Id.* at 7.

234. These same arguments would likely support a claim under a state consumer protection statute as well. Although this Note does not address consumer protection claims, these claims would likely not be preempted, as the *Murray* court found.

235. Concern over cell phone warnings has not been limited to state governments. In fact, on June 30, 2010, Representative Dennis Kucinich formally announced his intent to introduce a bill in Congress to create a new national research program on the health risks of cell phone radiation, to compel reconsideration of the current SAR standards, and to mandate specific warning labels on cell phones. Press Release, Congressman Dennis J. Kucinich, *supra* note 23. Specifically, Kucinich said that "[c]onsumers have a right to know whether they are buying the phone with the lowest—or the highest—level of exposure to cells phone radiation." *Id.* (quotation mark omitted).

236. S.F., CAL., ORDINANCE 155-10 (Jan. 7, 2011).

237. *Id.* §§ 1103-04 (requiring display, either next to display phones or on a nearby poster, of "(1) the SAR value of that phone and the maximum allowable SAR value for cell phones set by the FCC; (2) [a] statement explaining what a SAR value is; and (3) [a] statement that additional educational materials regarding SAR values and cell phones use are available from the cell phone retailer," in a manner specified by the San Francisco Department of the Environment).

238. *Id.* § 1104.

239. Olga Kharif, *San Francisco Phone-Radiation Law Sparks Proposals in California, Oregon*, BLOOMBERG, Aug. 5, 2010, *available at* http://www.bloomberg.com/news/2010-08-05/san-francisco-s-phone-radiation-law-may-win-followers-in-other-cities.html. Even before San Francisco passed its ordinance, state legislatures in California and Maine considered similar legislation. *See, e.g.*, *San Francisco Passes Cell Phone Radiation Law*, BBC NEWS (June 23, 2010), http://news.bbc.co.uk/2/hi/technology/8756996.stm. Due to what many believe was heavy lobbying from the cell phone industry, the proposed laws did not pass. *Id.*

The cell phone industry, for its part, did not respond kindly to the passage of the ordinance. Acting through its powerful lobbying group, CTIA—The Wireless Association, the industry promptly cancelled its trade show scheduled in the city for Fall 2010[240] and instituted an action in federal court.[241] In its lawsuit, the CTIA alleged, *inter alia*, that the FCC regulations preempt the San Francisco ordinance on the familiar basis of conflict preemption.[242] The CTIA took particular exception to the ordinance's provisions pertaining to SAR values. Although up until last year, the FCC had long-advocated the practice of comparing phone SAR values as a means for reducing radiation exposure, the agency recently decided such a comparison was not only availing, but also misleading.[243]

In a likely effort to avoid litigation, San Francisco temporarily shelved its ordinance until issuing an amended version in July 2011.[244] In its amended form, the ordinance removed all references to SAR values or to any SAR disclosure requirements.[245] Instead, the ordinance now requires dissemination of "informational poster[s]," "informational factsheet[s] and "informational statements," all of which must "inform consumers of issues pertaining to radiofrequency energy emissions from cell phones and actions that can be taken by cell phone users to minimize exposure to radiofrequency energy."[246]

In October 2011, the CTIA filed a second amended complaint challenging the amended ordinance and moved for a preliminary injunction to enjoin San Francisco from enforcing its ordinance. Again, the complaint alleged conflict preemption.[247] The core of CTIA's

240. *See* Kang, *supra* note 2.

241. First Amended Complaint at 26-27, CTIA—The Wireless Ass'n v. City of S.F. (N.D. Cal. July 23, 2010) (No. 10-03224).

242. The complaint also alleges field preemption. *Id.* at 25.

243. *See* Cecilia Kang, *FCC Changes Cell Phone Safety Guidance*, WASH. POST, Oct. 1, 2010, at A17; *FCC/CGB Secretly Flip-Flops on Decade Old SAR Policy*, SPECTRUM TALK (Sept. 24, 2010, 10:40 AM), http://www.marcus-spectrum.com/Blog/files/CGB_on_SAR. html (providing cached versions of old website and new website). This update, occurring right around the time that the CTIA filed its lawsuit against the City of San Francisco, led to many allegations of FCC/CTIA collusion. *Id.*

244. S.F., CAL., ORDINANCE 155-10 (amended July 11, 2011), *available at* http://www.sfbos.org/ftp/uploadedfiles/bdsupvrs/bosagendas/materials/bag071911_110656.pdf.

245. *Id.*; *see also* Second Amended Complaint at 18, CTIA—The Wireless Ass'n v. City of S.F. (N.D. Cal. Oct. 4, 2011) (No. 10-03224).

246. S.F., CAL., ORDINANCE 155-10, §§ 1103-04 (amended July 11, 2011). The ordinance requires display of the posters "in a prominent location visible to the public, within the retail store." *Id.* § 1103(a). The factsheets are to be "provided to any customer who requests it, regardless of whether they purchase a cell phone or not." *Id.* § 1103(b). Finally, the statements must be included along with display materials in retail stores, and must satisfy certain formatting and text requirements. *Id.*

247. Second Amended Complaint, *supra* note 245. In addition to field preemption,

preemption argument is that the ordinance impermissibly challenges the FCC's determination that SAR-compliant phones are safe and, by doing so, upsets the balance the FCC struck between public safety and an efficient nationwide wireless network.[248] In disrupting the balance, the ordinance indirectly frustrated the congressional purpose of creating a uniform national wireless communications network spearheaded by the FCC.[249]

The court should not accept the CTIA's argument. Regulating the manner in which warnings are to be displayed does not change the substance of the warning. The proposed informational factsheet, rather than referring to cell phones as "unsafe," merely restates what the FCC itself espouses on its website[250] and even cites to the FCC's website.[251] At most, the ordinance compels cell phone companies to present consumer warning information in a more transparent and accessible way.[252] In doing so, the ordinance does not upset any balance struck by the FCC, nor does it disrupt the wireless communications network.

Indeed, rather than *hinder* the FCC's ability to carry out its congressionally delegated goals, the San Francisco ordinance actually *bolsters* the FCC's furtherance of its goals. In 2001, the Government Accountability Office (GAO), Congress's "watchdog,"[253] conducted an investigation into mobile phone safety at the behest of two members of Congress.[254] One question that the congressmen asked the GAO to investigate was, "What key actions are federal agencies taking to inform the public about issues related to mobile phone health effects?"[255] After conducting its investigation, the GAO concluded that the FCC "provide[s] the public with information on radiofrequency exposure issues, but do[es] not meet general consumers' needs for clear and

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defendants also brought First Amendment and Section 1983 claims. *Id.*

248. *Id.* at 25-26.

249. *Id.*

250. For example, the FCC also recommends, explicitly or implicitly, each of the precautionary measures included on the San Francisco consumer factsheet. *See* Consumer and Governmental Affairs Bureau, *FCC Consumer Facts: Wireless Devices and Health Concerns*, FED. COMMC'NS COMM'N, http://www.fcc.gov/cgb/consumerfacts/mobilephone.html (last updated Sept. 20, 2010); *FCC Encyclopedia: FAQS-Wireless Phones*, *supra* note 15.

251. *See* Second Amended Complaint, *supra* note 245, at Ex. E, *available at* http://files.ctia.org/pdf/fiLE_4_60-1_Ex_A-E_to_Prelim_Inj_Motion.pdf.

252. Kharif, *supra* note 239 (quoting City Attorney Dennis Herrera as saying, "The ordinance affords consumers the same information they can find on the FCC website or elsewhere . . . ." and "all the city want[s] to do is make sure that information is out there in a transparent way").

253. *About GAO*, U.S. GOV'T ACCOUNTABILITY OFFICE, http://www.gao.gov/about/index.html (last visited Feb. 9, 2011). Located in the legislative branch, the GAO monitors and protects congressional interest.

254. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 20, at 1-2.

255. *Id.* at 2.

concise information."[256] With respect to the FCC's explanation of SAR values, the GAO noted that the SAR levels are presented to the public on the FCC's website in a way that "would baffle most consumers."[257] The GAO then noted that "[t]hese shortcomings are cause for concern because the industry is including . . . FCC's consumer information with new mobile phones."[258] Essentially, the GAO expressed a concern with respect to exactly the same issue that the San Francisco ordinance seeks to address.

VI. CONCLUSION

Although the health risks associated with long-term exposure to radiation from cell phones are now uncertain, as science progresses, the coming years will likely provide more insight. It is a mistake, though, to assume that the present scientific uncertainty renders today's cell phone litigation unimportant. Regardless of the attenuated causal linkages at this stage, conflict preemption may serve as an absolute bar to future meritorious claims. With this in mind, absent clear Supreme Court guidance, future courts must look deeper into congressional and agency intent and grapple with the uncertain legal status of conflict preemption.

Outside the realm of tort litigation, the way courts treat legislative enactments such as the San Francisco cell phone ordinance will also be important. Should the CTIA prevail in its preemption argument, subsequent municipal enactments in other cities may be less attractive.[259] As a result, cell phone manufacturers will have little incentive to prominently warn against the risks of radiation and may even actively withhold, or hide, health information. The costs from the perspective of consumer awareness are obvious. Cell phone safety inserts are already virtually indecipherable to the average user and risk becoming even more so if the law comes out firmly in favor of cell phone manufacturers. Conversely, should the City of San Francisco prevail, one would expect other municipalities and states to follow suit.[260] If enough states and municipalities pass similar legislation, and as more information becomes available to cell phone users, hopefully

256. *Id.* at 28.

257. *Id.*

258. *Id.* at 26.

259. Although the district court decision will not be legally binding on cities outside of the Northern District of California's jurisdiction, it may create a disincentive for other municipalities or states considering similar legislation.

260. Indeed, some already have. *See* Kharif, *supra* note 239 (quoting a lawmaker in the California city of Burlingame as saying, "We ought to seriously consider following San Francisco's lead . . . .").

users will be in a position to make informed decisions that may prevent future tragedy.