

May 2005

U.S. Supreme Court Rejects Blanket Pre-emption of Pesticide Claims

On April 27, 2005, the Supreme Court of the United States found that state law claims by a group of Texas peanut farmers against Dow Agrosciences LLC (“Dow”) with respect to Dow’s “Strongarm” pesticide were not pre-empted by the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”).¹ As one of the attorneys representing the farmers said after the decision was announced, the case “opens the courthouse door for people harmed by pesticides.”²

History of Pesticide Regulation

The Supreme Court’s Opinion began with a discussion of the history of regulation of poisonous substances, including pesticides. The Court cited its earlier precedent which explained that the 1972 amendments to FIFRA “transformed FIFRA from a labeling law into a comprehensive regulatory statute.”³ Among other things, under the 1972 amendments, the EPA would register a pesticide if it determined that the pesticide was efficacious, that it would not cause unreasonable adverse effects on humans or the environment, and if its label complied with the statutes’ prohibition on misbranding.⁴ The 1972 amendments also added Section 136v(b), which addresses the States’ continuing role in pesticide regulation, and explains, “States shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required under this subchapter.”⁵ Finally, the Court explained that Congress amended FIFRA in 1978 to authorize EPA to waive data requirements pertaining to efficacy, “thus permitting the Agency to register a pesticide without confirming the efficacy claims made on its label.”⁶ As a result of the 1978 amendments, the Court noted that, “Pesticide producers are aware that they are potentially subject to damage suits by the user community if their products prove ineffective in actual use.”⁷

The Supreme Court also discussed the history of tort litigation against pesticide manufacturers in light of FIFRA. The Court observed that such litigation was a “common feature of the legal landscape” at the time of the 1972 FIFRA amendments, and that “[f]or at least a decade after those amendments, arguments that such tort suits were pre-empted by § 136v(b) either were not advanced or were un-

successful.”⁸ In 1992, however, the Supreme Court found that the term “requirement or prohibition” in the Public Health Cigarette Smoking Act of 1969 included common-law duties, and therefore pre-empted certain tort claims against cigarette companies.⁹ As a result, the United States Court of Appeals for the Fifth Circuit in the Bates case, as well as the majority of the other Courts of Appeals, found that state law claims against pesticide manufacturers were pre-empted by § 136v(b) of FIFRA. Against this historical backdrop, the Court evaluated the claims of the Texas peanut farmers against Dow.

Supreme Court Analysis

The Court found that the farmers’ defective design, defective manufacture, negligent testing, and breach of express warranty claims were not pre-empted. The Court reasoned that such state-imposed common law duties did not qualify as requirements for “labeling or packaging” as the phrase was used in § 136v(b). In relation to the breach of express warranty claim, the Court reasoned that the common law did not require a manufacturer to make an express warranty, and that “[a] cause of action on an express warranty asks only that a manufacturer make good on the contractual commitment that it voluntarily undertook by placing that warranty on its product.”¹⁰ In so doing, the Court rejected the so-called “inducement test,” under which courts had found that common law duties were “requirements” for purposes of § 136v(b) if the effect of the duty would be to induce a company to alter its label.

The Supreme Court found that the farmers’ fraud and negligent-failure-to-warn claims were based on common-law rules that qualify as “requirements for labeling or packaging.” The Court, however, found that such common-law rules are not automatically pre-empted by § 136v(b). Such claims are pre-empted only if they are “in addition to or different from” FIFRA’s labeling requirements. The Court concluded, “Thus, a state-law labeling requirement is not pre-empted by § 136v(b) if it is equivalent to, and fully consistent with, FIFRA’s misbranding provisions.”¹¹ The Court explained that:

The long history of tort litigation against manufacturers of poisonous substances adds force to the basic presumption against pre-emption. If Congress had intended to deprive injured parties of a long available form of compensation, it surely would have expressed that intent more clearly.¹²

The Court, however, remanded the case to the Fifth Circuit to decide whether the particular common-law duties claimed by the farmers to have been breached were equivalent to FIFRA's misbranding standards.

What is left of § 136v(b) of FIFRA after *Bates*? The Supreme Court's Opinion answers this question:

In the main, it pre-empts competing state labeling standards - - imagine 50 different labeling regimes prescribing the color, font size, and wording of warnings - - that would create significant inefficiencies for manufacturers. The provision also pre-empts any statutory or common-law rule that would impose a labeling requirement that diverges from those set out in FIFRA and its implementing regulations. It does not, however, pre-empt any state rules that are fully consistent with federal requirements.¹³

Whether the Supreme Court's decision in *Bates* "opens the courthouse door" may be debatable. Nevertheless, the risk of potential state court actions provides pesticide manufacturers with a strong incentive to develop and market safe and properly labeled products.

Endnotes

- ¹ *Bates, et al., v. Dow Agrosciences LLC*, No. 03-388 (April 27, 2005) (hereinafter "*Bates*").
- ² David Frederick, of Kellogg, Huber, Hansen, Todd, Evans & Figel, PLLC, quoted in the April 28, 2005 edition of BNA's Daily Environment Report.
- ³ Slip Opinion at Page 4, citing *Ruckleshouse v. Monsanto Co.*, 467 U.S. 986, 991 (1984).
- ⁴ 7 U.S.C. § 136a(c).
- ⁵ 7 U.S.C. § 136v(b).
- ⁶ Slip Opinion at Page 7, referencing § 136a(c)(5) of FIFRA, 7 U.S.C. § 136a(c)(5).
- ⁷ Slip Opinion at Page 7, citing 47 Fed. Reg. 40661(Col. 2) (1982).
- ⁸ Slip Opinion at Page 8, citing *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (CA DC 1984).
- ⁹ Slip Opinion at Page 8, citing *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).
- ¹⁰ Slip Opinion at Page 11.
- ¹¹ Slip Opinion at Page 14.
- ¹² Slip Opinion at Page 17, citing *Silkwood v. Care-McGee Corp.*, 464 U.S. 238, 251 (1984).
- ¹³ Slip Opinion at Pages 19-20.

Questions regarding this ruling and its implications should be directed to an attorney in the Environmental, Safety and Toxic Tort Practice Group, or the Seyfarth Shaw LLP attorney with whom you normally work.

This newsletter is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. For further information about these contents, please contact the firm's Environmental, Safety and Toxic Tort Group.

ATLANTA
One Peachtree Pointe
1545 Peachtree Street, N.E., Suite 700
Atlanta, Georgia 30309-2401
404-885-1500
404-892-7056 fax

BOSTON
Two Seaport Lane, Suite 300
Boston, Massachusetts 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO
55 East Monroe Street, Suite 4200
Chicago, Illinois 60603-5803
312-346-8000
312-269-8869 fax

HOUSTON
700 Louisiana Street, Suite 3700
Houston, Texas 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES
One Century Plaza
2029 Century Park East, Suite 3300
Los Angeles, California 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK
1270 Avenue of the Americas, Suite 2500
New York, New York 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO
400 Capitol Mall, Suite 2350
Sacramento, California 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO
560 Mission Street, Suite 3100
San Francisco, California 94105
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.
815 Connecticut Avenue, N.W., Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS
Boulevard du Souverain 280
1160 Brussels, Belgium
(32)(2)647.60.25
(32)(2)640.70.71 fax