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Preemption Under the Federal Insecticide, Fungicide, and Rodenticide Act

Invalidating a U.S. state law that conflicts with U.S. federal law

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Preemption Under FIFRA

Since 1972, the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) has contained an express preemption provision, which vests the Environmental Protection Agency (EPA) with strict authority over pesticide labeling and packaging. Preemption has been used to prevent states from enacting its own labeling and packaging standards, which could eliminate pesticide uniformity across all fifty states. Thus, a state may not enact any labeling or packaging standards that are “in addition to,” or “different from,” federal standards. Originally, this rule was tightly followed by federal courts. However, following a 2003 U.S. Supreme Court decision, states are now able to enact labeling and packaging standards that are “equivalent to,” or “consistent with,” federal standards. States are also permitted, under FIFRA § 136v, to regulate the sale or use of any federally registered pesticide if it is not federally prohibited. If a state would like to apply a federally registered pesticide for a new or additional use, then it may do so through a Special Local Needs Permit. The following is an overview of a state’s ability to regulate pesticides under FIFRA, and where it is limited by federal preemption.

What is FIFRA?

FIFRA “is the Federal statute that governs the registration, distribution, sale, and use of pesticides in the United States.”¹ The definition of what constitutes a pesticide is broad and includes any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest. A pesticide may also be used as a plant regulator, defoliant, desiccant, or any nitrogen stabilizer.

¹Environmental Protection Agency, <https://www.epa.gov/enforcement/federal-insecticide-fungicide-and-rodenticide-act-fifra-and-federal-facilities> (last visited Mar. 15, 2021).

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The EPA is the federal agency responsible for implementing FIFRA. All pesticides distributed or sold in the U.S. must be registered for use by the EPA. Applicants who wish to use a pesticide must show, among other things, that a pesticide will not cause unreasonable adverse effects on the environment.

FIFRA defines the phrase “unreasonable adverse effects on the environment” to mean: “(1) any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of using the pesticide, or (2) a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the standard under § 408 of the Federal Food, Drug, and Cosmetic Act.”²⁷ The FDCA requires the EPA to set limits, known as tolerance levels, on the amount of pesticides that are found on and in food. The tolerance level is the maximum allowable level for pesticide residues in or on products for human food and animal feed.

One of the EPA’s key responsibilities under FIFRA is to ensure uniformity of pesticide sale and use in each state. Enforcement of pesticide labeling and packaging requirements is one way that the EPA accomplishes this responsibility. Because a federally registered pesticide label is federal law, all states are required to follow the label. The EPA has primary authority for labeling and packaging pesticides. However, states retain some regulatory authority for labeling and packaging, so long as the state regulation does not conflict with federal law.

Labeling and Packaging

A pesticide label provides critical information about how to handle and safely use the pesticide product and avoid harm to human health and the environment. All registered pesticides products must display labels that show the following information clearly and prominently:

- Name, brand, or trademark product sold under
- Name and address of the producer or registrant
- Net contents
- Product registration number
- Producing establishment’s number
- Ingredient statement
- Warning or precautionary statements
- Directions for use
- Use classification

²⁷ U.S.C. § 136(bb) (FIFRA) (also cited as 7 U.S.C § 24(bb)).



For packaging, FIFRA requires most residential-use pesticides with a signal word of “danger” or “warning” on the label to be in child-resistant packaging (CRP).³ CRP is designed to prevent most children under 5 years of age from gaining access, or at least delaying access, to a pesticide. FIFRA § 25(c)(3) authorizes EPA to establish standards with respect to the package, container, or wrapping in which a pesticide is contained to protect children and adults from serious injury or illness resulting from accidental ingestion or contact with pesticides. When a state enacts a regulation that affects the labeling or packaging of a federally registered pesticide, then the EPA will typically invalidate the state’s regulation through a court decision. The practice is known as preemption. !

What is Preemption?

Preemption occurs when a “higher” level of government reduces the authority of a “lower” level of government over a given issue. If a federal law and state law conflict, then the federal law has authority. For example, if there is a federal law stating “it is illegal to sell or use pesticide X,” and a state law says “it is legal to sell or use pesticide X,” then the state law is invalidated because it conflicts with the law of a higher level of government.

There are two types of preemption that can be invoked under FIFRA: express and implied. Express preemption exists when a law contains a preemption clause or other explicit preemptive language. Express preemption is the simpler of the two to identify because it is written into the applicable statute. Implied preemption exists where a state law stands as an obstacle to the accomplishment and execution of the purposes and objectives of Congress. Determination of implied preemption will turn on the presence and extent of specific EPA regulation and policy objectives in a particular area. Thus, even in the absence of express preemption provisions, state law is impliedly preempted by federal law where it is impossible for a person to comply with both state and federal requirements.⁴

FIFRA contains several express preemption provisions. Preemption can occur when a state attempts to regulate the sale or use of a pesticide prohibited by FIFRA, or if a state attempts to regulate the labeling or packaging of pesticides.

Preemption of a state pesticide regulation occurs only if two conditions are satisfied with regard to labeling and packaging:

- (1) The regulation must be a requirement “for labeling or packaging”; and

³Environmental Protection Agency, <https://www.epa.gov/enforcement/federal-insecticide-fungicide-and-rodenticide-act-fifra-and-federal-facilities> (last visited Feb. 1, 2020).

⁴ *English v. General Elec. Co.*, 496 U.S. 72, 79 (1990).



- (2) The regulation must impose a labeling or packaging requirement that is “in addition to or different from” those required by the federally registered label.⁵

State Authority under FIFRA

Under § 136v of the statute, FIFRA permits states to regulate the sale and use of federally registered pesticides.⁵ However, if the state regulation permits any sale or use prohibited by a federally registered pesticide label, then the state regulation is preempted. FIFRA also does not allow states to impose labeling or packaging requirements that are different from or in addition to federal requirements. However, there are exceptions to these general preemption provisions. In some instances, a state may use a pesticide in a manner that is not permitted on the federally registered label if the state demonstrates that it has a “special local need.” Under § 136v(c) of FIFRA, states can apply to the EPA for a Special Local Needs Permit which will allow a state to register a new or additional use for a federally registered pesticide.⁶

For labeling and packaging, the state may avoid preemption defenses if the claim involves state law causes of action (e.g. fraud, failure to test the pesticide, manufacturing defect, etc.), rather than the ultimate impact of a product’s label or packaging.

Special Local Needs Permit

The FIFRA Special Local Needs permit authorizes state pesticide regulators to register a new or additional use for a federally registered pesticide product. The purpose of this type of permit is to allow states to address a special local need, often an existing or imminent pest situation, without having the use preempted by FIFRA. The permit program allows states to register a new pesticide for any use or register an already federally registered pesticide for an additional use under FIFRA § 136v(c). To qualify for a Special Local Needs permit, a state must show both (1) a demonstrated “special local need,” and (2) a tolerance, exemption from a tolerance, or other clearance under the FFDCA:

- (1) Special Local Needs are an existing or imminent pest problem in a state for which the state lead agency determines that an appropriate federally registered pesticide product is not sufficiently available. The leading state agency’s determination must be based on satisfactory supporting information.
- (2) Tolerance means the maximum legally permissible levels of pesticide residues, including active and inert ingredients, that may be found in foods. A pesticide’s active or inert ingredients may be exempted from the tolerance requirement because they are considered safe enough for the use described in the tolerance

⁵*Bates v. Dow AgroSciences LLC*, 544 U.S. 431, 444 (2005).



exemption that a maximum permissible level does not need to be established.⁶

States may consider the following as candidates for special local needs: new method of application, new crop, site, or pest, changed rate, application in particular soil type, new product or different formulation, and products useful in managing pesticide resistance in a particular crop.⁷

What qualifies as a special local need is subject to change by the EPA. For instance, the timing of application for a pesticide used to be among the special local needs states could consider when applying for a permit. However, the EPA will no longer consider application timing as a special local need according to a guidance document issued by the agency in November 2020.⁸ According to the EPA, timing of application goes beyond the scope of § 136v(c) because they effectively imposed restrictions on federal registration. States were using Special Local Needs permits to establish application cutoff dates for pesticides with federal labels that did not contain any cutoff dates, so that when the pesticide could be applied varied from state to state. The EPA viewed the increasing trend as states “effectively impos[ing]” restrictions” on federal regulations. However, this change is not intended to prevent any state from limiting or restricting access to, or use of, EPA-registered pesticides. According to the EPA, if a state desires to impose an additional restriction to a federally registered product, it may do so under § 136v(a). That section of FIFRA allows states to regulate the “sale and use” of any federally registered pesticide so long as the regulation does not allow any sale or use that is prohibited by FIFRA.

To apply for a Special Local Needs permit, a state must submit to the EPA a notification that the state is registering a pesticide for a special local need under the authority of § 136v(c).⁹ The state must notify the EPA within 10 days of issuing the state registration.¹⁰ If the permit is rejected, then the registration issued by a state cannot be effective for more than ninety days.¹¹ However, if the EPA does not reject the state’s application within ninety days, the state registration will become a federal registration so that violating it will be a violation of FIFRA.

Because Special Local Needs permits become federal registrations after ninety days, the EPA is generally unable to set time limits for when the registration may expire. States are strongly encouraged to set expiration dates in their Special Local Needs registrations. The purpose of the expiration date is to allow review of the Special Local Needs registration after it has been in use to ensure the precautions and restrictions are still adequate. If a state would like to keep a Special

⁶7 U.S.C. § 136v(a) (also cited as 7 U.S.C § 24(a)).

⁷7 U.S.C. § 136v(c).

⁸Environmental Protection Agency, <https://www.epa.gov/pesticide-registration/guidance-fifra-24c-registrations> (last visited Mar. 15, 2021).

⁹ Environmental Protection Agency, <https://www.epa.gov/pesticide-registration/guidance-fifra-24c-registrations#how-to> (Last visited April 15, 2021)

¹⁰ *Id.*

¹¹ *Id.*



Local Needs registration in place past the original expiration date, it may submit a revised permit extending the expiration date.

Preemption for Labeling or Packaging Requirements

Section 136v(b) of FIFRA says that a 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.”¹² Before 2005, state courts primarily held that § 136v(b) of FIFRA preempted any state law claim that a plaintiff raised during a lawsuit that directly or indirectly attacked the adequacy of the warnings on EPA approved pesticide labels. Regardless of what claim a plaintiff brought into court, if the remedy involved a change or modification of a pesticide’s labeling or packaging, then the claim would be preempted by FIFRA. After *Bates v. Dow AgroSciences LLC*, 544 U.S. 431 (2005), the strict interpretation of FIFRA changed and manufacturers now have to show that a plaintiffs’ state law claims involving fraud or failure-to-warn diverge from federal pesticide regulations in order to get preemption.¹³

Bates was a Supreme Court decision that refined what had been the traditional view of FIFRA preemption. In that case, Texas peanut farmers sued Dow, an herbicide manufacturer, for crop damages allegedly caused by the company’s herbicide, Strongarm. The farmers claimed that Dow knew, or should have known that Strongarm would stunt the growth of peanuts in soils with pH levels of 7.0 or greater. The herbicide’s label stated “use of Strongarm is recommended in all areas where peanuts are grown.” Dow’s agents allegedly made equivalent representations in their sales pitches on the peanut farms, whose soils have pH levels of 7.2 or higher, as is typical in western Texas. Dow sought relief through FIFRA’s preemption clause because the farmers’ claims were related to allegedly misleading labels on the Strongarm herbicide. If the claim was related to the pesticide’s labeling, then the court would preempt the farmers’ claim as conflicting with § 136v(b). The farmers responded by claiming the damage caused by the herbicide satisfied tort claims in strict liability and negligence, as well as fraud, breach of warranty, and the Texas Deceptive Trade Practices Act.

The Supreme Court ultimately decided that FIFRA’s express preemption clause did not preempt state law design defect, manufacturing defect, failure to test, and other claims merely because an adverse judgment might compel a manufacturer to change a product label. Importantly, *Bates* involved the use of express preemption, instead of implied preemption. Under FIFRA, the express clause denies states the ability to control or regulate pesticide labeling and packaging. In other words, after *Bates*, a state may not impose any requirements for labeling or packaging “in addition to” or “different from” those required under FIFRA. However, a state regulation imposing labeling requirements “consistent with” or “equivalent to” FIFRA may survive preemption.

Although *Bates* appears to weaken federal preemption, § 136v(b) still has an important role in preventing states from imposing labeling requirements “different from or in addition to” federal

¹²7 U.S.C. § 136v(b).

¹³*Bates*, 544 U.S. 431 (2005).



requirements and “creating significant inefficiencies for manufacturers.” In the case of a state law claim, a jury verdict that “merely motivates an optional decision [to alter the label] is not a requirement” that is preempted. In other words, state law claims that may motivate pesticide manufacturers to change labeling requirements following a failure-to-warn or failure-to-test claim will not be automatically preempted. State law rules related to product design, testing, marketing, and warranty “do not qualify as requirements for ‘labeling or packaging.’”¹⁴ Section 136v(b) preempts competing state labeling standards, such as color, font size, and wording warnings.

What do future claims for labeling and packaging preemption look like?

Post-*Bates*, the ability of a pesticide manufacturer to show how the requirements imposed by a plaintiff’s failure-to-warn or fraud claims diverge from specific EPA regulations will be important to the success of an express preemption defense.¹⁵

Plaintiffs now have greater latitude to seek recovery under state law claims that are unrelated to labeling or that would impose labeling requirements that “parallel” EPA requirements. An analysis of express preemption under § 136v(b) begins with looking at the precise claims brought by plaintiffs. Specifically, it depends on whether the claim creates a label requirement that is “in addition to” that required by federal standards under FIFRA.

Conclusion

FIFRA is an important piece of federal legislation that governs the use of pesticides and ensures uniformity in labeling and packing of potentially hazardous pesticides across all states. Although FIFRA is a federal law and the EPA has a large amount of regulatory authority, states are still able to govern certain aspects of pesticide use. States are permitted to regulate a pesticide if it does not conflict with federal standards. States may also register for new or additional uses through a Special Local Needs permit. If a state goes beyond its authority granted under FIFRA § 136v, the courts may invalidate state action through preemption. Previously, preemption was strictly applied to regulations involving labeling and packaging. Following the *Dow v. Jones* Supreme Court decision, states now have the ability to exercise regulation over labeling and packaging if the regulations are “consistent with” or “equivalent to” federal standards. Thus, preemption claims have narrowed, and plaintiffs are better able to bring failure-to-warn or fraud claims to court if they are harmed by pesticides.

¹⁴*Id.* at 444.

¹⁵Mandler, J., FIFRA Preemption in the Wake of *Bates v. Dow*, *Natural Resources & Environment*, Vol. 20, No. 2 (Fall 2005).

