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Beyond *Bates*: Are Label Based Pesticide Injury Claims Still Preempted?

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Contrary to what one plaintiff recently argued, *Bates v. Dow AgroSciences*, 125 S. Ct. 1788 (2005) did not sound the "death knell" for preemption of pesticide "failure to warn" personal injury claims. Quite the opposite. *Bates* is factually and procedurally distinguishable from injury claims, and the Court's *dicta* on preemption may have little effect on preexisting law. These important differences mean that certain pesticide use personal injury actions are still preempted under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136 *et seq.* ("FIFRA").

Section 136v(b) of FIFRA provides for limited preemption:

> "**(b) Uniformity**
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter."

Until *Bates*, the Supreme Court's first foray into preemption of pesticide label based claims, multiple State and Federal courts have found that FIFRA preempts a broad range of personal injury actions alleging injury from an EPA approved pesticide (See related article, M. Palermo, Jr., *Federal Preemption of Insecticide, Fungicide and Rodenticide Exposure Cases*, DRI Toxic Torts and Environmental Law Committee Newsletter (Summer, 2004)).

As will be shown, the Supreme Court left open the possibility that theories of preemption of personal injury actions can retain much of their force. The author distinguishes *Bates*, and proposes that certain personal injury actions are still preempted, under both express and implied preemption theories.

Bates Should Have Limited Effect on Personal Injury Actions

In order to understand the potentially limited effect of *Bates* on personal injury actions, a look at the claims presented to the Court is in order. At their most simple, the farmers' claims in *Bates* were for Dow's alleged refusal to honor written and implied warranties—including efficacy claims which appeared on the product label—when the "Strongarm" pesticide damaged their peanut crops in west Texas due to varying pH levels found in their particular soil. The farmers also made claims for breach of implied and oral warranties arising from "field day projects" where Dow representatives told them that Strongarm was an excellent herbicide for west Texas peanuts. *Dow AgroSciences v. Bates*, 205 F. Supp. 2d 623, 626 (N.D. Tex. 2002). They alleged that the advice and statements that differed from the labels at the field day projects were not label based claims and not preempted under FIFRA. *Dow*, 205 F. Supp. 2d at 626.

The farmers' claims all arose from the label statements and the field days representations. Dow had provided a limited warranty and a limitation of remedies on the Strongarm label. In an attempt to avoid the apparent preclusive effect of these UCC authorized limitations, the farmers also made claims under the Texas Deceptive Trade Practices Act and for negligent design. *Dow*, 205 F. Supp. 2d at 624.

When the farmers threatened to sue, Dow filed a declaratory judgment action in District Court. In turn, the farmers filed their counterclaims. Dow immediately moved for summary judgment based on FIFRA preemption, which the Court granted. *Dow*, 205 F. Supp. 2d at 628.

The two most important factual and procedural distinctions of *Bates* are: first, there was no allegation of personal injury based on a failure to warn, and the farmers did not challenge the label's health and safety warnings. The farmers claims were for

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crop damage, not personal injury. Second, procedurally, the claims and proof had not been developed through either discovery or trial (*Bates* reached the Supreme Court essentially at the pleading stage. *Bates*, 125 S. Ct. at 1797 n. 15, 1804). Dow won the first two rounds in the District Court and the Court of Appeals, receiving rulings that any challenge to an EPA approved label was expressly preempted under FIFRA. See, *Dow AgroSciences v. Bates*, 332 F.3d 323 (5th Cir. 2003).

However, the farmers appealed to the Supreme Court. The farmers argued that neither express or implied warranties, nor efficacy statements, are a requirement imposed by the EPA, but rather were voluntary undertakings by Dow, and therefore such claims should not be preempted. *Dow*, 205 F. Supp. 2d at 626. The Supreme Court agreed. It found that the EPA explicitly does not review efficacy or warranty claims when approving pesticide labeling. Under FIFRA sec. 136a(c)(5), Congress authorized the EPA to "waive data requirements pertaining to efficacy." *Bates*, 125 S. Ct. at 1796. The EPA chose to do so in 1979 (44 Fed. Reg. 27932), and reconfirmed it in Pesticide Registration Notice 96-4 (June 3, 1996). *Bates*, 125 S. Ct. at 1796.

By waiving data review and approval for efficacy claims, as well as providing no review for warranty claims the EPA was left with the responsibility of reviewing and approving pesticide labeling where the pesticide as labeled "will perform its intended function without unreasonable adverse effects on the environment," i.e., it will not harm people. 7 U.S.C. 136a(c)(5)(C). Any pesticide manufacturer that puts warranty or efficacy claims on its labeling does so voluntarily and without EPA "approval" of the claims. Therefore, any state requirement enforcing these statements is not "in addition to or different from those *required*" by the EPA, and hence not preempted. *Bates*, 125 S. Ct. at 1799. This portion of the Court's opinion essentially decided the case. Unfortunately, the Supreme Court did not stop there in its analysis of FIFRA preemption.

Bates' Dicta

More problematic is the Court's lengthy discussion of the scope of FIFRA preemption outside the confines of the narrow claims made by the farmers. First, the Court declined to adopt the "inducement" test applied by other courts and argued by Dow. *Bates*, 125 S. Ct. at 1799. This test, generally stated, was that if any state "requirement" would have the effect of inducing a manufacturer to change its label to conform to the requirement, that requirement was preempted under sec. 136v(b) because only the EPA has authority to mandate label changes. *Bates*, 125 S. Ct. at 1799.

Courts have used the inducement test to find negligent design and strict liability cases preempted, reasoning that imposing a state requirement, such as a jury verdict, for negligent design would "induce" the manufacturer to merely change the label, versus re-designing the product. *Bates*, 125 S. Ct. at 1799. This cost-based analysis argues that it would be far less expensive to change a label than to perform the design, research and testing necessary to introduce a new product. See, *Worm v. American Cyanamid*, 5 F.3d 744, 747-48 (1993).

Whether the Court adopted the inducement test would not have affected the claim before it, the Court already having found that efficacy and breach of warranty claims were not subject to EPA approval and therefore not preempted. Furthermore, the Court ruled on the "failure to warn" claim even though "petitioners do not press such a claim here." *Bates*, 125 S. Ct. at 1797 n. 15. Thus, the author's conclusion that the remainder of the opinion is *dicta*.

The inducement test as applied to negligent design cases always seemed a little stretched to achieve preemption. Rather, an argument can be made that the EPA approved the labeling for the product *as designed*. That is, the EPA reviewed all the testing data for the product "in the can" and approved appropriate safety labeling. The product "in the can" is therefore presumptively safe if used according to the EPA approved label. Hence such a challenge to the "design" is in effect a direct challenge to EPA's approval process. This "field preemption" theory avoids the rejected inducement theory.

In that same vein, any "induced" change to the design of the product would necessarily require a manufacturer to re-test the product, and resubmit the data to the EPA for a new label to be approved – an arduous process. In essence, the re-designed product becomes in fact a new product. Thus the "inducement" theory was always a bit nugatory.

Most negligent design lawsuits relate to alleged general dangerous propensities of pesticides (e.g., acetylcholine inhibition), which are

subject to EPA review and preemption. However, there may be other elements to a product design not regulated by the EPA. For example, the product may degrade or interact with inert ingredients, create harmful gasses, or possibly explode due to the gasses. Such design issues (similar to efficacy claims) are not reviewed and approved by the EPA.

Defense counsel must concede that not all negligent design claims are preempted, thus satisfying the Court's concerns about the presumption against total and absolute preemption. *Bates*, 125 S. Ct. at 1801. However, to reach that point in the litigation will now require extensive discovery into a plaintiff's theories and experts. Counsel should continue to argue that a challenge to the design of the product is really a challenge to the EPA's authority to approve the product for use.

What's Left of Preemption?

In place of the inducement test, the Court adopted the "parallel requirements" test. What this means is that the Court has authorized states to enforce FIFRA violations. The Court reasoned that allowing a state to impose a remedy for a FIFRA violation gives meaning to the phrase "in addition to or different from" in section 136v(b). States can impose "requirements" in the form of jury verdicts so long as the violation is not for something "in addition to or different from" the EPA requirements. *Bates*, 125 S. Ct. at 1800–01.

The Court found that "the long history of tort litigation against manufacturers of poisonous substances" argues in favor of the presumption against preemption—this despite the fact that Congress included the preemption provision in FIFRA as enacted in 1972. The Court reasoned that section 136v(b) was "a relatively obscure provision" not intended to give manufacturers immunity, that if Congress intended to deprive injured parties of a remedy, it should have been more clear. *Bates*, 125 S. Ct. at 1801–02.

Contrary to the absolute label-based preemption of *Cippolone v. Liggett Group*, 505 U.S. 504 (1992), where Congress prescribed the terms of the warnings on cigarette packages, "FIFRA contemplates that pesticide labels will evolve over time" and tort suits can serve to help the EPA in the process. *Bates*, 125 S. Ct. at 1802. Under this theory, states may enforce FIFRA requirements "parallel" to the EPA. A plaintiff must show some violation of FIFRA other than a direct challenge to the label; a plaintiff cannot argue the label should have included "DANGER" when the EPA regulations required "CAUTION." *Bates*, 125 S. Ct. at 1804. The Court reasoned that section 136v(b) does not restrict states from imposing "remedies" but only "requirements" for labeling. *Bates*, 125 S. Ct. at 1800–01.

So what does the parallel requirements test mean for tort liability? Probably not much, because various courts have long found that private actions may be maintained to enforce certain FIFRA violations. See, *Worm*, *supra*; *Ackerman v. American Cyanamid*, 586 N.W.2d 208 (Iowa, 1998). States still cannot impose independent labeling requirements. *Bates*, 125 S. Ct. at 1803. Private remedies are allowed to enforce FIFRA violations. *Bates*, 125 S. Ct. at 1802–03. The Court did not delineate what kind of violations were subject to private enforcement, although to be sure the farmers' claims were not a FIFRA enforcement action.

Perhaps one can imagine a situation where a label that has not been approved by the EPA is affixed to a pesticide; or where the EPA mandates a label change but the manufacturer failed to implement it; or where label coloration and typeface conventions were violated. There may be instances where the product itself has been somehow contaminated (like finding a Corn Flake in a box of Cheerios); or where through some manufacturing defect the formulation of the product differed grossly from the approved formulation.

Less clear is whether the *Bates*' Court authorized private rights of action for negligent testing practices; "withholding" data from the EPA; failing to test a pesticide under certain conditions (like the farmers' claims in *Bates*); or negligently "designing" a pesticide. If so, a plaintiff will have to show that the manufacturer somehow violated FIFRA or its extensive regulations, and that the violation resulted in plaintiff's injury.

Bates Ignored Other Preemption Precedents

The Court's decision ultimately must be reconciled with prior Supreme Court precedent relating to regulated chemicals. Not addressed by the Court were theories of implied field preemption, nor conflict preemption. The Supreme Court has found, in another context, that FIFRA is a "comprehensive regulatory statute"

governing the labeling, sale and use of pesticides and hazardous materials. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). FIFRA "establishes a complex process of EPA review that culminates in the approval of the label under which the product is to be marketed." *Worm v. American Cyanamid Co.*, 5 F.3d at 747. The *Bates*' Court did not address in its majority opinion the complex regulations adopted by the EPA under FIFRA for testing practices, data submission, labeling requirements, etc., or the effect they would have on a claim. That is, would "field preemption" serve to bar a claim?

In *Gade v. National Solid Waste Management Association*, 505 U.S. 88 (1992), a case arising under OSHA, the Court found a state requirement for training, testing and licensing of hazardous waste workers impliedly preempted. The Court found that because there was a federal standard on the same subject in effect, the proposed state regulation conflicted with the OSHA standard, and was therefore preempted. *Gade*, 505 U.S. at 98.

Field preemption has been found to bar claims for "fraud on the EPA" or failure to submit certain data in support of registration. See, *Kimmel v. Dowelanco*, 275 F.3d 1199 (9th Cir. 2002). Furthermore, courts have found that FIFRA, OSHA and other similar statutes must be read in conjunction with one another. See, *Torres-Rios v. LPS Laboratories*, 152 F.3d 11, 13 (1st Cir. 1998).

Neither theory was addressed by the *Bates*' Court's majority opinion. The interplay between the Hazard Communication Standard, FIFRA, the Hazardous Substances Act, the Toxic Substances Control Act, and other regulatory statutes was likewise not discussed. Thus both field preemption and conflict preemption may still be available to bar certain personal injury actions, beyond express preemption.

Counsel in litigation of a pesticide injury case should outline for the court the broad and extensive regulations adopted by the EPA, which culminate in an approved label. Any challenge to a testing practice, design issue, data submission issue, or specific label provisions, can usually be rebutted with a regulation that mandates a certain testing procedure, a certain type of data submission, or a certain phrase, typeface or color on a label, with the conclusion to be drawn of conflict or field preemption.

Although the *Bates*' Court distinguished *Cipollone* with the argument that Congress mandated specific cigarette warnings, *Bates*, 125 S. Ct. at 1802, the FIFRA practitioner knows that the EPA likewise requires certain specific warnings and instructions. The regulations to FIFRA, "PR Notices" issued by the EPA, as well as EPA correspondence to the pesticide manufacturer exchanged during the approval process dictating changes to warnings and instructions will now play a role in arguing preemption. The product's march through the EPA approval process will become more relevant than just the final approved label.

Therefore, field and conflict preemption should be raised and argued alongside express preemption. However, instead of the usual pre-*Bates* express preemption motion to dismiss attaching the "approved" product label (basically a question of law at that point), counsel may now need to provide more data to the court in support of the implied preemption argument. This will include such information as EPA correspondence dictating label revisions, prior unapproved drafts of the label and related EPA correspondence, and perhaps all testing data given to the EPA in support of registration. A summary judgment motion like this should include substantial information showing the complexity and thoroughness of the EPA approval process – leaving the only conclusion for the court that plaintiff's challenge to the product is impliedly preempted.

So What Now?

So now what? Well, first counsel must continue to argue express preemption under FIFRA of all label based personal injury claims for failure to warn. That issue has not been ruled on by the Supreme Court. An alternative argument to the "inducement test" has been proposed that would couch negligence claims as direct challenges to an EPA approved label. Finally, because the *Bates*' Court did not address field or conflict preemption under FIFRA, both may remain as viable theories based on prior precedent.

Conceding that the scope of FIFRA express label preemption is no longer as broad as it was before *Bates*, nevertheless in the appropriate circumstance many personal injury actions may still be preempted.