Toxic Torts and Environmental Law

Summer 2004

The newsletter of the DRI Toxic Torts and Environmental Law Committee

DRI™ The Voice of the Defense Bar

In This Issue…

FRAUD OR MISREPRESENTATION?

Avoiding FIFRA Preemption

Michael Palermo, Jr.
Riordan, Donnelly, Lipinsky & McKee Ltd.
Chicago, IL

continued on page 6

Avoiding FIFRA Preemption

Michael Palermo, Jr.
Riordan, Donnelly, Lipinsky & McKee Ltd.
Chicago, IL
mpalermo@rdlmlaw.com

Introduction

Under the Federal Insecticide, Fungicide and Rodenticide Act, ("FIFRA"), 7 U.S.C. §136 *et seq*., any state cause of action challenging a registered product's EPA-approved warning label is preempted. Plaintiffs' attorneys have been trying to devise ways around FIFRA preemption of "failure to warn" and other cases, most all of which have been unsuccessful (see related article in this issue), but some of which survive. They have tried alleging causes of action for "fraud on the EPA," or misrepresentation in the label approval process; RICO and state consumer fraud act violations; and equitable estoppel to assert preemption as an affirmative defense. This article will offer a brief overview of the cases and how the courts have dealt with them.

Fraud on the EPA

The leading case of "Fraud on the EPA" is *Kimmel, Inc. v. Dowelanco*, 275 F.3d 1199, (9th Cir. 2002). The *Kimmel* court found so-called "fraud-on-the-EPA" claims preempted under the principle of "conflict preemption" detailed in *Buckman v. Plaintiffs' Legal Committee*, 531 U.S. 341 (2001).

Unlike express preemption which is explicit in a federal statute, conflict preemption arises where Congress has so regulated a field that it can be said to be to the exclusion of state-imposed regulation. As the *Kimmel* court reasoned, implied conflict preemption is "implicitly contained in the structure and purpose" of FIFRA. *Kimmel*, 275 F.3d at 1203, *quoting FMC Corp v. Holliday*, 498 U.S. 52 (1990). It exists where a state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*, *quoting Geir v. American Honda*, 529 U.S. 861 (2000).

Relying on *Buckman,* the court found that conflict preemption would apply to bar a plaintiff's state law claim for intentional interference with a business advantage arising from misrepresentations to the EPA. Plaintiff alleged that defendant misrepresented to the EPA that plaintiff's protective bags, used to protect food when applying defendant's pesticide in restaurants, were insufficient for that purpose. Defendant received permission from the EPA to modify its product label to exclude plaintiff's bags as an authorized food-cover. Plaintiff's lawsuit alleged that defendant "knowingly and intentionally submitted false and misleading information to the EPA" in support of its requested label change. *Kimmel*, 275 F.3d at 1202.

The court reviewed the structure of FIFRA, including all enforcement mechanisms given to the EPA to police compliance with the Act. The court reasoned that FIFRA provided a complex statutory structure, with broad enforcement powers given to the EPA such as civil, administrative, and criminal penalties. The court was concerned that an applicant could be found by the EPA to have fully complied with FIFRA, but then still be subject to liability in a state court for potentially failing to disclose additional information. It is not up to the states to determine, the court concluded, what information the EPA needs or to police the EPA's performance. *Kimmel*, 275 F.3d at 1207. Such principles of conflict preemption properly resulted in the dismissal of the plaintiff's "fraud on the EPA" lawsuit.

RICO and Consumer Fraud Act Violations

In a creative twist, the plaintiffs in *Williams v. Dow Chemical* alleged that the manufacturer of Dursban violated the Racketeer Influenced and Corrupt Organizations Act ("RICO") in obtaining EPA approval of the pesticide. 255 F. Supp. 2d 219 (S.D. N.Y. 2003). In granting part of Dow's summary judgment motion, the court rejected the RICO claims. RICO only provides recovery for injury to a business or property, 18 U.S.C. §1964(c), not personal injury, the court began. Because the plaintiffs' claims were for personal injury, RICO does not provide a remedy. Second, "racketeering"

under RICO refers to attempts to deprive a person or business of property or money; it does not apply to attempts to gain EPA regulatory approval. *Williams*, 255 F. Supp. 2d at 225–26. The court quickly dismissed the RICO claims and moved on.

In two crop damage cases brought by groups of farmers alleging violations of state consumer fraud acts, the Fifth Circuit and the Supreme Court of Minnesota reached widely disparate results. Affirming a $52,058,931 judgment against BASF, the Supreme Court of Minnesota reasoned that the jury properly could have found that BASF violated the New Jersey Consumer Fraud Act, N.J. Stat. Ann. §§56:8-1–56:8-116. *Peterson v. BASF Corp.*, 675 N.W.2d 57 (2004). BASF had advertised in print ads, articles to the trade, and on FIFRA-approved labels that its products "Poast" and "Poast Plus" were appropriate for use on two mutually exclusive types of crops, when in fact they were the same product. The farmers alleged false and misleading advertising, and false statements to the EPA in obtaining label approval for the second product. *Peterson*, 675 N.W.2d at 60–63.

The court found that the action was not based on false or misleading statements in registration or the label *per se*, but that by obtaining the second registration, and advertising the two products separately, BASF committed consumer fraud "by leading farmers to believe that the cheaper Poast Plus could only be used on major crops." 675 N.W.2d at 70.

On the opposite side of the spectrum, the Fifth Circuit held a group of farmers' cause of action under the Texas Deceptive Trade Practices Act (Tex. Bus. & Cons. Code Ann. §17.505(a)), was preempted under FIFRA. *Dow Agrosciences v. Bates*, 332 F.3d 323 (2003). The farmers had claimed that the herbicide sold by Dow stunted the growth of peanuts and reduced total peanut production. Taking the initiative, Dow filed a declaratory judgment action to head off the potential consumer fraud lawsuits that had been threatened.

Ruling in favor of Dow, the Fifth Circuit reasoned that the plain meaning of the FIFRA preemption clause, 7 U.S.C. §136v(b) could not be avoided by the farmers' claims that the label statements concerning application and efficacy of the herbicide were false and misleading. Although the EPA had not enacted regulations concerning product efficacy (versus safety), the court concluded, allowing the fraud action to proceed would still be an attempt to impose a requirement "in addition to or different from" the approved label. *Bates*, 332 F.3d at 330–31.

Estoppel to Assert FIFRA Preemption as a Defense

Plaintiffs have argued that under equitable principles defendants should be estopped from asserting preemption because of misrepresentation to the EPA in the registration process. For example, in *Reutzel v. Spartan Chemical Co.* the plaintiffs charged that Spartan "withheld" information from the EPA when it switched to mint fragrance for the product, but failed to disclose this to the EPA. 903 F. Supp. 1272, 1284 (N.D. Iowa 1995). In dismissing, the court reasoned first that, under Eighth Circuit law, "agency approval *eliminates any possible claims* under state tort law for failure to comply" with labeling requirements. Then, adopting the reasoning in *Taylor Ag Ind. v. Pure-Gro*, 54 F. 3d 555 (9th Cir. 1995), the court found that its position was not to analyze the performance of the EPA. Additionally, express label preemption is independent of whether or not the EPA received all appropriate material. *Reutzel*, 903 F. Supp. 1283.

The court finally reasoned that Congress put the EPA, not the courts, in charge of administering FIFRA and determining what materials are necessary for label approval. To allow otherwise, the court concluded, "would save all state tort claims" against pesticides based only on a plaintiff's charge that the manufacturer omitted giving the EPA some information. Such a result would "circumvent" the express preemption protection granted by Congress, and would undermine the EPA's authority to control its own approval process, rendering them "a nullity." *Reutzel*, 903 F. Supp. 1283–84.

In contrast, the District Court in Arkansas ruled that DuPont's alleged withholding of material facts from the EPA would serve to bar it from raising preemption under FIFRA. *Roberson v. E.I. DuPont*, 863 F. Supp. 929 (W.D. Ark. 1994). The court reasoned that to do otherwise would allow a manufacturer to falsely obtain approval of its label, then hide behind the very same label that it knows to be inadequate. Additionally, if the manufacturer obtained such a label under false pretenses, it could not claim that its label was approved by the EPA because "the EPA will never have made any determination at all with regard to the facts withheld." *Roberson*, 863 F. Supp. at 933.