



## An Agricultural Law Research Article

# **Supreme Court Considers Preemption of State Law Claims Under the Federal Insecticide, Fungicide, and Rodenticide Act**

by

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April, 2005

*Editor's note: On April 27, 2005, The United States Supreme Court issued its ruling in Dow Agrosciences v. Bates, the case that is the focus of this article. The information set forth in this article remains relevant but should be read in light of the Court's ruling. An article discussing the Court's decision and its implication is forthcoming.*

## Supreme Court Considers Preemption of State Law Claims Under the Federal Insecticide, Fungicide, and Rodenticide Act

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### Introduction

In *Dow Agrosciences v. Bates*,<sup>1</sup> several Texas peanut farmers contended that their peanut crops were damaged when a herbicide manufactured by Dow Agrosciences, LLC (Dow) was applied to their peanut crops. The farmers submitted demand letters to Dow that threatened to sue Dow for false advertising, breach of warranty, and fraudulent trade practices under the Texas Deceptive Trade Practices Act. Dow responded by seeking a declaratory judgment that, among other things, the farmers' claims were preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>2</sup> The farmers filed a counterclaim against Dow for "negligence, breach of implied and express warranties, fraud, fraud in the inducement, defective design, estoppel, and waiver."<sup>3</sup> The United States District Court for the Northern District of Texas ruled that the farmers' claims were preempted by FIFRA because they "constituted 'requirements for labeling and packaging in addition to those required under' FIFRA."<sup>4</sup> The farmers appealed the decision to the Fifth Circuit.

The Fifth Circuit held that the farmers' claims were preempted by FIFRA because success on the claims would have the "undeniable practical effect' of inducing a manufacturer to alter the product or label to avoid liability."<sup>5</sup> The holding in *Bates* is not altogether unusual but is significant because it is currently being reviewed by the United States Supreme Court.<sup>6</sup>

In light of the Supreme Court's review of *Bates*, this article discusses the FIFRA, the evolution of courts' views regarding FIFRA preemption of state law claims,<sup>7</sup> and the Fifth Circuit's decision in

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<sup>1</sup> 332 F.3d 323 (5th Cir. 2003).

<sup>2</sup> 7 U.S.C. §§ 136-136y.

<sup>3</sup> *Bates*, 332 F.3d at 325-26.

<sup>4</sup> *Id.* at 329.

<sup>5</sup> *Id.* at 329 n.9 (quoting *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994)).

<sup>6</sup> The matter was argued before the Supreme Court in January of 2005.

<sup>7</sup> The discussion regarding the evolution of courts' views on FIFRA preemption is significantly generalized. For an excellent and detailed discussion of how courts' views have evolved, see ELIZABETH C. BROWN ET AL, PESTICIDE REGULATION HANDBOOK, 82-87 (2000), from which much of the historical development discussed in this article is synthesized.

*Bates*. The article also briefly discusses *Hardin v. BASF Corp.*,<sup>8</sup> the most recent federal circuit court decision on FIFRA preemption. *Hardin* relied on *Bates* to hold that several farmers' state law claims against a herbicide manufacturer were preempted by FIFRA because "a favorable outcome for . . . [the farmers] would induce, if not require, BASF to alter its label."<sup>9</sup>

## FIFRA

FIFRA regulates the use and distribution of "pesticides"<sup>10</sup> through comprehensive labeling and registration requirements.<sup>11</sup> FIFRA provides the federal government wide latitude to regulate pesticides but authorizes states to play a role as well. In particular, FIFRA provides that "[a] State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter."<sup>12</sup> It also provides that "[s]uch 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."<sup>13</sup> Essentially, this statutory language "gives states the authority to regulate the *use* of pesticides more strictly, while denying states the power to regulate the *labeling* of such pesticides either more or less strictly than the federal government."<sup>14</sup>

The issue arises as to whether state common law tort claims are preempted by FIFRA because the claims impose requirements "in addition to or different" from those imposed by the Environmental Protection Agency (EPA), the federal agency responsible for implementing FIFRA.<sup>15</sup> The predominant view among state and federal courts is that all common law tort claims that challenge the adequacy of pesticide labels are preempted by FIFRA.<sup>16</sup> In particular, state law claims for failure to warn, actual defective-label claims, and claims for breach of express and implied

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<sup>8</sup> 397 F.3d 1082 (8th Cir. 2005).

<sup>9</sup> *Id.* at 1086. *See id.* at 1086 n.3 (recognizing that *Bates* was argued before the Supreme Court in January of 2005 and stating that "[h]owever, the *Bates* claimants are the intended users of the herbicide, and they assert product effectiveness claims. Accordingly, the Supreme Court's eventual *Bates* decision is unlikely to materially affect our analysis.").

<sup>10</sup> 7 C.F.R. § 136(u) (setting forth statutory definition of "pesticide").

<sup>11</sup> For more information about pesticides and FIFRA, including many summaries of FIFRA preemption cases, visit the Pesticides Reading Room at the National Agricultural Law Center wWeb site, [www.nationalaglawcenter.org](http://www.nationalaglawcenter.org).

<sup>12</sup> 7 C.F.R. § 136v(a).

<sup>13</sup> 7 U.S.C. § 136v(b).

<sup>14</sup> BROWN, *supra* note 7, at 78 (emphasis in original).

<sup>15</sup> *See, e.g.,* Netland v. Hess & Clark, Inc., 284 F.3d 895 (8<sup>th</sup> Cir. 2002); King v. E.I. Du Pont De Nemours & Co., 996 F.2d 1346 (1<sup>st</sup> Cir. 1993); Worm v. American Cyanamid Co., 5 F.3d 744 (4<sup>th</sup> Cir. 1993); Shaw v. Dow Brands, Inc., 994 F.2d 364 (7<sup>th</sup> Cir. 1993); Papas v. Upjohn Co., 985 F.2d 516 (11<sup>th</sup> Cir. 1993); and Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc., 981 F.2d 1177 (10<sup>th</sup> Cir. 1993).

<sup>16</sup> *See* BROWN, *supra* note 7, at 89.

warranties are preempted by FIFRA.<sup>17</sup> Courts have expressly recognized, however, that not all state law claims are preempted by FIFRA.<sup>18</sup>

#### Evolution of Courts' Views on FIFRA Preemption

In *Ferebee v. Chevron Chemical Co.*,<sup>19</sup> the D.C. Circuit held, *inter alia*, that FIFRA did not preempt state law damage actions but rather operated to preclude states from directly mandating that EPA-approved labels be altered.<sup>20</sup> *Ferebee* was the prevailing view for several years, with a substantial majority of courts adopting its holding.<sup>21</sup>

Another view emerged, however, when the United States District Court for the Eastern District of Michigan held in *Fitzgerald v. Mallinckrodt*<sup>22</sup> that state common law claims that conflict with FIFRA were preempted.<sup>23</sup> A few years later, the holdings set forth in *Fitzgerald* and its progeny were cemented in *Cipollone v. Liggett Group*<sup>24</sup> when the Supreme Court held in a plurality decision that federal cigarette labeling regulations expressly preempted certain state laws brought against cigarette manufacturers, including state common law claims.

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<sup>17</sup> See *Hardin*, 397 F.3d at 1085 (citing *Netland*, 284 F.3d at 900). See also BROWN, *supra* note 7, at 89-90.

<sup>18</sup> See, e.g., *Worm v. American Cyanamid Co.*, 5 F.3d 744 (5<sup>th</sup> Cir. 1993); *Anderson v. State, Dep't of Resources*, 693 N.W.2d 181 (Minn. 2005); *Peterson v. BASF Corp.*, 675 N.W.2d 57 (Minn. 2004), *pet. for cert. filed*, 73 U.S.L.W. 3076 (July 16, 2004, no. 04-81 (Minn. 2004) (state consumer fraud claim not preempted); and *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000) (negligent misrepresentation and negligent testing claims not preempted). It has been held that state law claims based on "off-label" representations may not be preempted by FIFRA. See *Lowe v. Sporicidin*, 47 F.3d 124 (4<sup>th</sup> Cir. 1995) (claims based on representations that "substantially differ" from product label not preempted by FIFRA). *But see Papas v. Upjohn Co.*, 985 F.2d 516 (11<sup>th</sup> Cir. 1993) (holding that "claims that point-of-sale signs, consumer notices, or other informational materials failed . . . to warn . . . necessarily challenge adequacy of . . . label" and therefore preempted) and *Taylor AG Indus.v. Pure-Gro*, 54 F.3d 555 (11<sup>th</sup> Cir. 1993) (quoting *Papas*).

<sup>19</sup> 736 F.2d 1529 (D.C.Cir. 1984).

<sup>20</sup> See *id.* at 1540.

<sup>21</sup> See, e.g., *Ciba-Geigy Corp. v. Alter*, 834 S.W.2d 136 (Ark. 1992); *Montana Pole & Treating Plant v. I.F. Laucks & Co.*, 775 F.Supp. 1339 (D. Mont. 1999); *Evenson v. Osmose Wood Preserving, Inc.*, 760 F.Supp. 1345 (S.D. Ind. 1990); and *Roberts v. Dow Chem. Co.*, 702 F.Supp. 195 (N.D. Ill. 1988).

<sup>22</sup> 681 F.Supp. 404 (E.D. Mich. 1987).

<sup>23</sup> *Fitzgerald* acknowledged *Ferebee* but adopted the reasoning set forth in *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1<sup>st</sup> Cir. 1987), a preemption case that involved a state law claim related to cigarette labeling.

<sup>24</sup> 505 U.S. 504 (1992).

The Court returned to the issue of federal preemption in *Medtronic, Inc. v. Lohr*,<sup>25</sup> where it considered whether amendments to the Food, Drug, and Cosmetics Act (FDCA)<sup>26</sup> preempted state laws and precluded all common law damage claims against manufacturers of a cardiac pacemaker.<sup>27</sup> The statutory provisions at issue in *Medtronic* expressly prohibited states from creating any requirement for medical devices that “is different from, or in addition to, any requirement under this chapter to the device” and that “relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this subchapter.”<sup>28</sup> The Court held that although states were prohibited under the FDCA amendments from regulating a device in a manner that conflicted with the federal requirements for the device, states possessed “the right to provide a traditional damages remedy for violations of common-law duties when those duties parallel federal requirements.”<sup>29</sup> It added that “[t]he presence of a damages remedy does not amount to the additional or different ‘requirement’ that is necessary under the statute; rather, it merely provides another reason for manufacturers to comply with identical existing ‘requirements’ under federal law.”<sup>30</sup>

Neither *Cipollone* nor *Medtronic* directly involved FIFRA but courts that have considered whether FIFRA preempted state law claims have nevertheless looked to these decisions for guidance.<sup>31</sup> Most of these courts “have . . . continued to uphold FIFRA’s express preemption of state law claims based on inadequate labeling”<sup>32</sup> in accordance with *Cipollone*. Since *Cipollone*, at least nine federal circuit courts, including the Fifth Circuit in *Bates*, have held that “FIFRA expressly preempts state tort claims insofar as those claims would create additional or different labeling requirements from those imposed by FIFRA.”<sup>33</sup>

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<sup>25</sup> 518 U.S. 470 (1996).

<sup>26</sup> 21 U.S.C. §§ 301-397.

<sup>27</sup> BROWN, *supra* note 5, at 85.

<sup>28</sup> 21 U.S.C. § 360k.

<sup>29</sup> *Medtronic v. Lohr*, 518 U.S. 470, 495 (1996).

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., *Arkansas-Platte Gulf Partnership v. Dow Chemical Co.*, 981 F.2d 1177 (10th Cir. 1993) (holding on remand from the Supreme Court post-*Cipollone* that FIFRA expressly preempted certain state law claims) and *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993) (per curiam) (holding on remand from the Supreme Court post-*Cipollone* that FIFRA expressly preempted state law claims for failure-to-warn to adequately label product).

<sup>32</sup> BROWN, *supra* note 7, at 85. See also *id.* at 85-86 (citing and discussing several cases that have followed the reasoning set forth in *Cipollone*). See also *id.* at 86-87 (citing and discussing several cases that “have found *Medtronic* to be relevant to FIFRA preemption claims.”).

<sup>33</sup> BROWN, *supra* note 7, at 84 (citing *Hawkins v. Leslie’s Pool Mart, Inc.*, 184 F.3d 244 (3d Cir. 1999); *Andrus v. Agrevo USA Co.*, 178 F.3d 395 (5th Cir.); *Kuiper v. American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997); *Grenier v. Vermont Log Bldgs. Inc.*, 96 F.3d 559 (1st Cir. 1996); *Taylor AG Indus.v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995); *Lowe v. Sporicidin Int’l*, 47 F.3d 124 (4th Cir. 1995); *Bice v. Leslie’s Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994); *MacDonald v. Monsanto Co.*, 5 F.3d 744 (5th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King v. E.I. du*

## ***Dow Agrosiences v. Bates***

In *Bates*, the Fifth Circuit held that state law claims brought against Dow were preempted by FIFRA. The court explained that “FIFRA preempts state laws that either directly or indirectly impose different labeling requirements” than those imposed by the EPA.<sup>34</sup> In a footnote it added the following: “For example, different requirements may be imposed when a court authorizes a damage award against a manufacturer that has the ‘undeniable practical effect’ of inducing a manufacturer to alter the product or label to avoid liability. It is this mandate that is fatal to appellants’ argument.”<sup>35</sup>

The farmers raised two arguments before the Fifth Circuit: (1) that their claims related to product effectiveness were not within the scope of FIFRA preemption, and (2) that their claims were not “sufficiently related to the content” of the herbicide label to warrant FIFRA preemption.

The court rejected the farmers’ first argument, stating that “[f]or a state to create a labeling requirement by authorizing a claim linked to the specifications of a label, even where the EPA has elected not to impose such labeling requirements, would clearly be to impose a requirement ‘in addition to or different from those’ required under FIFRA.”<sup>36</sup> The court thus concluded that all of the farmers’ claims, including those related to product effectiveness, are preempted by FIFRA if they relate to the content of the herbicide label.

The court next examined whether the farmers’ claims were “sufficiently related” to the product’s label. It stated that the claims would be expressly preempted by FIFRA “if a judgment against Dow would induce it to alter its product label”<sup>37</sup> and that each of the farmers’ claims would have to be examined to determine whether a judgment against Dow would induce Dow to alter the product label.<sup>38</sup>

The farmers’ claims for breach of warranty, fraud, and violations of the Texas Deceptive Trade Practices Act were based on allegedly misleading “off-label” comments made by a Dow retailer. The court explained that breach of warranty claims “based upon an ‘off label’ representation are [not] preempted by FIFRA only if the representation deviates from the contents of the product label.”<sup>39</sup> The

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Pont de Nemours & Co., 996 F.2d 516 (7th Cir. 1993); *Papas*, 985 F.2d at 518; and *Arkansas-Platte*, 981 F.2d at 1179).

<sup>34</sup> *Bates*, 332 F.3d at 329.

<sup>35</sup> *Id.* n.9 (quoting *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1025 (5th Cir. 1994)).

<sup>36</sup> *Id.* at 331.

<sup>37</sup> *Id.* (citing *Andrus*, 178 F.3d at 399) (notation omitted).

<sup>38</sup> *Id.* (citing *MacDonald*, 27 F.3d at 1024).

<sup>39</sup> *Id.* (citing *Andrus*, 178 F.3d at 399). The court apparently failed to include the word “not” immediately before the word “preempted.”

court also explained, however, that success on an “off-label” claim would “provide a manufacturer with a strong incentive” to alter the product label.<sup>40</sup> The court held that the breach of warranty and fraud claims were preempted because it agreed with the district court’s determination that “the farmers failed to establish a genuine issue of material fact that the Dow retailer’s comments differed or strayed in any material manner from the contents of the . . . [product’s] label.”<sup>41</sup> According to the court’s reasoning, had the farmers demonstrated a genuine issue of material fact regarding whether the retailer’s claims “differed or strayed in any material manner” from the product’s label, their claims for breach of warranty and fraud would be preempted because it would provide Dow a “strong incentive” to alter the product label.

Turning to the farmers’ claim that Dow violated the Deceptive Trade Practices Act, the court explained that the DTPA did not establish a warranty but rather established “a remedy for the breach of an independent warranty.”<sup>42</sup> It concluded that “[b]ecause the only warranty issue at issue is based upon these ‘off-label’ comments, the farmers’ success on a DPTA action would also induce Dow to alter its label. The DPTA is thus necessarily preempted by FIFRA . . . .”<sup>43</sup>

The court next examined the farmers’ defective design claim. It explained that “[m]erely to call something a design or manufacturing defect claim does not automatically avoid FIFRA’s explicit preemption clause.”<sup>44</sup> The court noted that the farmers’ design defect claim “is functionally a disguised claim for failure to warn. It is inescapable that success on this claim would again necessarily induce Dow to alter the . . . [product] label.”<sup>45</sup> The court therefore affirmed the district court’s determination that the design defect claim was preempted by FIFRA.

The court held that the farmers’ claims that Dow was negligent in the testing, manufacture, and production of the rice herbicide were preempted by FIFRA. It stated that under Texas law— unlike some other jurisdictions— a negligent testing claim is considered a variation of a failure to warn claim.<sup>46</sup> It rejected the negligent manufacture claim because it was merely a disguised failure-to-warn claim and therefore preempted by FIFRA.

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* The court added in the following sentence the following: “After reviewing the record, we agree with the district court. Thus the farmers’ claims are preempted under FIFRA . . . .” *Id.*

<sup>42</sup> *Id.* at 332 (citation omitted).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (quoting *Grenier v. Vermont Log Buildings, Inc.*, 96 F.3d 559, 564 (1<sup>st</sup> Cir. 1996)).

<sup>45</sup> *Id.*

<sup>46</sup> See *id.* (citing *American Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 437 (Tex. 1997)). Other courts have held that negligent testing and negligent manufacture claims are not preempted. See, e.g., *Worm*, 5 F.3d at 744 (recognizing that “state law claims for negligent testing, formulation, and manufacture . . . would not be preempted.”) and *Goeb v. Tharaldson*, 615 N.W.2d 800 (Minn. 2000) (negligent misrepresentation and negligent testing claims not preempted).

## ***Hardin v. BASF Corp.***

Decided in February of 2005, *Hardin* is the most recent federal circuit court decision to consider whether state law claims were preempted by FIFRA. In *Hardin*, several commercial tomato growers brought an action for negligence and strict liability against BASF alleging that Facet, a rice herbicide manufactured by BASF, damaged their tomato crops when it drifted onto their properties from aerial spraying of nearby rice fields. The United States District Court for the Eastern District of Arkansas held that the growers' action was preempted by FIFRA because "regardless of how the issues were couched by plaintiffs, they were failure-to-warn claims, or if plaintiffs prevailed on another theory, the resolution would require a label change."<sup>47</sup> The growers appealed the decision to the Eighth Circuit.

The growers argued that "they brought a design-defect claim not subject to FIFRA preemption because precautions will not reduce Facet's damage-causing drift" and that "any *response* from BASF as a result of the defective design (i.e., label change), [sic] does not alter the fact that the basis for their claim is a design defect."<sup>48</sup>

The court rejected the growers' arguments, stating the following:

This reasoning is contrary to our *Netland* decision, where we noted FIFRA preempts *any* cause of action which has the effect of directly, or indirectly, challenging an EPA-approved pesticide label. We stated, "[t]o guide our [preemption] analysis, we must ask whether in seeking to avoid liability for any error, would the manufacturer choose to alter the label or the product." If the manufacturer would choose to alter the label, the claim is preempted.<sup>49</sup>

The court concluded that the growers' claim was preempted by FIFRA because "a favorable outcome for . . . [them] would induce, and even require, BASF to alter its label."<sup>50</sup>

## **Conclusion**

The issue of whether FIFRA preempts state law tort claims has arisen on numerous occasions and will continue regardless of the outcome of the Supreme Court's review of *Bates*. Given the express statutory language in FIFRA that prohibits states from imposing "requirements for labeling or packaging in addition to or different from those" established by the EPA, it is highly unlikely that the Court will deviate from the general rule that state law claims that challenge a product label are preempted by FIFRA. However, the Court's decision should clarify whether this general rule is

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<sup>47</sup> *Hardin*, 397 F.3d at 1084-85 (citing *Hardin v. BASF Corp.*, 290 F.Supp.2d 964, 970-71 (E.D. Ark. 2003)).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (citations omitted).

<sup>50</sup> *Id.* at 1086.

satisfied if, as was held in *Bates* and *Hardin*, a manufacturer would be induced to alter its label in the event that state law tort claims brought against the manufacturer succeeded. The Court's decision will be particularly important because, unlike *Cipollone* and *Medtronic*, *Bates* directly involves the issue of federal preemption under FIFRA.